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LABOR LAWS OF THE UNITED STATES SERIES

DECISIONS OF COURTS
AFFECTING LABOR : 1917

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JOHN A. HARRIS
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REVIEW OF DECISIONS OF COURTS AFFECTING LABOR, 1917.

INTRODUCTION.

This bulletin is the sixth in the series devoted exclusively to the presentation of court decisions, the preceding numbers being 142, 152, 169, 189, and 224. The first bulletin noted bears date of 1912, prior to which time decisions of this nature appeared in practically every issue of the bimonthly bulletins, ending with No. 100. Brief statements are given in the MONTHLY LABOR REVIEW of the bureau of the more important cases as soon as they come to the knowledge of the office, but these are included in the annual summary. No attempt is made to cover the entire list of decisions handed down by the State and Federal courts, representative types being usually sought for. In a few classes of cases, however, as those construing workmen's compensation laws, those relating to labor organizations, and those involving important questions in interstate commerce, a more general inclusiveness is practiced. The decisions used are mainly those handed down by Federal courts and the State courts of last resort, though in some cases opinions of subordinate courts of appellate jurisdiction are used, notably of the Supreme Court of New York. As has been the case for the past few years, no opinion of the Attorney General of the United States construing Federal labor legislation has appeared.

The opinions are presented in abridged form, the facts being usually stated in the language of the editors, with quotations from the language of the court in most cases, though occasionally the conclusion reached is indicated without such quotation. The sources used are the same as in the past, i. e., the National Reporter System, published by the West Publishing Co., and the Washington Law Reporter for the District of Columbia. With a few exceptions the cases used are those which were published during the calendar year 1917, the volumes covered being as follows:

Supreme Court Reporter, volume 37, page 22, to volume 38, page 64.

Federal Reporter, volume 236, page 609, to volume 245, page 816.

Northeastern Reporter, volume 114, page 321, to volume 117, page 848.

Northwestern Reporter, volume 160, page 209, to volume 165, page 304.

Pacific Reporter, volume 161, page 113, to volume 168, page 1120.

Atlantic Reporter, volume 99, page 257, to volume 102, page 336.

Southwestern Reporter, volume 189, page 801, to volume 198, page 816.

Southeastern Reporter, volume 90, page 801, to volume 94, page 480.

Southern Reporter, volume 73, page 1, to volume 76, page 824.

New York Supplement, volume 161, page 961, to volume 167, page 704.

Washington Law Reporter, volume 45.

An unusually large group of important decisions relate to the subject of labor organizations, a notable case being that of *Hitchman Coal Co. v. Mitchell*, passed upon by the Supreme Court of the United States. The workmen's compensation laws of the various States afford the largest single group of cases, and here again the Supreme Court of the United States has rendered important decisions on the subject of the application of the State laws on this subject to cases of admiralty and interstate commerce. Other important decisions uphold the constitutionality of the minimum-wage laws of Arkansas and Minnesota and declare unconstitutional the initiated act of Washington forbidding employment agencies to collect fees from persons seeking employment by their aid.

This review is an attempt to present in brief the salient points passed upon by the courts in cases under consideration. Technicalities are omitted as far as practicable in the more extended reports and are almost entirely eliminated in this briefer review. In some instances the case must be referred to under more than one head by reason of the fact that more than one point is involved in the discussion. As last year, the subject matter of the case, and not the nature of the law on which it is based, i. e., common or statutory, determines the grouping.

EMPLOYER AND EMPLOYEE.

ENFORCEMENT OF CONTRACT.

While it is commonly said that a contract for personal services is not subject to the rule of specific performance, a few States have enacted laws practically seeking the enforcement of contracts where advances have been made by the employer on the strength of an agreement for services. The Florida law on this subject was under consideration in a case (*Goode v. Nelson*, p. 69) in which conviction

by the lower court was reversed by the supreme court of the State on account of the declared unconstitutionality of the law as tending to create a status of involuntary servitude. The Federal statute forbidding peonage was held applicable in a case (*Bernal v. United States*, p. 185) in which a Mexican woman was being held to compulsory service by the proprietor of an alleged hotel in Texas on a claim that the latter had paid the woman's fare, and refused to allow wages for the work done.

A different aspect of the subject of enforced contracts is presented in the case of employees leaving service after having obtained knowledge of secrets of manufacture or other important data of value to their employer, whose exclusive right thereto is guaranteed by principles of common law. An obvious difficulty in passing upon questions involving secret processes of manufacture is their necessary disclosure to experts in cases in which the novelty of the process is in dispute. Such a question was involved in the case *E. I. Du Pont de Nemours Powder Co. v. Masland*, p. 78), in which the Supreme Court sustained an injunction against a general disclosure to experts, leaving the court opportunity to control inquiries and limit them to those necessary for a determination of the rights of the employer and the employee. In *Aronson v. Orlov* (p. 80) a simpler question was involved, since the contest hinged on the right of an employer to make use of a device for which applications for patents were under discussion. In this case the Supreme Court of Massachusetts affirmed an injunction against the employee making use of his employer's device in the conduct of a rival business in the same field. A list of customers of a laundry was held (*New Method Laundry Co. v. McCann*, p. 79) to be a trade secret, the use of which for soliciting trade for a rival company could be enjoined. The company's contention that the injunction should cover the receipt of work by its former employee from its old customers was not sustained.

BREACH OF CONTRACT.

Damages for the unlawful discharge of an employee were approved in a case (*Barry v. New York Holding & Construction Co.*, p. 68) where an estimated value of commissions on business that might have been obtained but for the unlawful discharge was included in the award. A manager of a department store was held entitled to damages for discharge made during the course of the fourth year of service, under a contract for the term of one year, with presumed renewals, the court holding such a presumption controlling (*Stewart Dry Goods Co. v. Hutchison*, p. 72). Employment during a part of the time was held not to reduce damages, since it was unremunerative.

The effect of a custom of trade was under consideration in *Cormier v. Lumber Co.* (p. 70), in which it was held that "straight time"

covered the period of a protracted shutdown, since the employee had not been definitely discharged at its commencement.

The inattention of the superintendent of an establishment to its operation was held to warrant his discharge in *Farmer v. First Trust Co.* (p. 71), where it was in evidence that the establishment was not being satisfactorily managed and required close personal supervision—this in face of the contention that an employee of his rank could not be held to constant personal attendance upon his duties.

CLEARANCE CARDS.

The vexed question of the constitutionality of laws compelling the employer to furnish on demand a clearance card or service letter was before the Supreme Court of Missouri (*Cheek v. Prudential Insurance Co.*, p. 75). That laws of this class are within the police power of the State and that they are of beneficial intent as protecting workmen from the oppressive practices sometimes indulged in by employers or groups of employers was maintained by the court in the face of adverse citations.

INTERFERENCE WITH EMPLOYMENT.

The Supreme Court of Massachusetts had before it a case (*Doucette v. Sallinger*, p. 74), in which the question of damages for discharge caused by the activity of a third person was involved. The offender had acted under a mistake, but it was held that it was his duty to assure himself of the identity of the person complained of for nonpayment of a debt, failing which he was liable for damages for causing the discharge of an innocent man.

Two cases are noted which arose under the Sherman Antitrust Act, one (*United States v. Hollis*, p. 65) being a prosecution for conspiracy and combination to restrain trade by an association of retail lumber dealers. Its purpose was, among other things, to prevent sales to consumers by others than retail dealers and to boycott wholesale dealers and manufacturers who made such sales. Activities of this nature were held to be offenses against the law and were enjoined. The second case (*Knauer v. United States*, p. 64) involved quite similar activities on the part of an association of master plumbers, and in this case a conviction for violation of the Sherman Act was affirmed by a circuit court of appeals.

A novel case based on general economic principles was passed upon by the Supreme Court of the United States, which sustained the constitutionality of a statute of Maine which authorized municipalities to maintain coal and wood yards for the purpose of selling fuel at cost to the resident population. Interested parties sought to have this act declared unconstitutional on the ground that taxation

for such purposes was not for a public purpose and was not within the power of the legislature to levy. This the Supreme Court, however, denied and sustained the law. (*Jones v. City of Portland*, p. 121.)

SEAMEN.

Since the enactment of the seamen's law of 1915 the status of such employment is much more closely assimilated to that of laborers generally, though none of the cases herein noted makes reference to that act. In *Alaska Steamship Co. v. Gilbert* (p. 188) the point involved is simply as to the terms of the contract to be held as implied at the time of employment and changed without notice to the employee. The court held that a discharge for refusal to accept the changed conditions of employment was not warranted and affirmed a judgment awarding wages and expenses. Quite similar questions were involved in the second case (*The Moana*, p. 187), in which sailors were held entitled to the benefits of an understood agreement for a round-trip employment, as against the employer's contention that they were hired for one way only.

A third case that may be mentioned under this head involved the construction of the Federal alien contract labor law and its application to aliens brought from a foreign country for employment on an outgoing vessel, service as sailors also being rendered on the voyage to the United States. The claim that this service was a subterfuge was rejected, as was their classification as laborers; while their transfer from one vessel to another in an American harbor was held not to constitute a bringing of them into the United States under the terms of the law. (*Scharrenberg v. Dollar S. S. Co.*, p. 61.)

RESIDENCE IN COMPANY VILLAGE.

An interesting case that does not fall under any of the usual headings is one (*Harris v. Keystone Coal & Coke Co.*, p. 73) in which the Supreme Court of Pennsylvania passed upon the validity of a company order excluding a tradesman from the streets of a village owned by it and occupied by its employees. The authority to make such exclusions was sustained as being within the terms of a valid contract with the workmen.

WAGES.

MINIMUM WAGE LAWS.

The question of the constitutionality of laws authorizing the establishment of a minimum wage for women and minors was before the courts of last resort of Arkansas and Minnesota. The Supreme Court of Oregon had upheld a law of that nature in a decision rendered in 1914 (Bul. 169, p. 172), and this was sustained on April 9, 1917, by an evenly divided court on an appeal to the Supreme Court

of the United States, one justice known to be in favor of the constitutionality of the act not taking part in the decision by reason of his connection with the case during its trial. Subsequent to this decision (June 4, 1917), the Arkansas law establishing a statutory daily wage was sustained by the supreme court of the State (*State v. Crowe*, p. 191), reference being made to the physical needs of women as requiring an adequate wage. The Minnesota statute resembles that of Oregon in providing for a commission to determine wages, and a subordinate court had taken the position that the law was unconstitutional and enjoined its enforcement. The supreme court, however (*Williams v. Evans*, p. 193), took the opposite view and sustained the law as a valid exercise of the police power not forbidden by the fourteenth amendment.

MODE AND TIME OF PAYMENT.

In the *Ballestra* case (p. 195), a California statute forbidding the payment of wages in scrip, etc., unless immediately redeemable in full in lawful money was held constitutional and a conviction for its violation affirmed.

A case that may be noted here as involving the question of the full and adequate payment of wages earned, though not concerned with the question of scrip or orders, is one decided by the Supreme Court of Oregon (*Sumpter v. St. Helens Creosoting Co.*, p. 199), the matter of overtime pay being under consideration. A contention that the 10-hour law of the State was unconstitutional was first rejected, but inasmuch as the monthly pay checks were so drawn as to constitute, when indorsed, receipts in full of wages earned to date it was decided that no claim could be sustained for labor performed in excess of the 10 hours declared by law to be a day's work.

A law of Arizona establishing a semimonthly pay day was challenged as to its validity, primarily because its enforcement might involve imprisonment for debt where the employer became subject to punishment for its violation (*Arizona Power Co. v. State*, p. 197). This contention was rejected in view of the fact that the employer in the present instance was a corporation, which could not be imprisoned, and was therefore not entitled to raise the question. The fact that the law applied only to corporations was likewise held not to invalidate it; nor could it be regarded as void for uncertainty in requiring payment of wages "at once" to persons leaving service, the language being held to imply payment within a reasonable time.

ASSIGNMENTS.

The practice of assigning future earnings as security for loans is regulated by law in an increasing number of States, and the con-

stitutionality of such laws was challenged in two cases coming under review at this time. In *People v. Stokes* (p. 62) a conviction was affirmed by the Supreme Court of Illinois against a lender who charged a rate in excess of the statutory amount, the law being held valid against claims that it was unconstitutional legislation and that it abridged the privileges and immunities of citizens, depriving them of property without due process of law. The Supreme Court of Ohio (*Wessell v. Timberlake*, p. —), likewise sustained the validity of the law of this State against quite similar objections where money had been loaned without procuring the license required by the statute.

An assignment of a different type was before the Supreme Court of Virginia (*London Bros. v. National Exchange Bank*, p. 179), the case being one in which a contractor had assigned a balance due him prior to the satisfaction of claims for labor and supplies. The lower court had sustained the validity of the assignment, holding that the mechanics' lien law of the State was not available where the property improved was owned by a municipal corporation. The supreme court reversed this decision, however, and held the assignment invalid until the claims had been met.

Where a contractor borrowed money from a bank and assigned as security all money to become due him on a contract with a city, prior to any notice that claims might be made for unpaid wages, the final balance paid by the city was subject to the assignment to the bank rather than to such claims, leaving the contractor's bondman liable therefor. Time checks for labor assigned by the workmen themselves might also be cashed by the bank and fall within the protection of such bond, though the claims of a subcontractor and a bookkeeper were not of such a nature as to be entitled to this protection (*Northwestern National Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, p. 196).

HOURS OF LABOR.

RAILROADS.

The most important decision of the year under this head is that construing and sustaining the Federal eight-hour law applicable to railroad employees, decided in March, 1917. As it was possible to insert this decision in the bulletin covering 1916 decisions, it was reproduced in that number (No. 224, p. 144). The decisions to be noted at this time relate entirely to the construction of the 16-hour law, so-called, though some of the cases relate to the 9-hour employment of certain classes of persons under the same act. Thus in *Chicago & A. R. Co. v. United States* (p. 118), a circuit court of appeals held that switch tenders who habitually received orders by telephone were within the class to whom the nine-hour provision ap-

plied. A similar conclusion was reached in a case (*Denver & Interurban Ry. Co. v. United States*, p. 118), where a telegraph operator who occasionally handled orders for interstate trains was held to be within the act, even though on a particular day no such orders might be transmitted. A third case under this head (*Illinois Central R. Co. v. United States*, p. 115), involved the question of offices continuously operated, the court holding that the shifting of the register and order book from a station to a tower a few hundred feet away after 12 hours' use by one operator, there to be used for 12 hours by another operator, must be held as the maintenance of a single office, and individual employment therein limited to 9 hours of service within 24.

The starting point for computing the 24-hour period within which 16 hours of work are to be performed was considered in *United States v. Missouri Pacific Ry. Co.* (p. 114), the court of appeals agreeing with the company that this should be the time when the individual enters upon his duties for the day.

Two somewhat contradictory opinions were given as to what constitutes a break in continuous service within the law. In *Minneapolis & St. L. R. Co. v. United States* (p. 115), an absolute release of from two to two and one-half hours at the intermediate station of a round trip was held not to be such interruption as to be subtracted from the total period between the start and the completion of the round trip. In *Pennsylvania R. Co. v. United States* (p. 117), on the other hand, a court of similar rank in another circuit held that the crew of a pushing engine helping trains over mountain grades was off duty during rest periods of 50 minutes each, the time being spent in a rest house, the men being subject to call at any time, and pay being continuous. This opinion does not seem to be based squarely on the provisions of the law, however, as appears from the statement of the court that the nature of the work and the circumstances surrounding it were exceptional, reference also being made to unusual conditions arising from a state of war, to which consideration might well be given if no actual overstrain of the employees was permitted.

What is unavoidable delay so as to constitute an emergency excusing excess employment was considered by the Supreme Court in *Atchison, Topeka & Santa Fe Ry. Co. v. United States* (p. 119). The actual cause of the delay was held to be unavoidable accident, but since the crew might have been relieved at a division terminal, the overtime work was held to be unjustifiable, even though that terminal was not the regular end of the crew's run. Another case before the same court (*United States v. Northern Pacific R. Co.*, p. 116), involved the point of making reports of overtime employment, and an honest mistake on the part of the company in selecting the point of time from which the hours of service should be reckoned, was held to warrant the nonenforcement of the penalties provided for its violation.

WOMEN.

A Wyoming statute had established a workday for women, including those employed in restaurants, but excepting railroad restaurants from the application of the law. The supreme court of the State found no adequate reason for making this exemption, and declared the law unconstitutional in so far as it applied to restaurants of any kind (*State v. Le Barron*, p. 113). A later act of the legislature met the situation by extending the law to restaurants without distinction.

SUNDAY LABOR.

That the observance of the Jewish Sabbath, made in good faith, was an adequate compliance with a law calling for the observance of Sunday, was maintained by the Kentucky court of appeals in *Cohen v. Webb* (p. 191). In a New York case the pasteurizing and bottling of milk on Sunday was held not to be work in a factory in violation of the labor law of the State (*People v. R. F. Stevens Co.*, p. 189); while in another case, under the same law (*People v. Transit Development Co.*, p. 200), the employment of a machinist for 7 days without a rest of 24 consecutive hours was held to be a violation of the law, a construction-and-repair shop, auxiliary to a street railway company, being held to be a factory within the meaning of the law, and not exempted in the group of power houses, etc., owned and operated by public-service corporations, which are excluded from the operation of the act.

What is a work of necessity was passed upon by the Supreme Court of Arkansas (*Rosenbaum v. State*, p. 190), the operation of a moving-picture show on Sunday being held not to fall within that class—this over the contention of the proprietor that the importance of furnishing suitable entertainment for soldiers encamped near by, who were at liberty only on Sunday, constituted a necessity under the circumstances.

FACTORY REGULATIONS.

The liability of a tenant for conditions in a factory building of which he occupies a part was considered in *People v. Shevitz* (p. 112), construing the New York statute. It was held that even though the defect lay outside of the portion of the building rented by him, the defendant was liable for punishment for taking quarters in a building not conforming to the provisions of the law.

RAILROADS.

The Supreme Court of the United States ruled (*Illinois Central R. Co. v. Williams*, p. 187), that the safety-appliance law of 1910

required security in certain equipment even though orders standardizing such equipment were not in force, the time allowed for standardization not being permitted to waive responsibility for safety in the meantime.

The relation of State and Federal laws was considered by the court of appeals of Alabama in a case (*Louisville & Nashville R. Co. v. State*, p. 186) in which the construction of laws requiring locomotive headlights was passed upon. Here again the effect of delay due to the establishment of regulations was under review, but the court held that the Federal law was in effect from the date of its enactment, so that the State law in the same field must be considered as superseded at that time.

LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

Though the question of employers' liability is of much less interest at the present time on account of the action of the legislatures of so many States in passing workmen's compensation laws, the fact that such laws are not exclusive in a number of the States and that railway service is in large degree still subject to the doctrines of liability law—exclusively so as to interstate commerce—leaves to the subject a measure of importance.

Approximating the principle of compensation, in that the employer is held liable for injuries occurring in designated hazardous occupations without regard to the question of negligence, is an Arizona statute enacted in conformity with provisions of the State constitution. The constitutionality of the statute was challenged (*Inspiration Consolidated Copper Co. v. Mendez*, p. 85), on the ground that the act is in conflict with the fourteenth amendment to the Federal Constitution. The supreme court of the State held that the act was valid in spite of the declaration of liability without fault, basing its position largely on the decision of the Supreme Court of the United States upholding workmen's compensation laws embodying the same principle. Other points against the same statute were raised in *Superior & Pittsburgh Copper Co. v. Tomich* (p. 82), the contention being made that the provision requiring the defenses of contributory negligence and assumed risks to be always considered as questions of fact and left to the jury was unconstitutional. This also was rejected by the court, and the law appears now to be well established in the judicial system of the State.

SAFE PLACE AND APPLIANCES.

The maintenance of safety conditions in mines is prescribed in practically every mining State by regulations covering the subject of inspection and maintenance of standard conditions of safety. The

Utah statute calls for an inspection for gases in mines "known to generate explosive gases," and this provision was held (*Eleganti v. Standard Coal Co.*, p. 87), to be absolute, without regard to the amount of such gases developed. An explosion of gases in a place marked safe was held by the Supreme Court of Arkansas (*Sterling Anthracite Co. v. Strobe*, p. 91) to be evidence of negligence, making the employer liable even though the inspector who had made the mark had reported the working place unsafe. An interesting point in this case was as to the proximate cause of death, which was due directly to pneumonia. The physician had testified that in his opinion the pneumonia was a sequel of the burns received at the time of the injury and the recumbent position made necessary thereby, and the supreme court refused to disturb the finding and judgment of the court below on this point.

Poisonous fumes of slow operation may give rise to a suit for damages if it appears that the employer was negligent in failing to provide adequate ventilation in a place made dangerous by such fumes (*Fritz v. Elk Tanning Co.*, p. 90), the Supreme Court of Pennsylvania holding that such was the case both under the common law and under the statutes of the State. The fact that the injured man continued at work under assurances from his superintendent was held not to charge him with contributory negligence.

The negligence of the employer in failing to inspect piling upon which a railway track was supported was held to charge it with liability in *South v. Seattle, Port Angeles & Western Ry. Co.* (p. 102), though the company contended that since piling should last for three years there was no duty to inspect until that time had expired. It appeared, however, that conditions had indicated the propriety of such inspection prior to the accident, and liability was affirmed.

The question was raised in *Louisville & Nashville R. Co. v. Layton* (p. 99) as to how far the benefits of the Federal law requiring safety couplers on railway trains extend. A switchman, not at the time interested in the matter of coupling or uncoupling cars, was injured by the failure of two cars to couple, and the company contended that the act could be of no benefit to him, since it was only to protect against defects in the coupling those whose duty required them to go between the cars. The Supreme Court of the United States admitted that the immediate occasion of the law was to protect those directly employed in coupling, but that its benefits were by no means confined to that class of employees. Another case involving a defect in safety appliances was that of *Minneapolis & St. Louis R. Co. v. Gotschall* (p. 100), like the foregoing decided by the Supreme Court of the United States, the case coming up from the Supreme Court of Minnesota. Negligence was held properly inferable from the failure of the coupler to hold, resulting in the

fatal injury to a head brakeman—this in view of the fact that a positive duty is devolved upon the railroads by the law. The right of a father to damages for the death of his son was considered in this case, no pecuniary loss appearing. It was held, however, that as under the Minnesota law the father was entitled to the earnings of the minor, no evidence of pecuniary loss was necessary to support an award of proper amount.

The construction of a Kansas statute regarding the operation of dangerous machinery and the abrogation of the principle of assumed risks was also passed upon by the Supreme Court in *Bowersock v. Smith* (p. 83). A paper company had contended that the guarding of the machinery in question was not practicable, and that the injured man, who was superintendent, had assumed the risk of the injury inasmuch as it was his duty to safeguard the machinery. The court below had also instructed that where there was a violation of the statute the common-law defenses of contributory negligence, fellow service, and assumed risks were not applicable, to all of which the company excepted, contending that such a construction would deprive it of its rights under the fourteenth amendment. The Supreme Court of Kansas had affirmed an award in the plaintiff's favor, and this was upheld by the United States Supreme Court, which said as to the claim that the superintendent was himself obligated to safeguard the machinery, that the duty was imposed upon the employer in an absolute manner, and that he could not relieve himself therefrom by contract, the constitutionality of the law being sustained in full.

The matter of the material worked upon rather than of the conditions of the plant itself was considered in a Delaware case (*Potter v. Richardson & Robbins Co.*, p. 88) in which damages were sought because of an infection due, as alleged, to the handling of putrid carcasses of chickens furnished to be canned. The court held that the fitness of the chickens for food did not concern the employee, but that she was employed to prepare the chickens, which were presumably suitable for the purpose; and if she found them to be otherwise, she was in the best position to determine their condition, and in proceeding to handle a decayed carcass she was guilty of contributory negligence, barring her right to recovery.

The responsibility of an employer for medical treatment to be furnished under an agreement with his employees was held by the Supreme Court of South Carolina to extend to a case in which death followed the refusal of the company physician to render the service requested to an employee's wife. (*Owens v. Atlantic Coast Lumber Corp.*, p. 86.) This ruling was based on the assumption that the company maintained the fund on a basis of pecuniary profit to itself, no showing to the contrary appearing.

Going beyond the contract relationship of employer and employee, a case (*Clayton v. Enterprise Electric Co.*, p. 102) was passed upon by the Supreme Court of Oregon, which held the company liable for the death of an employee whose employer derived power from the transmission wires of the company. The failure of the company to properly insulate its switches was held to entail a liability upon it under the State statute.

OVERTIME WORK.

The effect of prolonged employment as entailing liability upon the employer for injuries traceable thereto was considered by the Supreme Court in a case before it on appeal from an appellate court of Illinois. (*Baltimore & Ohio R. Co. v. Wilson*, p. 99.) Over 14 hours had intervened between the excessive work and the time when the injury was received. The jury had found that the injury was due to the strain upon the plaintiff because of the excessive labor. The contention that the injury must be received during the time of excessive work was rejected by the Supreme Court, as well as other contentions, and the defenses of contributory negligence and assumed risks were not allowed, and the judgment was affirmed.

RELATION TO COMPENSATION LAWS.

The compensation laws of a number of States establish alternative systems, providing that where the employer rejects or fails to accept the provisions of the compensation act liability remains with certain defenses abrogated. The Iowa statute is of this nature and declares that where injury occurs it should be presumed that such injury was due to the negligence of the employer as its proximate cause. In *Mitchell v. Phillips Mining Co.* (p. 104) this presumption was originally relied upon by the plaintiff, but on evidence being introduced to overthrow the presumption, both parties brought in additional evidence on this point. The trial court passed upon this evidence without submitting the case to the jury, but the supreme court of the State held this action improper, and remanded it for a jury trial, holding that only thus could the purposes and objects of the act be carried out.

In *Shaughnessy v. Northland Steamship Co.* (p. 103) the Supreme Court of Washington held that the workmen's compensation law of the State, which was claimed by the company to abolish suits at law for injuries to employees, was not applicable in a case in which a longshoreman was injured while unloading a vessel in Puget Sound. The court held that this abrogation could take effect only where the State laws were operative, and that this, being a maritime case, was outside of State control. Of the same tenor was the conclusion reached by the Supreme Court of Massachusetts in a case (*Morrison*

v. Commercial Towboat Co., p. 105) in which the mate of a towboat operating in Boston Harbor was injured while attempting to deliver an article to a seagoing barge. The State law excludes interstate commerce and seamen from its operation, and as the claimant was engaged in the excluded employments no benefits were obtainable under the act.

The status of a minor lawfully permitted to work, but engaged in a prohibited employment, was held by the Supreme Court of Minnesota not to be that of an employee under the compensation act, so that an action for damages was properly brought. (*Westerlund v. Kettle River Co.*, p. 106.)

FEDERAL STATUTE

Jurisdiction.—Where a suit has been decided under the law of a State without objection from the defendant, the Supreme Court of Missouri held that it was too late to raise the question of interstate commerce and the application of the Federal law on an appeal, and affirmed the judgment of the court below. The Supreme Court of the United States took the same position, holding also that since there was no right or privilege duly claimed under the Federal act it had no jurisdiction, and dismissed the case, leaving the judgment of the State courts undisturbed. (*Missouri Pacific Ry. Co. v. Taber*, p. 101.)

Limitation.—Involving, like the foregoing, a consideration of State and Federal laws, was a case (*Hogarty v. Philadelphia & Reading R. Co.*, p. 97), passed upon by the Supreme Court of Pennsylvania. The conductor of a shifting crew on a railroad had sued at common law, and the company defended on the ground that he had received benefits from its relief society. On its admission that the injured man was engaged in interstate commerce at the time of the accident, he pointed out that the Federal law did not make this a release from liability. On the company's reply that the action was not brought under Federal law, an attempt was made to amend the pleadings so as to bring the case under that statute, which the trial court refused to allow. The supreme court reversed this ruling, and ordered a new trial, whereupon judgment was given for the employee. An appeal was again taken to the supreme court, which thereupon reversed its previous decision, following the decision of the Supreme Court of the United States in a case involving this point, which had in the meantime been handed down. This was to the effect that a new cause of action was introduced by pleading the statute, and since more than two years had elapsed since the injury was received, the limiting provisions of the law prevented the prosecution of the case.

Exclusiveness.—By far the most important cases relating to the exclusiveness of the Federal statute will be considered under the

heading "Workmen's Compensation, Interstate Commerce." A decision by the Supreme Court of the United States affecting a phase of this question determined that where a minor had recovered in a suit for damages under the Federal law, no common-law rights survived to the father, since the Federal statute determined the full liability of the company in cases of injury to its employees in interstate commerce (*New York Central & Hudson River R. Co. v. Ton-sellito*, p. 98).

Interstate commerce.—The question of when the Federal law is applicable, and when it can not be availed of because the employee is not in interstate commerce, continues to be a vexing one. The general principle underlying the decisions is that the workman must at the time be engaged in work that is directly connected with or will facilitate interstate commerce. That such a connection existed in the case of a gateman who met his death while undertaking to back a horse and wagon from the track, so that he might close a protecting gate for the passage of an intrastate train, was held by the Supreme Court of California in *Southern Pacific Co. v. Industrial Accident Commission* (p. 92). This action involved the overruling of an award made by the commission under the State compensation law, the decision being based on a finding that the use of the track for both interstate and intrastate commerce brought within the scope of the Federal statute persons keeping it in suitable condition for use in interstate traffic. The same court reached an identical conclusion in a case involving the same principals (p. 93), the employee in this instance being a lineman engaged in removing a telephone wire which had fallen upon a trolley wire, the latter being a part of the equipment of an electric railway used in interstate and intrastate commerce. The Supreme Court of Massachusetts (*Lynch v. Boston & Maine Railroad*, p. 96), likewise held the Federal law applicable in the case of a station agent killed while attempting to secure mail bags delivered by an interstate train; so also of a workman injured while assisting in jacking up a wrecked car to release another employee and to assist in clearing away the wreck (*Southern Ry. Co. v. Puckett*, p. 92), the decision in this instance being rendered by the Supreme Court of the United States. Another inclusion decided upon by the court of appeals of Missouri (*Christy v. Wabash R. Co.*, p. 94) was that of a switchman killed while shifting cars to be taken to a point a few miles away for loading for interstate commerce. The court held that since the car had been designated for that use the Federal law applied, even though the car had not yet been loaded. Another point involved in this case was as to a violation of the safety-appliance law; the cars were properly equipped with safety couplers, but inasmuch as the method of switching adopted required the employee to take a position between the cars, it was held that the law was violated and liability incurred.

Cases held to be excluded from the operation of the Federal law, the employment not being of the nature of interstate commerce, were decided by the Supreme Court of the United States as follows: In *Illinois Central R. Co. v. Peery* (p. 91), where a freight conductor injured on a return trip, purely intrastate, claimed damages on the ground that the outgoing trip, in which interstate goods were carried, gave quality to the entire run—a contention which the court rejected; a case (*Lehigh Valley R. Co. v. Barlow*, p. 95) involving the shifting of cars loaded with coal for use in coaling the engines, the coal having been brought from without the State but stored for several days in a yard within the State where the injury occurred, the court in this case holding that the interstate movement had terminated when the coal reached the yards; and a third case (*Minneapolis & St. Louis R. Co. v. Winters*, p. 94), in which the work of repairing a locomotive used in both interstate and intrastate commerce was involved. In this case the court distinguished between such repairs and repairs upon a road permanently devoted to commerce among the States, the use of the engine being variable.

WORKMEN'S COMPENSATION.

While the vast majority of cases arising under the compensation laws receive final adjudication at the hands of the administrative officials, or by agreement between the parties, a considerable number reach the courts of last resort for the determination of contested points.

CONSTITUTIONALITY OF STATUTES.

Charges of unconstitutionality were made in several cases, some being directed against the essential principles of the acts, while others were addressed to specific provisions of law held objectionable by the contestants. Thus in *Fassig v. State* (p. 212) an objection was raised to provisions of the Ohio law permitting an injured employee to submit to the State commission his claim for redress where the employer has failed to come under the act and has not received permission to become a self-insurer. The right of thus submitting a claim to the commission is made alternative to that of bringing a suit for damages with the common-law defenses barred. The trial court had held that the legislature had exceeded its authority in making such a grant, but the appellate courts sustained the law and affirmed the award of benefits and penalty. Another provision of this same law provided for self-insurance where ability to make the necessary payments was satisfactorily shown. Certain employers, having secured the right to become self-insurers, proceeded to take out insurance for their protection in stock companies, whereupon

the State sought to oust such companies from writing insurance on the ground that the provision of the law authorizing self-insurance was unconstitutional. This the court rejected, and held the action both of the legislature and of the self-insurers to be valid (*State ex rel. Turner v. United States Fidelity & Guaranty Co.*, p. 284). A subsequent amendment debars self-insurers from obtaining such insurance.

Of more general nature were objections raised against the Illinois law (*Chicago Rys. Co. v. Industrial Board*, p. 215), the appellant contending that the act in question differs so largely from the act of 1911, which had been held constitutional, that the decision with reference thereto was not conclusive. The chief difference charged was that of discriminatory or class legislation, but the court found no merit in this contention and affirmed the constitutionality of the law on the principles laid down in its decision on the earlier law. The contract of the employee to assume the risks of his occupation was held to be void as contrary to the policy of the act. The employer in a case before the Maryland Court of Appeals (*Solvuca v. Ryan & Reilly Co.*, p. 216) made various objections to the law on grounds of due process and contravention of the law of the land, but these objections were held answered by decisions of the Supreme Court. The contention that the act created a judicial body in violation of the State constitution was likewise ruled out. In *Adams v. Iten Biscuit Co.* (p. 217), the unconstitutionality of the law of Oklahoma was maintained by an employee who sought larger benefits in damages than the compensation law allows. A novel contention raised was that the compensation law is so revolutionary in character as to be in effect an amendment to the State constitution and beyond the power of the legislature to enact. The court held, however, that the act was within the police power of the State and valid. Another point involved in this case was as to the payment of damages for serious disfigurement in addition to the benefits allowed by the compensation law for disability; this the court would not allow, holding the act to be exclusive in its operation and not permitting supplementary action of the sort contemplated.

A circuit court of Hawaii had held the compensation law of that Territory unconstitutional as not allowing due process of law, both because of its alleged deficiency in the matter of requiring notice of hearings before the arbitration committees and because it abolished trial by jury; some question was also raised as to classification. The Supreme Court of the Territory rejected all the contentions made and sustained the act in every part. (*Anderson v. Hawaii Dredging Co.*, p. 211.)

PARTICULAR PROVISIONS OF THE LAWS.

INJURIES COMPENSATED.

Accidents.—The Supreme Court of Minnesota (State ex rel. Fari-bault Woolen Mills Co. v. District Court, p. 201) reversed an award in favor of a claimant whose injury was typhoid fever, said to have been contracted from drinking infected water furnished by the employer, the court holding that such an event was not of a sudden and violent nature, essential to constitute an accident. This court held, however, that freezing (State ex rel. Nelson v. District Court, p. 202) and sunstroke (State ex rel. Rau v. District Court, p. 202) were accidental injuries compensable under the act.

The Court of Appeals of Connecticut reversed an award in behalf of a fireman in a brewery, whose death was due to pneumonia following an unusual exposure, added to exhaustion, holding that exhaustion, although due to accident, could not be classed as a bodily injury within the meaning of the act. (Linnane v. Aetna Brewing Co., p. 277.)

A rather peculiar definition of the term "accident" is insisted upon by the Supreme Court of Michigan (Landers v. City of Muskegon, p. 200), when it holds that pneumonia following protracted wetting in a freezing temperature was the sequel of but a common occurrence in the occupation of a city fireman, and that even a sudden rush of water drenching the fireman from head to foot was only an ordinary incident of his duties and not an accident; the disease that followed was brought on, therefore, not by an unexpected event but by one incident to that nature of employment. A more liberal view was taken by the Appellate Court of Indiana in a case (United Paper Board Co. v. Lewis, p. 277), where nephritis followed overheating and wetting and subsequent chill, the employee being engaged in flushing hot pulp out of a basement into which it had escaped from a broken pipe. The court held that any disease due to such exposure might properly be classed as a personal injury by accident, compensable under the law of that State.

Occupational disease.—The element of accident as a cause is not in evidence in a case (In re Maggelet, p. 274), decided by the Supreme Court of Massachusetts, the claimant being a cigar maker who suffered from neurosis, claimed to be due to the employment. In view of medical testimony to the effect that the disease was probably caused by a stooping position assumed by the workman, but not necessary to the conduct of his work, the case was distinguished from one of true occupational disease, and the claim disallowed.

An inflamed condition of the lining membranes of the nose and mouth due to dust inhaled in handling pulverized grain was classed as a compensable injury by the Supreme Court of California (Hartford Accident & Indemnity Co. v. Industrial Commission, p. 239).

COVERAGE.

Employment status.—A claim for compensation made by the president and principal stockholder of a lumber company for injuries received while handling lumber was denied by the Court of Appeals of New York (*Bowne v. S. W. Bowne Co.*, p. 228), the court saying that the provisions of the law were evidently directed to persons of a different status from that in evidence for the claimant in the case, and the distinction was such as should not be obliterated. A wife employed as cashier and bookkeeper in a store owned by her husband was held by the Supreme Court of Massachusetts not to be an employee under the act, since a married woman can not make a contract with her husband (*In re Humphrey*, p. 229).

Election.—Some difficulty attended the adjudication of a case which was before the Supreme Court of Arizona (*Woodruff v. Producers' Oil Co.*, p. 224), the case coming before the court a second time, with the result that the first decision was reversed. In the first place the court denied to the plaintiff employee any right to sue for damages, declaring that his only recourse was under the compensation law, which he would therefore have no interest in having declared unconstitutional, and it refused to pass upon the points of unconstitutionality raised by him. On the second trial it was decided that since the act calls for express or implied election before it can become applicable, but establishes a presumption in favor of such election unless an express statement in writing is given not less than 30 days prior to the accident, the apparent contradiction must be solved by giving effect to the paragraph of presumably later enactment, and since 30 days had not elapsed from the time of employment the compensation act would not be considered to govern.

The status of minors was involved in two cases before the Court of Errors and Appeals of New Jersey, in one of which (*Brost v. Whitall-Tatum Co.*, p. 226) the father was held to be duly notified of the son's exclusion from the benefits of the compensation act by a printed notice appearing on the boy's pay envelope. The company was therefore not allowed to plead its liability under the compensation law as a bar to a suit for damages. In the second case (*Young v. Sterling Leather Works*, p. 226), the provision making the law applicable to minors in the absence of a written statement to the contrary, which, in the case of minor employees, must be given by or to the parent or guardian, was claimed to deprive minors of their right of election, and so of their property rights. The court held that the effect of the law was exactly to the contrary, being to safeguard the minor's interest and protect him against acts of immature judgment, as the legislature had the power to do.

Place of employment.—The law of New Hampshire is applicable to work in shops, mills, factories, etc., employing five or more per-

sions. It was held (*King v. Berlin Mills Co.*, p. 230) not to cover the case of a workman erecting a carrier for pulp wood at a distance of about a mile from the mill of the employer, though engaged at the time with five or more other men. So also the Supreme Court of Kansas (*Hicks v. Swift & Co.*, p. 258) reversed an award in behalf of a driver delivering meat at a distance from the employer's packing house, since the accident did not occur on, in, or about any of the company's establishments.

Casual employment.—The problem of a workman employed for the odd job, or not in the regular line of the employer's business, remains unsolved. The laws of a majority of the States exclude the so-called casual employee from the benefits of compensation, though the definitions are not uniform. The courts, of course, can not initiate action, but there is a considerable diversity in the definitions formulated by them, where this duty devolves upon them. Whether the disjunctive "or" or the conjunctive "and" is used in describing the employees under consideration is significant, some laws saying "casual and not in the regular line of the employer's business," while others use the word "or" instead. In a case passed upon by the Supreme Court of Minnesota (*State ex rel. Nienaber v. District Court*, p. 229), the driver of a sprinkler cart was requested by a teamster delivering coal to assist in extricating him from a mud-hole. While rendering this assistance the driver received an injury, and made claim of compensation against the coal dealer, which the court allowed, since, though the employment was casual in the ordinary sense, it was in the usual course of the dealer's business. On the other hand, a workman engaged in plastering a room being erected as an addition to a brewing establishment was denied the benefits of the Illinois statute on the ground that employment for three or four days was casual and not contemplated for inclusion in the enactment of the law (*Aurora Brewing Co. v. Industrial Board*, p. 210).

A denial of the benefits was the result of a consideration by the Supreme Court of Pennsylvania of a case (*Marsh v. Groner*, p. 230) in which a residence was being remodeled, a plasterer employed in the work receiving injury. The employer was held not to be engaged in business in this undertaking, so that no responsibility for injury to the workman could be predicated on the existing facts. A different status appeared in a case passed upon by an appellate court of California (*Miller & Lux (Inc.) v. Industrial Accident Commission*, p. 211), where it appeared that building operations were a part of the regular business of a company owning a ranch, so that a carpenter in their employment was entitled to the benefits of the act. The defense that farm employments are excluded was not allowed, and the commission's award was approved. Another case involving

the principle of casual employment is discussed under the succeeding heading (McLaughlin case, p. 227).

Hazardous employments.—The limitation of the acts to classes of employment designated as hazardous renders necessary adjudications as to the meaning of this term and also as to how far an incident of the principal employment is to be affected by the character of that employment. The Court of Appeals of New York (*Dose v. Moehle Lithographic Co.*, p. 233) affirmed an award made by the industrial commission of the State in favor of a building laborer who was engaged in repairing the building used by the company, though the appellate division of the supreme court had denied the right. The company was engaged in a so-called hazardous employment, and under the definition of "employee" in the amended New York law benefits were available to employees of the company in connection with its business, even though not employed in the main line of its industry. It is clear that this differs from the doctrine announced in the *Bargey* case (Bul. 224, p. 270), where similar employment was held not to be in the line of the employer's business—a rule followed in the *Aurora Brewing Co.* case, noted under the previous heading. The New York court pointed out that the conduct of the business necessitated proper buildings, and that repair work was so essential thereto that it could properly be called part of the undertaking.

The same court found it necessary, however, to distinguish between the general business of an employer and the duties of a specific employee in a case (*Glatzl v. Stumpp*, p. 235), in which a florist, whose business was not hazardous under the act, employed a driver, this specific employment being classed as one of the hazardous occupations. Notwithstanding this, a driver who went so far as to undertake to arrange a window box for which flowers were being delivered, was held to have departed from his hazardous employment as driver in so doing, and not to be within the protection of the law. Another case passed upon by this court involved identical principles, a salesman in a nonhazardous business having been fatally injured while operating a motorcycle, i. e., a vehicle propelled by gasoline or other power, and by reason of such specific act bringing himself within the terms of the law. The claim that the employer was not engaged in the business of operating motorcycles for gain was admitted, but since he was engaged in a business for gain, and in that business made use of motorcycles, this was held to bring him within the act. (*Mulford v. A. S. Pettit & Sons (Inc.)*, p. 236.)

The New York law classes storage as one of the hazardous occupations to which it applies, but the appellate division of the supreme court held (*In re Roberto*, p. 237) that the storing of coal by a large

retail dealer was not such storage as the law contemplates; so also in a retail establishment, where an employer was injured while moving the goods temporarily stored in the basement. (*Walsh v. F. W. Woolworth Co.*, p. 237.) The contrary view was taken by the Supreme Court of Illinois (*Friebel v. Chicago City Ry. Co.*, p. —), in which it was held that where a furniture company maintained a warehouse for the storage of its furniture, it was operating a warehouse within the meaning of the act.

The loading and unloading of goods in transportation is called hazardous by the New York law, and anthrax contracted through an abrasion of the skin received while handling hides was held compensable as an accidental injury in an included employment. (*Hiers v. John A. Hall & Co.*, p. 238.)

Admitting the work of blasting out stumps on a highway to be hazardous, the Supreme Court of Illinois (*McLaughlin v. Industrial Board*, p. 227) denied benefits in the case of a workman killed while so employed, on the ground that such work was merely casual or incidental. Thus, though the injured man was a regular employee in road building, the fact that blasting was not regarded as a regular part of that work debarred him from the benefits of the law.

Farm labor.—The common exclusion of agricultural, horticultural, etc., employments was held by the appellate court of Indiana not to be applicable in the case of a workman employed about a thrashing machine that went about from farm to farm (*In re Boyer*, p. 233); so also in the case of a workman operating an ensilage cutter propelled by a gasoline engine (*Raney v. State Industrial Commission*, p. 235), in which case the Supreme Court of Oregon classed this work as the operation of a feed mill, which is designated as one of the hazardous occupations under the law. Such a decision, however, is no longer possible, since an explicit exemption of such work on farms is made by an amendment enacted in 1917. The janitor of a building injured while pruning a tree was held to be engaged in horticultural labor, and an award of the California commission in his favor was on that ground reversed. (*Kramer v. Industrial Accident Commission*, p. 239.)

Public employees.—While public employees are commonly included under the terms of the various State laws, the phraseology is often such as to debar them of their presumptive rights. Thus the Supreme Court of Kansas denied the right of a workman engaged in hauling gravel for use on the county road, since the county was not engaged in the work of road construction for the purpose of business, trade, or gain. (*Gray v. Board of County Commissioners*, p. 280.) Another case before the same court (*Griswold v. City of Wichita*, p. 281) was decided adversely to the claimant, a police captain killed by a burglar being held not to be a workman. It was also pointed out that in the

exercise of purely governmental functions, not carried on for profit, there was no possibility of passing on the burden entailed by compensation payments to a consuming public; but the weight of this argument as applying to a governmental corporation sustained entirely by taxation is not entirely obvious.

The Supreme Court of Massachusetts denied the benefits of the compensation law of that State to a teacher of automobile repairing in an industrial school conducted by the city of Lowell, who met his death as a consequence of some improper action of a boy whom he was instructing, the claim being rejected on the ground that the injured man was not a laborer, workman, or mechanic within the meaning of the law. (*Lesuer v. City of Lowell*, p. 281.) The same court held, however, that a schoolhouse janitor who personally did the work of cleaning, heating, washing windows, etc., about the building was a laborer within the meaning of the law and not in the "official service," though an appointee under the civil-service act. An award in his behalf was therefore affirmed. (*White v. City of Boston*, p. 280.)

The Washington statute provides compensation benefits for public employees unless State law or city charter or ordinance makes other provision in their behalf. Workmen injured while employed in the lighting department of the city of Seattle claimed damages at common law for their injuries, and a settlement was agreed upon. The contention being made that the city was under the provisions of the compensation act, a subordinate court took the ground that either common-law damages or a pension provided for by the city charter were the remedies available. The supreme court, however, held that the alternative provisions of the compensation law did not revive any common-law liability as to public employees, but that where the city charter makes provision that provision must be accepted. The constitutionality of such construction was challenged, but the court overruled the contention, even though different recoveries might result in different municipalities, holding that where a substantial provision was made, the local enactment would govern. (*State ex rel. Fletcher v. Carroll*, p. 278.)

Extraterritoriality.—Two opinions noted under this head come from the Supreme Court of California and indicate a restriction to State boundaries of the operation of the law. In *North Alaska Salmon Co. v. Pillsbury* (p. 231), a workman was injured in Alaska while employed under a California contract. On first consideration the court assumed jurisdiction, but on a second examination of the question a contrary conclusion was reached, a distinction being drawn between a compulsory law, under which the parties to the contract have no voice in the matter, and an elective law, which they might voluntarily accept as a part of the contract. In the second instance

(*Kruse v. Pillsbury*, p. 232), the claim was on account of a man killed on a vessel in a port in the State of Washington. Accepting the view as to extraterritoriality previously adopted by the court, the contention was still made that by a fiction of admiralty the vessel was a part of the territory of the State of California, so that the law would apply. This contention was rejected and the award made by the commission was annulled.

Interstate commerce.—A question of the highest degree of importance and interest was passed upon by the Supreme Court of the United States in its consideration of decisions made by the New York courts in favor of persons employed in interstate commerce, but injured without the negligence of the employer. These courts had held that the Federal statute relating to employers' liability limited itself to cases in which injury was due to negligence, and the State might find an unoccupied field in which it could act and furnish a remedy for injuries due merely to the hazards of employment without regard to negligence. This the Supreme Court denied (*New York Central R. Co. v. Winfield*, p. 260), the conclusion being reached that the Federal act undertook to define the full scope of the common carrier's liability when it enacted a law basing that liability on negligence, and declared the act to be both comprehensive and exclusive, two justices dissenting.

The New Jersey courts had taken the same view as the New York courts, and in *Erie R. Co. v. Winfield* (p. 265) the Supreme Court announced its reversal of a decision sustaining an award in behalf of a compensation claimant. An added point considered in the New Jersey case was as to the nature of the injured man's employment, he having left his engine, the injury occurring while he was leaving the yard after completing his day's work. Since he had been engaged in interstate commerce during at least a portion of his employment through the day, it was held that in leaving the yard he was still employed in commerce of the same nature, since the trip through the yard was a necessary incident of his day's work. It was also held that since the Federal law was dominant, no presumption of election to be governed by the State law could be imputed or allowed. Following the decision in this case, the Court of Errors and Appeals of New Jersey reversed a decision of the Supreme Court of that State, which had affirmed an award in a case involving no negligence on the part of the employer, stating that the State courts are bound by the decisions of the Supreme Court of the United States (*Rounsaville v. Central R. R. of New Jersey*, p. 267).

The difficulty of deciding between State and Federal legislation is in no wise minified by the enactment of compensation laws in lieu of liability statutes, and the question of what employments shall be classed as interstate continues to afford difficulty. The Supreme

Court of Illinois affirmed an award made by the State board in a case (*Jackson v. Industrial Board*, p. 259), in which a workman employed in painting bridges, towers, etc., had been killed and compensation claimed in his behalf. An action had been brought under the Federal liability statute, but was demurred to on the ground that the employee was not engaged in interstate commerce. The court sustained this, and an award under the compensation law followed, the supreme court declaring that no right to compensation had been lost by the election to sue under the liability act. The decision in the foregoing case that the employment was not in interstate commerce can hardly be regarded as in harmony with the finding of the Court of Appeals of New York that a laborer incurring injury while mowing weeds and grass along the right of way was engaged in interstate commerce, since his "work contributed to the safety and integrity of the railroad," which must certainly be admitted of the work of a painter of bridges, switch towers, and the like. In the New York case (*Plass v. Central New England R. Co.*, p. 267), an award affirmed by the supreme court of the State was reversed on the ground that the Supreme Court of the United States had placed interstate employees entirely outside the scope of the State law. The supreme court of the State, appellate division, also ruled against the compensation claim of a plumber whose duty it was to look after the pipes and plumbing equipment about the stations of the road employing him, the court holding that this was a maintenance of the ways and instrumentalities of interstate commerce (*Vollmers v. New York Central R. Co.*, p. 268). Where, however, a spur track for private use was the place of injury of a railroad laborer, no interstate traffic being moved thereon at the time, it was held that the injury was of an intrastate nature, so that the compensation law could apply (*In re Liberti*, p. 270); and where a switchman was killed while assisting in the movement of cars onto a storage track, to be iced for the shipment of meats, it was held by the Supreme Court of Illinois (*Chicago Junction R. Co. v. Industrial Board*, p. 270) that even though several cars subsequently were loaded for interstate shipment they had not acquired the interstate quality at the time of the injury, and a compensation award was affirmed.

Admiralty.—The courts of New York (*Southern Pacific Co. v. Jensen*, p. 203), and California (*North Pacific Steamship Co. v. Industrial Accident Commission*, 163 Pac. 199—case not reproduced), had taken the view that longshoremen and stevedores might choose the benefits of the compensation laws of their respective States in lieu of proceeding in admiralty, and a number of awards were made and approved in accordance with these views. The Supreme Court of the United States, however, in the *Jensen* case, declared the remedy offered by the State compensation laws incompatible

with the theory of uniformity contemplated by the Constitution in matters of maritime commerce; so that, although there was by Federal law a saving to suitors of the common-law remedy, where competent, in lieu of admiralty proceedings, the remedy proposed by the compensation statutes, wholly unknown to the common law, could not under existing law be regarded as an alternative. A like conclusion was announced by the same court in the case of *Clyde Steamship Co. v. Walker* (p. 203), the principles involved being the same. It is of interest to note that Congress has met the situation by reserving to suitors not only the common-law rights previously enjoyed by them, but permitting them also to make claim under the compensation laws of their States of residence if they so elect.

ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

The limitation implied in the phrase "arising out of and in the course of the employment," is of the essence of the right to compensation under practically every law. Washington provides by its law a kind of insurance covering the employee while at his work, compensation being "a kind of pension in exchange for absolute insurance on his master's premises." The Ohio statute does not contain the words "arising out of," but despite this omission the supreme court of the State held (*Fassig v. State*, p. 212), that it was the plain intention of the act not to cover any injury which had its cause outside of and disconnected with the employment. In most acts, however, the two terms are used conjunctively and no question can arise as to the necessity of both tests.

The Supreme Court of Illinois (*Chicago Rys. Co. v. Industrial Board*, p. 215) overruled the contention that negligent conduct on the part of the injured man would take him out of the employment in which he was engaged, nor would the accident be for this reason regarded as out of the course of employment. Reference might here be made to the *Maggelet* case (p. 274) previously noted, where it was held that the neurosis from which the claimant suffered did not arise out of the employment as a necessary incident thereof.

The effect of natural conditions was involved in a case that was before the Appellate Court of Indiana (*In re Harraden*, p. 250), in which a fire insurance agent slipped upon the icy sidewalk while going from the railway station to a hotel in a city to which he had been sent on business. Compensation was allowed on the ground that the claimant was where he was on account of his employment, and that his exposure to such increased hazards generally was a consequence of the nature of his employment. The Supreme Court of Massachusetts took the opposite view in quite a similar case (*Donahue v. Maryland Casualty Co.*, p. 251), where a salesman was returning from a business interview to take a car, and slipped on the ice.

The court reversed an award for compensation on the ground that the injury was due to a risk common to the public, and not due to his employment. A different condition existed in a case before the Supreme Court of New York (*Redner v. H. C. Faber & Son*, p. 242), in which a workman slipped on the ice on a street which separated the two parts of the employer's factory. The contention that it was simply a street accident was rejected, even though the street was an actual highway, since its situation was such that in going from part to part of the plant it was necessary to cross it.

Two other cases in which the question was raised as to the effects of natural conditions were passed upon by the Supreme Court of Minnesota. In one (*State ex rel. Nelson v. District Court*, p. 202), a janitor suffered from the freezing of a toe, the ultimate result being the amputation of his leg, the freezing taking place while he was engaged in shoveling snow on a very cold day. The lower court denied the claim on the ground that while the injury arose out of the employment, it was not an accident; but as the supreme court had reached the conclusion in another case that freezing is an accident, the only question that remained on this appeal was as to whether it arose out of the employment, which the court held to be true in this instance. Another case decided the same day also reversed the lower court, and approved the claim of a widow for the death of her husband, who had suffered from sunstroke while employed as a street laborer (*State ex rel. Rau v. District Court*, p. 202). There was a conjunction of extreme conditions of exposure to heat and moisture, which led the court to say that there was a violent injury produced by a power not natural.

The principle involved in the *Redner* case differs in no respect from that of the workman going from one part of the building to another to answer a telephone call (*Holland-St. Louis Sugar Co., v. Shraluka*, p. 240). Here the Appellate Court of Indiana affirmed an award; especially as the workman had been summoned by a superior, and might well assume that the answering of the telephone pertained to his employment.

It is generally held that horseplay is so removed from the duties of workmen that injuries in the course of it are not compensable, but the court last mentioned approved an award in a case (*In re Loper*, p. 245), in which a workman was fatally injured in his attempt to jerk away from the nozzle of a compressed air hose turned upon him by a fellow-workman, the evidence indicating that the injured man was at the time attending to his duties, and that the employer at other times had acquiesced in the play which in this instance resulted fatally.

Injury received while the employee is engaged in an act outside the line of his duty would ordinarily remove him from the operation

of the act. Thus the Supreme Court of Illinois (*Eugene Dietzen Co. v. Industrial Board*, p. 251) reversed an award in the case of an employee engaged in buffing, who opened the cover near a ventilating fan for the purpose of recovering from the dust receptacle an article which he had accidentally dropped therein; so in a Massachusetts case (*In re Borin*, p. 241), in which a workman in a dye house sought to open windows that were nailed down, obviously for the purpose of preventing such opening, the court holding that the nailing was a plain notice of intent, and that in violating such notice the workman was engaged in an undertaking outside of his duties. Where, however, the extraneous undertaking is related to a duty, the injury may be held to be within the terms of the act, as in the case of a boiler tender whose duty it was to read a steam gauge, and while attempting to do so found his way obstructed by some heavy beams and undertook to remove them, suffering injury as a consequence (*Manning v. Pomerene*, p. 247). The Supreme Court of Nebraska held in this case that pain and nausea were sufficient objective symptoms of an injury to warrant its classification as an accident.

When the injury is due, not to the employment but to the physical condition of the workman, it can not be said to arise out of the employment, even though occurring in its course. This is the pronouncement of the Supreme Court of Michigan in a case (*Van Gorder v. Packard Motor Car Co.*, p. 244), in which a workman was fatally injured in a fall from a scaffold about 6 feet from the floor, the fall being due to an epileptic fit. The Supreme Court of California announced a like conclusion in a case of practically identical circumstances not reproduced (*Brooker v. Industrial Accident Commission*, 168 Pac. 126).

The point of time at which the status of employee terminates was the essential element in a decision by the Supreme Court of Massachusetts (*In re O'Brien*, p. 244), in which an employee fell from a stairway while leaving the place of his employment. The court ruled that the circumstances warranted the presumption that such an accident was a reasonable probability, so that it could be regarded as having occurred in the course of employment and as a risk and hazard of the business. An extension of the same doctrine led the Supreme Court of Connecticut to award compensation in the case of a man who was killed while being transported from the place of his work to his home, transportation charges being provided by the employer in addition to the regular wages, and an arrangement made by which one of the employees received the transportation money directly from the employers to carry the men back and forth in his automobile (*Swanson v. Latham & Crane*, p. 249). The Supreme Court of California decided (*Atolia Mining Co. v. Industrial Accident Commission*, p. 246) that a shotfirer who left the mine after laying the fuses

and returned some 20 minutes later to remedy the conditions due to the supposed failure of two charges to explode was still within the employment when he was shot by a watchman on his return from this visit of inspection. In spite of the fact that the shooting was unjustifiable and reckless, it was still held to be within the scope of the watchman's duties, not being an intentional or premeditated assault, so that the injured man had suffered from conditions created by his employer, and the injury was an incident of such conditions.

That the employment status did not exist at the time of the injury, or rather that the injury did not arise out of the employment, was the conclusion of the Supreme Court of New York in a case in which a contractor's employee went to a part of a building distinct from the working place of his employer for the purpose of there eating his lunch (*Manor v. Pennington*, p. 242). The Appellate Court of Indiana likewise (*Inland Steel Co. v. Lambert*, p. 252), held that a switchman was not injured in the course of his employment when, after having quit work, he changed his working clothes for street clothes and started to deposit a time card; while on the way he attempted to go upon a moving engine that would carry him to his destination without compelling him to make a detour on account of an excavation that interrupted his usual walk. An award in his favor was reversed, the court saying that the act of attempting to board the car was not within the duties of his employment, but was an act only for his own convenience, characterizing it as an unnecessary attempt to do a perilous act, so that the injury did not arise out of the employment. Somewhat in contrast with the foregoing was the action of the Supreme Court of New Jersey in holding (*Kolasynski v. Klie*, p. 241), that a domestic servant fatally injured while lighting a fire with alcohol in disobedience of orders not to use kerosene "or anything like that," was, notwithstanding, injured by an accident arising out of and in the course of employment.

The circumstances under which the injury is received may be such that whether or not the injury comes within the description of the phrase under consideration can only be inferred. Thus, where a carpenter was working on the top of a car upon which were iron frames, near the end of an uninsulated live cable, and the first information as to the injury was derived by seeing the workman fall, the Supreme Court of Illinois held that there was sufficient evidence of accidental injury arising out of and in course of employment to sustain an award, even though there could not be an actual demonstration of all that took place (*Bloomington, D. & C. R. Co. v. Industrial Board*, p. 243). Likewise favorable to the claimant was a decision of the Supreme Court of New York (*Chludzinski v. Standard Oil Co.*, p. 248), in a case in which a workman was

burned to death by his flannel shirt catching fire in a locker room in which was a lighted Bunsen burner, the injured man being alone in the room at the time when he received the injury. The Supreme Court of Illinois held the presumption to be in favor of the claim made in connection with the death of a night watchman who was apparently assaulted with an iron pipe by some unknown person (*Ohio Building Safety Vault Co. v. Industrial Board*, p. 249). The court held that the nature of his employment made his assault by trespassers a possibility, so that an injury of this nature would be classed as a hazard of his work.

WILLFUL MISCONDUCT.

A district court of appeals of California held (*Pacific Coast Casualty Co. v. Pillsbury*, p. 292) that a messenger boy who undertook to operate a freight elevator in violation of specific orders not to do so, notice to that effect also being posted, was excluded from the benefits of the law because of willful misconduct. With this may be noted the action of the Supreme Court of Rhode Island affirming a decree denying compensation where it was clear that the death of an employee was due to his intoxication, the claimant's husband being drowned while attempting to come ashore from a dredge where he was employed as a watchman, to secure an additional supply of liquor (*Collins v. Cole*, p. 269).

Where the employer is found guilty of serious and willful misconduct, the law of Massachusetts permits a double award. In *Riley v. Standard Accident Insurance Co.* (p. 286), the supreme court of that State reversed a finding of such a penal award made against an employer on the ground that he had maintained an elevator in such a state of disrepair as to make him guilty of willful misconduct. The court held that negligence, even though gross or culpable, will not be classed as serious and willful misconduct under the act, since the idea involved is one rather of intentional wrongdoing with a wanton and reckless disregard of its probable consequences. The Ohio statute proceeds on a different principle, and allows a suit for damages instead of an action under the compensation law where an employer fails to comply with any lawful requirement for the welfare of his employees. An appellate court affirmed a judgment in a case (*American Woodenware Mfg. Co. v. Schorling*, p. 286) in which the supreme court found only common-law negligence, and reversed the courts below. The matter of failing to comply with a lawful regulation was held to be limited under the act to disobedience to specific orders or requirements of the industrial commission of the State, or definite provisions of laws and ordinances; so that the mere neglect to maintain a safe place along lines of common-law definitions could not be regarded as making the employer liable in damages instead of under the compensation law.

LIABILITY OF THIRD PARTIES.

It is a common provision of the statutes that where the injury is due to the negligence of a third party the injured employee may sue him or take his compensation from his employer at his own option. In the latter case the employer has recourse against the third person for recoupment, but no excess recovery may be maintained by him for his personal benefit. A United States circuit court of appeals construed the Nebraska law in a case of this nature (*Otis Elevator Co. v. Miller & Paine*, p. 256), in which settlement had been made by the employer under the provisions of the compensation law of the State. On the employer's suit against the third party a larger recovery was made than the total of the award. The third party's contention that it should have been permitted to show that the employer's negligence concurred in producing the injury was denied, the court holding that under the law the employer's responsibility was positively fixed without regard to questions of its negligence, and that it was entitled to a subrogation to the rights of the injured man or his dependents in proceeding against the culpable third party. Payments made by the employer on account of the compensation award, and the expense of the prosecution of the suit, were held to be proper deductions from the judgment recovered, the balance to go to the dependents of the deceased workman.

Where all the parties are under the compensation law, the Illinois statute provides for recovery of compensation from the employer, the latter being then subrogated to the rights of the employee to the extent of recovery from the third party of the amount paid as compensation. An injured man's suit against the third party was therefore held by the supreme court of the State to necessarily fail in a case where this condition controlled, even though there was a possibility of a larger recovery in such a suit (*Friebel v. Chicago City Ry. Co.*, p. 255). It was pointed out that while the employee might be a financial gainer if he had elected not to come under the compensation law, he was at least protected by a double recourse for a limited recovery under the law, so that he could not be regarded as unconstitutionally deprived of his rights. The Kentucky statute varies from the more common methods of procedure in permitting the employee to claim compensation from his employer or proceed against the third party, or to secure redress from both by concurrent or successive actions, though double recovery can not be had. In *Book v. City of Henderson* (p. 258), the injured man first secured a compensation award and then sued the third party for damages, making his employer a party to the suit. Such a step was held by the court of appeals of the State to be proper, and if the employer would interplead, any amount recovered from the third

party would be properly distributed between the two suitors, the employer's recovery being limited to his compensation payments, but the employee being entitled to any amount in damages recovered without regard to the awards provided in the compensation law.

Where a third party was sued and judgment recovered an appeal was taken and the defense set up that the widow of the injured man, the employer, and the insurer, were parties to a contract by which it was provided that the widow was to sue, and if she recovered \$3,000 or more was to receive no compensation, but if she received less than \$3,000 the deficit was to be made up to her. The third party defendant in this case contended that this agreement amounted to an election of the compensation remedy, but the court held the agreement void, and the judgment was affirmed (*Detloff v. Hammond, Standish & Co.*, p. 254).

A peculiar condition was involved in the case, *Dietz v. Solomonowitz* (p. 253), passed upon by the supreme court of New York. The claimant had been assaulted by strikers, and was awarded compensation, assigning his right to sue for damages to the person or institution which should be liable to make the compensation payments. In the meantime criminal prosecutions were had against the assailants, and they were sentenced to imprisonment, sentence being suspended on condition of good behavior and the payment of certain sums to the injured man. The industrial commission had refused to make any allowance for these payments in awarding compensation, but the court directed that the amounts thus paid should be deducted from the compensation benefits.

DEPENDENCE.

The Supreme Court of Illinois held (*H. G. Goelitz Co. v. Industrial Board*, p. 207) that the rights of a widow to compensation were based on the legal obligation of the husband to support her, and not upon cohabitation or actual dependence. In this case the husband had been separated for a number of years, and he had lived illicitly with another woman, but it was held that his unfaithfulness, while warranting the wife's living apart, did not invalidate her claim, the Illinois statute not requiring that the husband and wife must be living together at the time of the injury. On the other hand, a wife remaining in a foreign country on a farm operated by a hired man, and receiving some funds from her son in this country, was held by the Supreme Court of Massachusetts not to be dependent upon her husband who had been a few months in America, and had sent her nothing, but intended to have her come to this country later on (*In re Gorski*, p. 223); but where remittances were regularly made of an amount that would afford only partial support, the Supreme Court of Michigan (*Kalcie v. Newport Mining Co.*, p. 223), approved an award

made by the industrial accident board for benefits as for complete dependency, on the ground that the evidence showed that there was an actual dependency, her earnings being insufficient for her support.

An unusual aspect of the question of a surviving wife's rights was involved in a case (*Crockett v. International Ry. Co.*, p. 221) in which the Supreme Court of New York held that a widow who had married the deceased subsequent to the date of his injury was a beneficiary within the terms of the law, since the question of dependency is immaterial as regards wife or children, and construing the sentence of the law, "All questions of dependency shall be determined as of the time of the accident," as not applying to persons in those relationships. A similar situation was passed upon by the Supreme Court of Wisconsin, which held (*Kuetbach v. Industrial Commission*, p. 220) that the widow had no rights at the time of the injury, and could acquire none by her subsequent marriage.

The status of a sister who had made a home for her brother, receiving weekly contributions from him for expenses, was held by the Supreme Court of Massachusetts not to be that of a dependent, the deceased man being declared not to be the head of a family of which the sister was a member (*In re Murphy*, p. 222).

A father partially dependent, receiving all the earnings of his minor son, was declared by the Appellate Court of Indiana (*In re Peters*, p. 219) to be entitled to the maximum award, even though he was only a partial dependent, since he had been in receipt of the full earnings of his son. Partial dependency was also found by the Supreme Court of Kansas where a minor son had turned over to his mother the major part of his earnings, even though the father owned property of some value and received wages of \$125 per month, the court declining to consider the private affairs and economies of the family (*Fennimore v. Pittsburg-Scammon Coal Co.*, p. 219). Whether regularity of contributions was essential to sustain a finding of dependency was decided in the negative by the Supreme Court of Illinois, the court finding that the statute did not require dependence in the case of surviving parents or lineal heirs (*Commonwealth Edison Co. v. Industrial Board*, p. 221).

DISABILITY.

The Appellate Court of Indiana had before it a case involving multiple injuries—one, the amputation of an arm, calling for an award for permanent partial disability, while other injuries occasioned temporary total disability. The State board inquired whether separate awards should be made for the two injuries, to which the court replied in the affirmative, stating that the provision that awards for permanent partial disabilities should be in lieu of all other compensation meant only other compensation for such injuries them-

selves, and not for other injuries that might be received at the same time (*In re Denton*, p. 289). A different view was taken of such a situation by the Court of Appeals of New York (*Marhoffer v. Marhoffer*, p. 289). The State industrial accident commission had made an award for a period of total disability where there was a laceration of the thumb and index finger and an amputation of the second finger, and an additional award for the schedule period for the loss of the second finger. Current and consecutive awards based on separate items of physical impairment, disconnected from earning power, were held not to comport with the spirit and purpose of the act.

An award for total disability where the injury consisted of the amputation of one finger of the right hand and a stiffening of two other fingers was held by the Supreme Court of Massachusetts not to be warranted in a case (*In re Lacione*, p. 290) in which no employment had in fact been obtained since the accident. The evidence was held, however, not to show either a total inability to do work or to secure work to do, so that the award could not stand.

The Supreme Court of Wisconsin had before it a case involving an attempt of the employer and insurer to overthrow an award for permanent total disability where there was a paralysis, though not total, of the lower limbs and the lower part of the back, disqualifying entirely for work as a carpenter or laborer, these being the lines of former employment of the injured man. The fact that a lump sum was requested in order that the man and his wife might engage in some small business was held not to warrant a review of the question of total disability, since the award was based on his wage-earning capacity, and not on what might follow if he should attempt to supervise or direct a business undertaking (*McDonald v. Industrial Commission*, p. 275). A quite similar case was before the Supreme Court of Kansas (*Moore v. Peet Bros. Mfg. Co.*, p. 291), where a man awarded benefits for permanent total disability was found to be making an income of some \$12 or \$15 a week from the conduct of a cleaning, pressing, and tailoring business in the basement of his home. The court held that the profits of business did not constitute earnings under the law, and such an undertaking was in no wise incompatible with total incapacity for work.

Another case that was before the same court was that of a man who suffered total and partial disability for a period in excess of two years, for which period compensation benefits were allowed. Before the expiration of the time he found other employment at wages in excess of his earnings at the time of the injury, but the court held that this fact did not afford any warrant for a cancellation of the minimum allowance made to him, the statute having made no provision for such a case. It was also said that the condition would be of comparatively short duration and without serious

results (*Dennis v. Cafferty*, p. 209). The Supreme Court of Nebraska took a similar view in the case of an injury to a minor employed as a laborer, who after his injury attended a business college and returned to his former employer at an advance in wages. Such advance was held, however (*Epsten v. Hancock-Epsten Co.*, p. 291), not to be incompatible with an award as for loss of earning power, since this was the fact as to employment in his former occupation. A case of permanent impairment of use of a foot was before the Appellate Court of Indiana (*Underhill v. Central Hospital for the Insane*, p. 210), the claimant asking for benefits as for total disability. An award which considered the proportionate loss of use as compared with the actual loss of a foot was sustained by the court as falling within the implied limitations.

AWARDS.

The Supreme Court of Massachusetts rejected the contention of the insurer that insanity from another cause than the injury for which compensation benefits were being paid should terminate such payments (*In re Walsh*, p. 224). This claim was based on the contention that insanity was analogous to death from a cause independent of the injury, but the court disallowed it and ordered the continuance of payments.

An agreed award was held not to be binding by the Supreme Court of Kansas (*Weathers v. Kansas City Bridge Co.*, p. 282), where the extent of the disability was not known at the time of the settlement and signing of a release. The court held that if the mistake of fact was mutual, there should be an opportunity to develop the facts as they existed that a proper adjustment might be made.

The proper award for the loss of a defective eye was passed upon by the Supreme Court of Michigan in a case (*Purchase v. Grand Rapids Refrigerator Co.*, p. 208) in which the injured man had had a defective eye since childhood, due to accidental injury. The eye was capable only of distinguishing light and perceiving approaching objects, and the contention was made that an award as for the loss of a perfect eye was not warranted. The workman was in fact able to return to work at undiminished wages after a few weeks, but the court held that the law made no specification as to the eye for which compensation should be awarded being normal, though perhaps a mere sightless organ might be considered no eye at all. In the case in hand, however, an award for full benefits was affirmed.

MEDICAL TREATMENT.

In *State ex rel. Turner v. Employers' Liability Assurance Corp. (Ltd.)* (p. 293), the Supreme Court of Ohio construed the law of that State requiring insurance companies to provide specifically for medi-

cal expenses in their insurance contracts, this provision being held valid as a limitation upon the kind of contract that the companies might write in certain cases in the State.

The other cases under this head arose under the Indiana law, and hinged upon a single provision of the statute; all were decided by the appellate court. In the first case noted (*In re Kelley*, p. 272), it was found at the termination of the 30 days of required medical service that further attention was necessary in order to save the life of the injured man, whereupon the employer instructed the physician to continue treatment. The insurer contested its liability for such additional services, but it was held obligated, in view of the provisions of the act giving the employer the option of furnishing additional needed attendance, and requiring policies to cover all benefits offered by the act. Quite in contrast with the foregoing was a case (*In re Henderson*, p. 271) in which an evidently necessary operation was deferred until after the expiration of the statutory 30 days, and the question was raised whether the board could obligate the employer to pay the expenses of such deferred operation. The court found the statute somewhat ambiguous, but answered the question in the affirmative.

When the statutory 30 days begins to run was considered in a case (*In re McCaskey*, p. 271) in which the injured man did not become disabled from the accident until the 30 days' period had expired. The court held that in this case the injury and accident were not contemporaneous, but that the development of the resulting disability furnished the starting point of the period.

PROCEDURE.

Notice and claim.—Failure to file notice on the mere assumption that somebody was safeguarding his interests was held by the Supreme Court of Massachusetts to be fatal in a case (*In re Fells*, p. 274) where the time elapsed without action, ignorance or mistake not being considered as reasonable justification. The same court found the law not complied with where no notice and claim were filed in behalf of a nonresident widow, the injuries having been received in June, 1914, and an administrator appointed in February, 1915, who mailed a form of notice to the employer and to the board, which, however, was not received by the board (*In re Gorski*, p. 223). In this case, though the wife was absent, the son was present, and no sufficient reason appeared under the statute for condoning the delay. The Supreme Court of New York (*In re Dorb*, p. 273) held it not a sufficient notice of injury where the injured man simply telephoned that he was sick without indicating the nature of the illness or that there had been an accident. Subsequent conversa-

tion with a foreman disclosed the nature of the injury, but not the time, place, or circumstances of its receipt, nor did it give any intimation that there would be a claim for compensation. It was also said that to admit such acts as notice would completely nullify the provision of the law for written notice, the object of which was to give the employer opportunity to make investigation of the circumstances of any alleged accidental injury.

Review.—What must be regarded as a condition requiring legislative correction was developed in a case (*Adleman v. Ocean Accident & Guarantee Corporation (Ltd.)*, p. 284) passed upon by the Court of Appeals of Maryland. An award had been made, following the death of a workman, for a term in excess of four and one-half years, to his mother and sister. After about six months the sister married, an event which would have caused the termination of payments to a widow, and the insurer sought a review of the award under the provision of the law that authorizes modification and reapportionment of awards on occasion. The court held, however, that it had no authority to annul the compensation of a beneficiary who was dependent at the time of the employee's death, a situation which obviously discriminates between the widow and other dependents whose marriage may take place during the compensation period.

A case involving readjustment of awards under the law of New Jersey, which permits such readjustment after a year from the original award, was considered by the supreme court of that State (*Safety Insulated Wire & Cable Co. v. Court of Common Pleas*, p. 272). The facts of this case resemble those found in cases under the previous heading of disability, the company having sought a modification of awards in view of the fact that the injured man, after being incapacitated for about a year and a half, had so far recovered from his condition of total disability as to be able to do light work, and had subsequently procured a position at wages in excess of those earned at the time of his injury. The court of common pleas took the ground that it could not review the award, but the supreme court reversed this, saying that a modification of the award might be had on a showing of change in conditions.

The effect of final settlements was passed upon in two cases noted, one before the Supreme Court of Massachusetts (*In re McCarthy*, p. 282), which held that a lump-sum settlement in full of all liability for the injuries received was binding even though a condition might develop from the injury unknown at the time of the settlement. The same view was taken by the Supreme Court of Kansas (*Odrowski v. Swift & Co.*, p. 283), where a release had been given about four months after the injury, on receipt of the amount of compensation due up to that time, no fraud or undue influence appearing in the

procuring of the release. In connection with the McCarthy case, attention may be called to the Weathers case already noted (p. 282), in which the Supreme Court of Kansas held that where there was inadequate consideration and a mutual mistake of fact, the release was not binding.

Somewhat more technical was the point involved in a case before the Appellate Court of Indiana (*Union Sanitary Mfg. Co. v. Davis*, p. 278). Davis had been awarded compensation, and the employer appealed, whereupon Davis sought to secure a dismissal of the appeal, since no motion for a new trial had been made, as in ordinary civil suits. The court ruled that such procedure was not necessary in the case at hand, especially as there had been a review of the award by the full board, so that the parties had had opportunity for presenting all questions.

EMPLOYERS' LIABILITY INSURANCE.

A statute of Massachusetts provides that where a loss occurs under a contract of liability insurance, the company is directly and absolutely liable without regard to whether or not the insured person makes settlement with the injured person. In *Lorando v. Gethro* (p. 107), the supreme court of the State upheld the law as constitutional, and affirmed the right of the injured person to have the insurance money applied directly to the satisfaction of the judgment in his favor. A quite similar point was involved in *Verducci v. Casualty Co. of America* (p. 108), a judgment having been secured against employers that were insolvent. The company admitted that they were insurers of the employers, but contended that the policy was only for the benefit of the insured firm in case payments had been made by it. The Supreme Court of Ohio held that such a stipulation was inconsistent with the law of the State, and that it was void; judgment was therefore entered for the employee. Another point that arose under the law of this State was as to the writing of insurance by stock companies to indemnify an employer for the result of his own negligence or that of his agents. Such insurance was forbidden by the law, and a company writing insurance of the prohibited nature was ordered to conform with the law or cease operations in the State (*State ex rel. Turner v. Employers' Liability Assurance Corp. (Ltd.)*, p. 293).

Not involving the matter of employers' liability insurance, but noted here as a matter of interest, is a case of brotherhood insurance of a trainman who became affected with color blindness and was, as a consequence, discharged from his employment (*Roult v. Brotherhood of Railroad Trainmen*, p. 68). The policy provided for benefits as for total and permanent disability where there was complete

and permanent loss of sight of both eyes. The Supreme Court of Nebraska held that there had been such loss of sight for the purpose of the employee's vocation, so that he was entitled to full benefits under the insurance contract.

Another case involved the question of accident insurance, the Supreme Court of Illinois declaring that the sunstroke of a traffic policeman, compelled to stand on the streets on a very hot day, entitled him to benefits as for bodily injury sustained "solely through accidental means," reversing the lower courts, which had denied the benefits of the policy (*Higgins v. Midland Casualty Co.*, p. 120).

PENSIONS.

Public employees.—The first case to be noted under this head is one involving the right of a policeman receiving benefits from a pension fund for the maintenance of which deductions had been regularly made from his wages, to continue to receive such benefits after an award of compensation under the Iowa law (*Dickey v. Jackson*, p. 184). The decision of the city officials in refusing to make pension payments was annulled by the courts, the supreme court of the State affirming this action on the ground that the rule against double pensions did not apply. A later amendment makes the compensation law inapplicable where city employees are entitled to pensions under local regulations.

The application of an Illinois statute directing the establishment of pension funds for employees of counties was passed upon by the supreme court of that State in *Helliwell v. Sweitzer* (p. 188). Contributions to the fund had been contested by some of the employees of Cook County, and the act was held void by a county court as to all officers and employees provided for. The supreme court, however, distinguished between employees whose salaries were governed by county regulations and those over whom the legislature had direct authority, holding the law valid and applicable as to the latter only.

Mothers' pensions.—As a form of outdoor relief presenting an industrial aspect, in that it is restricted to benefits where there are children under the working age, the subject of mothers' pensions has been included as in some degree a labor proposition. The constitutionality of the Utah statute was sustained by the supreme court of the State (*Denver & R. G. R. Co. v. Grand County*, p. 180), over the contention that the tax for the maintenance of such a pension is not a public purpose. The benefits of the law were held to warrant its enactment, and a second contention that the legislature could not devolve upon the county commissioners the right of levying the necessary tax was also rejected, and the law sustained in all its parts.

The continuance of payments under an amended form of the

law was passed upon by the Supreme Court of Pennsylvania (Commonwealth ex rel. Trustees of Mothers' Assistance Fund of Philadelphia County v. Powell, p. 181). An act of 1913 authorized pension payments to abandoned mothers among others, while in 1915 the law was made to apply only to those whose husbands are dead or permanently confined in institutions for the insane. The court refused to indulge in the presumption of death in a case where the father had disappeared in 1906 and had not been heard from since, and overruled the trustees and the lower courts, which had adopted the view that an unexplained absence for more than seven years raised a valid presumption of death.

Old-age pensions.—The New Hampshire Legislature sought the advice of the supreme court of the State on the constitutionality of a proposed measure for the payment of old-age pensions (In re Opinion of the Justices, p. 182). While the opinion turns largely on the somewhat unusual provisions of the constitution, it is of interest to note that these provisions limit the grant of pensions to those for actual services, and for not more than one year at a time. The court held that there was no means by which the legislature could circumvent the limitations by means of valid act.

EMPLOYMENT OFFICES.

The single case noted here is one of unusual interest, the decision having been rendered by the Supreme Court of the United States, four of the nine Justices dissenting (Adams v. Tanner, p. 108). The question before the court was as to the constitutionality of an initiated law of the State of Washington, forbidding employment offices to take fees from workmen for securing positions for them. The act was held to be unconstitutional as interfering unjustifiably with a legitimate business in violation of the provisions of the fourteenth amendment to the Federal Constitution. Interesting dissenting opinions were prepared, contending that the law should be sustained as a declaration of the public policy, in view of demonstrated evils involved in the existing system.

LABOR ORGANIZATIONS.

MEMBERSHIP.

While the rights of members as such are usually determined by the constitution and by-laws of the organizations themselves, the courts may find occasion to intervene where there is a failure to comply with these provisions, or where they are inadequate, or where malice is shown. The Supreme Court of Rhode Island (Fales v. Musicians' Protective Union, p. 139) found that the proceedings of the local in its trial of the complainant had not been in good faith or in legal

form, and declared them void, saying that in such case an injured party need not exhaust his remedy by appeal within the society. Where, however, it appears that there has been an adequate observance of the regulations and the hearing and procedure have been free from fraud and duress, the courts will not intervene to compel the reinstatement of an expelled member (*Pratt v. Amalgamated Association of Street and Electric Railway Employees*, p. 144).

The Supreme Court of Georgia found that a member who had been fined on the ground that he had preferred unfounded charges against a fellow member had been unable to make his defense because of the intimidation of the witnesses. He was not present at the time this action was taken, nor had he been notified of the intention to consider his case. The court therefore ordered that he be given the privileges of the union pending a proper trial (*Holmes v. Brown*, p. 175).

It may happen that a member of a union is expelled in accordance with its constitution, so that the expulsion is not reviewable by the courts, but a right to damages will still remain if the union proceeds maliciously to prevent the expelled member from securing other employment. The action of the union in interfering with the member's securing other employment in the case in hand was found to be not to serve the economic interests of the association, but to preserve discipline in their own ranks by punishing him for leaving and becoming a member of a rival organization (*Shinsky v. Tracey*, p. 142). The Supreme Court of Massachusetts therefore affirmed an assessment of damages made by a master.

A protracted battle has been fought in the case *St. Louis Southwestern Ry. Co. v. Thompson* (p. 141), it having been at least four times before the Appellate and Supreme Courts of Texas in the more than 10 years during which it has been contested. The present hearing was on an appeal from an award of damages against the railroad company which had caused him to be expelled from a brotherhood and against the brotherhood for its action in expelling wrongfully and not in good faith. The judgment was affirmed and the contention that an excess of damages had been awarded was rejected, since a previous decision had been made that a larger verdict was not excessive.

RESTRAINT OF TRADE.

The Supreme Court of the United States had before it a case (*Paine Lumber Co. (Ltd.) v. Neal*, p. 176), alleging a conspiracy of a labor organization to prevent the sale in interstate commerce of goods manufactured by the complaining company. A district court and a court of appeals had refused to award the injunction prayed for, and the Supreme Court took the same view, four justices dis-

senting. The conclusion was based principally on the finding that there was no malice toward the plaintiffs; nor had they been caused any special damage warranting an injunction. It was held that if there was in fact restraint of trade in violation of the so-called Sherman Antitrust Act a private person could not bring suit for an injunction thereunder; reference was also made to the position taken by the New York courts in regard to the issuance of injunctions as set forth in its opinion in the *Cumming* case (170 N. Y. 315).

Quite similar was the position of the Supreme Court of Minnesota in regard to a dispute between a builder and contractor of St. Paul and the local building-trades council (*George J. Grant Construction Co. v. Building Trades Council*, p. 131). The injunction sought was not so much to restrain designated acts as unlawful, but what was termed "organized economic oppression," the contest being over the right and liberty of the employer to maintain an open shop. It was held that the employer was entirely within his rights in so doing, but also that the members of the union might not only refuse to work in an open shop, no contract being involved, but might also agree not to work for any subcontractor on any part of the work, even though he employs only union men. On rehearing in this case the question of restraint of trade was pressed, and, while it was admitted that the acts of members of labor-unions might be such as to violate the State law on the subject, there was nothing shown to indicate that such action had yet been taken by the union in question. It was added that the statute in question was not intended to require unwilling rendition of service during the pendency of the dispute.

INTERFERENCE WITH EMPLOYMENT.

Several cases were noted in which employers or business managers sought protection against the acts of organized labor which tended to interfere with the conduct of their establishments. The most important of these was passed upon by the Supreme Court of the United States, involving the right of a labor organization to seek to unionize a plant against the owners' wishes (*Hitchman Coal & Coke Co. v. Mitchell*, p. 145). In this case the mine in question was being conducted as a nonunion mine, all workmen therein being under contract not to become members of a labor organization so long as they remained in their present employment. A protracted contest due to efforts of the United Mine Workers to organize the mine led to an injunction restraining such activities, and the Supreme Court held, three justices dissenting, that the operators were entitled to the protection sought against what was determined to be an illegal interference with their rights. The right of an employer to the good will of its employees and to protection in enjoying a reasonable prospect

of their continued service on agreed terms was mentioned as having a pecuniary value "incalculably great," for the protection of which the courts would act. On the same day that the foregoing decision was rendered the same court announced its conclusions in a case involving much the same principles (*Eagle Glass Mfg. Co. v. Rowe*, p. 152). In both these cases the District Court had granted a temporary injunction, which had been reversed by the Circuit Court of Appeals, and in both the action of the Circuit Court of Appeals was reversed and the injunctive right granted. An additional point in the present case was as to threats of violation by an organizer, and the motive and purpose behind his activities, as to which leave was given to connect other persons within the jurisdiction of the court with such acts of the organizer named.

In *Bossert v. Dhuy* (p. 129) the Court of Appeals of New York considered the action of union carpenters in instigating a boycott against an open-shop establishment. Bossert's factory had been selected from among several as the one against which a boycott would first be declared, and the proprietors had secured an injunction, which was on this appeal reversed. The doctrine of the court, as already laid down, was referred to, and the acts found justifiable as being for the benefit of the membership and in good faith, rather than for any malicious purpose or for the destruction of the plaintiff's business.

That the union had gone beyond legal bounds in its boycott of an employer was found by the Supreme Court of Massachusetts in *Harvey v. Chapman* (p. 128). The entire controversy apparently arose out of the failure of the employer to discharge his clerks on account of their neglect in the matter of the payment of dues to the union. The court held that there was no apparent justification for the conduct of the union in picketing and boycotting, it having no real dispute with the employer, and his employees not being engaged in the dispute.

The same court had before it a case in which rival organizations of moving-picture operators were involved (*Martin v. Francke*, p. 127). The proprietors of the theater, and their operators, who were members of the Knights of Labor, sought an injunction against a boycott and the advertising of the theater as unfair to organized labor. Although no actual loss in attendance was shown on account of the picketing, the rival union was enjoined from interfering with the rights of the employers and their employees. A quite similar case was brought before the Supreme Court of Minnesota, though in this instance the operator employed was not a union man. An injunction was sought to prevent the picketing of the theater and the carrying of a banner announcing that the proprietor was unfair to organized labor. It was held that the term "unfair" had a limited

meaning pertaining to the relations of the employer with organized labor, without implying moral shortcomings or lack of integrity, and since the effort was made to further the interests of the union, and not as a malicious interference with the right of the employer, no injunction would be allowed. It was said, however, that if, upon a hearing, the charges made were found true, proper relief would be afforded (*Steffes v. Motion Picture Machine Operators' Union*, p. 125). A like conclusion was reached by the Supreme Court of Montana in a case (*Empire Theater Co. v. Cloke*, p. 123), where the dispute arose over the refusal of the company to employ five members of the Musicians' Union at every exhibition of moving pictures. It was denied that the plaintiff had any vested right in the patronage of the defendants, or of any one else choosing to withhold it; nor had persons wishing to patronize the theater any vested rights of patronage; but they must take it on the terms imposed or leave it as they saw fit. Admitting that such dictation is offensive, it was held that attempted dictation is always present, and that the public must choose whether it will yield, such dictation not being an unlawful invasion of liberty if it amounts to nothing more than a demand which a person has a legal right to make, upon the alternative of his displeasure.

Involving circumstances quite similar to the Martin case above, is one (*Tracey v. Osborne*, p. 138), in which an organization of shoe workers sought to restrain a rival union from causing employers to break agreements to employ members of the plaintiff union. Agreements had been made by the authorized agencies of the complaining union whereby employers should be furnished with labor by that union, so long as it was able to do so, and for that period members of the union should be employed to the exclusion of all others. The lawfulness of such agreements was sustained by the Supreme Court of Massachusetts, and efforts to procure the breach of contracts of this nature were held to be an invasion of rights warranting the issue of the injunction.

STRIKES.

Any distribution of cases involving labor disputes is difficult, in view of the fact that strikes involve picketing, and picketing is for the purpose of a boycott, while injunctions are sought to prevent whatever specific act appeals to the aggrieved party as the vital or vulnerable point of attack. The cases grouped under this head therefore involve matters of picketing, conspiracy, etc. In a case passed upon by a United States district court, the obligation of a telephone company to maintain its service as set forth in its charter was pleaded, and a decree asked for, directing the company to render its service and maintain its equipment as a duty paramount

to the private interests of the company and all other persons whatsoever. It was replied that the inability to render service was due to the acts of strikers and sympathizers, who prevented the employment of repairmen, and an injunction was issued against interference with the company's employees. The contention was then raised that the injunction attempted to restrain the strikers from actions claimed to be lawful under the antitrust act as amended by the so-called Clayton Act. The court found that this act, sometimes called "Labor's Bill of Rights," also recognized the rights of the employer and of the public, and limited the acts it would justify to those which are lawful and peaceful, accepting as a fair test of peaceful picketing the inquiry as to whether these acts would be lawful if no strike existed (*Stephens v. Ohio Telephone Co.*, p. 165). The injunction was not modified, the court holding that no actions permitted by the Clayton Act were interdicted by it. A circuit court of appeals also sustained an injunction, though with modifications, in a case, (*Tri-City Central Trades Council v. American Steel Foundries*, p. 158), where pickets had assaulted employees, threatening any who might take employment with the employers. All picketing was enjoined by the decree entered by the district court, but the court of appeals held that peaceful picketing was lawful. The principles governing strikes for higher wages and improved conditions were passed upon, such action being declared lawful, though if there is an unlawful conspiracy to destroy business, even lawful acts of striking employees may be restrained. The mere fact that business is interrupted was said not to determine the lawfulness of a strike, or of persuasion or picketing in the interests of a lawful strike; but the question of legality is to be decided upon the facts in each case. The status of former employees on strike was touched upon, being described as one of a temporary suspension of relations, but not one of an absolute determination of them; so that such interference as might lawfully be engaged in could not be said to be an act of mere intermeddlers.

An injunction was granted by the United States District Court for the Western District of Washington (*Alaska Steamship Co. v. International Longshoremen's Association of Puget Sound*, p. 160), conspiracy and violence being shown, also interference with interstate commerce. Lawful picketing was recognized, but it was said that slight violence or intimidation would have much weight in determining its character. The right to strike was maintained, but no overt act obstructing the use of the complainant's property is justifiable. Reference was made in this case to the Clayton Act, but the privileges enounced were held to have been exceeded. Another case in which an injunction was granted was that of the *Niles-Bement-Pond Co. v. Iron Molders' Union* (p. 172), in which a district court

for the Southern District of Ohio found strikers guilty of assaults and violent conduct participated in by members of the union and even the strike committee, with no apparent effort on the part of the union to discourage such wrongful conduct. The right to strike and maintain a peaceful picket was declared, but abuse and intimidation were said to have no place.

An agreement of members of the union not to work with non-union men was again upheld (*Cohn & Roth Electric Co. v. Bricklayers', etc., Union*, p. 162), the complainant in this instance being an electric company whose opportunity to make contracts was being interfered with because other mechanics would not work on buildings on which nonunion employees were engaged. An injunction sought for was therefore refused by a lower court, this finding being approved by the Supreme Court of Connecticut. The same court granted a new trial in a case in which damages had been awarded by the court below by reason of the acts of strikers and pickets, a part of the damages allowed being for the expense of guards to protect the company's property. (*Max Ams Mach. Co. v. International Ass'n of Machinists*, p. 164.) It was inferable that a portion of this expense was for guards employed after the issue of the injunction, and as it could not be assumed that the injunction would be violated, the court decided that such expense should be borne by the company itself if it wished to continue the guards, and it was for the allowance of this cost that the new trial was ordered.

Where an employer was engaged in the conduct of business on the open-shop plan, and both union and nonunion men had been employed, the Supreme Court of Massachusetts held that the union men are within their rights in withdrawing from the employment, but may be enjoined from interfering with other contracts by means of a secondary boycott or blacklist. Damages by reason of the violation of an alleged contract by the officers of the union to furnish labor were held not to be available, since the officers had no power to make a binding bargain, unless authorized thereto in some definite way by the men themselves. (*W. A. Snow Iron Works (Inc.) v. Chadwick*, p. 171.) The illegality of a secondary boycott was also maintained by the Supreme Court of New York (*Justin Seubert Inc., v. Reiff*, p. 136), where there was an effort to compel the use of a union label; an injunction was therefore issued, and the question of damages was submitted to a referee.

A novel feature in a case passed upon by the Supreme Court of New Hampshire (*White Mountain Freezer Co. v. Murphy*, p. 169) was as to the right of the labor commissioner of the State to be exempt from testifying in a labor dispute, with regard to which he had obtained particulars by reason of attempts on his part to act as a conciliator. The court held that there was no confidential relation in-

volved, but that his status was comparable to that of a subordinate court, so that he might be called upon to give evidence. It may be noted that the situation was changed by an act of the legislature making it impossible for the commissioner thus to give testimony in the future. The dispute in this case arose over an attempt to procure the unionizing of the shops, and questions as to whether the action of the union could be classed as a conspiracy and whether organized picketing was unlawful, were carried to the supreme court, which decided that under the circumstances the strikers were called upon to give evidence as to the lawfulness of their motives in declaring the strike, and that the legality of picketing would be determined by the facts shown in a disclosure of the methods used.

Punishment for contempt was considered by the Chancery Court of New Jersey in a case, *Flockhart v. Local No. 40* (p. 163), in which the conduct of an alleged violator of an injunction was said to indicate an assumption on his part that he could by some means evade punishment for any act that he thought necessary for the success of the strike. In view of the persistence of the offenses jail sentences for 40 and 20 days were imposed upon two offenders, but there was a subsequent remission of the unexpired portion of the sentence on the ground that there had been a sufficient penalty to convince the offenders that they must obey the injunction.

Unfortunate events that frequently accompany labor disputes, resulting fatally in two cases noted, were considered by the California Court of Appeals and the Supreme Court of Colorado. In the first instance (*People v. Schmidt*, p. 133), the court affirmed the conviction and sentence to life imprisonment in the case of a person charged with responsibility for the death of a person named, on the occasion of the destruction of the Los Angeles Times Building in 1910. The case turned largely on the nature of the evidence which connected the defendant with the events leading up to the explosion and its consequences; the principles governing convictions for conspiracy are also briefly discussed. The connection of the party with the different activities was held to be shown by the various items of circumstantial evidence developed, and the conviction was affirmed.

In the case before the Colorado court (*Zancannelli v. People*, p. 173), the action of the court below in convicting the appellant for murder was reversed, the circumstances being such that the court was not able to content itself with a simple reversal, but showed the animus of the prosecution and the court, and the nature and number of the errors to be such that if they had not been "written into the record as they are, under the seal of the trial court, we could not believe that such things had occurred in the trial of a cause in a court of record."

Another case that may be noted in this connection is one in which the Supreme Court of Arkansas affirmed a sentence of imprisonment

in the case of an assault by a striker. (*Cranford v. State*, p. 157.) The contention of the appellant was chiefly as to erroneous admissions by the court of testimony as to what he had said before the occurrence of the alleged assault. The court ruled that it was admissible as showing the state of the appellant's mind, and his feeling toward persons of the class to which the assaulted man belonged.

PICKETING.

The specific point of picketing in strikes was passed upon in a few cases noted, the Supreme Court of New York (*Heitkamper v. Hoffman*, p. 154) granting an injunction against such picketing as to blockade the entrance to the complainant's place of business, marching upon the sidewalk in front of his shop, or interfering with his customers by threats, violence, etc., though at the same time recognizing the right of the union to distribute a circular giving information as to the relations between the complainant and union labor and asking those who sympathized with such labor to withhold their patronage. Similarly, an injunction against picketing was directed by the Supreme Court of Washington in a case involving much the same class of conditions. (*St. Germain v. Bakery & Confectionery Workers' Union*, p. 153.) The court below had described what picketing would be allowed, but the supreme court held that all picketing should have been forbidden, since there was a legal right to carry on business without obstruction. This case arose on the failure of the employer to compel the payment of union dues by its employees, and cards had been distributed, and large numbers of persons blockading the streets and sidewalks had joined to coerce the action of the employer.

Municipal ordinances were considered by appellate courts of Texas and Oklahoma. In the former case (*Ex parte Stout*, p. 155) the constitutionality of an ordinance of the city of El Paso forbidding walking up and down in front of the place of business with signs to discourage dealing with the person being picketed was affirmed. The court took the ground that the conduct prohibited was of a nature likely to lead to disturbances, to intimidate customers, and injure business which should properly be protected. In the other case, on the other hand (*In re Sweitzer*, p. 156), an ordinance of Oklahoma City prohibiting loitering was held not to be available to prevent picketing, in view of the fact that there was a State law authorizing the performance of acts in labor disputes which would not be criminal if committed by one person. It was said that the ordinance could not do indirectly or incidentally what it could not do directly, and a discharge was granted in the case of the defendant convicted thereunder.

DECISIONS OF COURTS AFFECTING LABOR: 1917.

ALIEN CONTRACT LABOR—BRINGING SEAMAN FROM CHINA—*Scharrenberg v. Dollar S. S. Co. et al., Supreme Court of the United States (Nov. 5, 1917), 38 Supreme Court Reporter, page 28.*—Action for statutory penalties was brought by Paul Scharrenberg against the company named and two other corporations, operators of the British steamship *Bessie Dollar*, and the master of that ship. There were 19 counts in the complaint, each charging the bringing of a Chinaman from Shanghai, China, to San Francisco. Scharrenberg afterwards shipped on another steamship, the *Mackinaw*, working "as a seaman" upon it for some days at San Francisco, going thence to Grays Harbor, Seattle, Wash., and being under contract to complete the voyage to Shanghai. The action was brought while the vessel was still at Grays Harbor. The subordinate courts rendered judgment for the defendants on demurrer, and this was affirmed by the Supreme Court, which held that the facts alleged in the complaint made out no violation of the law of the United States prohibiting the importation of alien contract laborers. Mr. Justice Clarke delivered the opinion, and, after stating the allegations, spoke as follows:

The employment of the man to serve as a bona fide seaman on the *Mackinaw* is not questioned, and the allegations of the complaint negative any suspicion that the employment of him in China was a subterfuge adopted for the purpose of unlawfully securing his entry into the United States.

Basing his right upon the allegations of the complaint, the claim of the petitioner is, that by employing and bringing an alien laborer as a seaman to San Francisco, in the manner described, for the purpose of shipping him, followed by his actually being shipped, as a seaman on board a vessel of American registry, the defendants violated the act of Congress of February 20, 1907 [forbidding the importation, etc., of alien contract labor] (34 Stat. at Large, p. 898).

The argument in support of this claim is that the seaman, described in each count of the complaint, was an alien contract laborer; that the steamship *Mackinaw* was a part of the territory of the United States, and that therefore the contracting to bring such alien to San Francisco and to there employ him upon such vessel was to knowingly assist and encourage the migration of an alien contract laborer into the United States, for the purpose of having him perform labor therein, in violation of the fourth and fifth sections of the act.

The pertinent provisions of the act are then reviewed, and the opinion continues:

In familiar speech a "seaman" may be called a "sailor" or a "mariner," but he is never called a "laborer," although he doubtless performs labor when assisting in the care and management of his ship; and a "seaman" is defined, in the United States statutes applicable to "merchant seamen," as being any person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel. (R. S. sec. 4612.) In the shipping articles, which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as "seamen" or "mariners." Thus, neither in popular nor in technical legal language would the men employed on the *Mackinaw* be called or classed as "laborers," and such seamen are not brought "into this country" to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them or on another, as soon as employment can be obtained.

ASSIGNMENTS OF WAGES—CONSTITUTIONALITY OF LOAN LAW—*People v. Stokes, Supreme Court of Illinois (Dec. 19, 1917), 118 Northeastern Reporter, page 87.*—F. B. Stokes was convicted of a violation of the act, page 553, Laws of 1917, requiring lenders of money in amounts less than \$300 and at rates of interest greater than 7 per cent per annum to be licensed, and regulating the conduct of such business. The offense charged consisted of loaning to one Miller, on an assignment of his wages, \$100 at a rate of interest alleged to be $8\frac{1}{3}$ per cent per month—the borrower receiving \$100, and agreeing to pay back \$25 per month until \$150 had been paid. The only ground of appeal from the judgment of conviction was that the statute was invalid. The supreme court upheld the act and affirmed the judgment, Judge Craig delivering the opinion. He considered together the first and second objections, viz, that the act was class legislation, abridging the privileges and immunities of citizens and depriving them of property without due process of law, in contravention of the Federal and State constitutions, and that it granted special privileges or franchises. These contentions were answered by references to decisions of the Supreme Court of the United States and of the courts of the States. The other objections, based on the State constitution, are likewise found to be untenable, in that the act embraces subjects not expressed in its title, and is a local or special law regulating the rate of interest; and that it vests judicial powers in an administrative body, the department of trade and commerce, which is authorized to grant or refuse licenses, according to the qualifications of the applicant or the lack of them, and to demand additional security from licensees when the bond given becomes

doubtful for any reason. It was pointed out that these powers were administrative and intended merely to further the carrying out of the law as enacted, and that a party who was refused a license, or whose license was revoked, had an undoubted right to resort to the courts for redress.

ASSIGNMENTS OF WAGES—CONSTITUTIONALITY OF LOAN LAW—*Wessell v. Timberlake, Supreme Court of Ohio (Nov. 21, 1916), 116 Northeastern Reporter, page 43.*—Herman Wessell was arrested by one Timberlake, a constable, for making loans at a rate of interest in excess of 8 per cent without a license. He brought habeas corpus proceedings to test the validity of the chattel-loan law of Ohio (sec. 6346-1 to 6346-9, General Code). The common pleas court of Hamilton County and the court of appeals successively declared the law valid, and this judgment was affirmed by the supreme court, Judge Wanamaker delivering the opinion. The claim of unconstitutionality was largely based upon deprivation of property and due process of law, emphasis being placed upon the alleged arbitrary power conferred upon the superintendent of banks to revoke a license when in his opinion the licensee was guilty of violation of the law, with an unfair and ex parte hearing or none at all, and with no opportunity of appeal to the courts. The judge stated that the plaintiff relied largely upon the decisions of a United States district court regarding the so-called blue-sky law, but that this decision had recently been reversed by the United States Supreme Court (Hall, etc., v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217). Judge Wanamaker then discussed the nature and scope of the police power, and quoted from an opinion by Mr. Justice Day on the subject. Ancient and modern instances of legislation against usury are cited. Continuing, he said:

It would seem now too late to challenge the constitutionality of such legislation upon the ground that it is a denial of the right of property or liberty of contract.

The right of property, or liberty of contract with reference to property, is by our own constitution made "subservient to the public welfare." Where, therefore, a statute seeks to accomplish such purpose as prevention of usury, such statute is clearly within the police power of the State of Ohio under the provisions of both the State and Federal constitutions, unless some part of the machinery for its administration may violate some provision of State or Federal constitution.

The power of the State to regulate the business of chattel loans was said to be settled in *Sanning v. City of Cincinnati*, 81 Ohio St. 142, 90 N. E. 125.

The court continues:

We come now to consider the second question as to whether or not the plans and provisions of the statute for the promotion of such purposes are a legal exercise of such police power.

The legal machinery provided by the statute for the enforcement of its provisions obviously must be operated by some officer or board. The statute designates the superintendent of banks as such officer. He grants the license provided for by the act, and agreeable to the act may revoke a license. He is merely the executive of the State for the enforcement of the statute, and the presumption surely is that he would exercise his discretion fairly and justly and in accordance with the purpose, terms, and spirit of the act.

The decisions of the United States Supreme Court in the "Trading Stamp Case," *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, and in the "Blue Sky Law Case," were then examined, and the doctrine as to valid classifications adopted in those cases was held to apply to the present. The court then said that the chief and most serious objection is that relating to the revocation of licenses; but since in this instance the plaintiff did not take steps to secure a license at all, but ignored the law and contested its validity as a whole, the question of the validity of the provisions for revocation was not presented as essential to the disposition of the case. In so far as involved, is the conclusion, the act is a valid one within the police power of the State, and not in conflict with any provision of the Constitution of the United States.

BOYCOTT—BLACKLISTING—CONSPIRACY—COMBINATION IN RESTRAINT OF TRADE—ANTITRUST ACT—*Knauer v. United States*, *United States Circuit Court of Appeals, Eighth Circuit* (Sept. 16, 1916), 237 *Federal Reporter*, page 8.—Prosecution was inaugurated against 36 persons, members of the National Association of Master Plumbers, and they were indicted for conspiracy in violation of section 1 of the Sherman Antitrust Act enacted in 1890. They were convicted of this offense in a district court, and the circuit court of appeals affirmed the judgment, the illegality of the policies carried out by the association being shown in the following quotation from the opinion delivered by Judge Smith:

When the Sherman law was passed in 1890 the National Association of Master Plumbers had been organized for the "protection" of master plumbers against the competition of the manufacturers and wholesalers, and had pledged members not to buy of such manufacturers and dealers as sold to consumers, and this had been declared "the pivot of the position we are striving for as an organization." On the day that the Sherman law became effective this organization became illegal under the decision of *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53].

It is not our purpose to in any way limit the power of the members of the association to withdraw as soon as it became manifestly an illegal association. In other words, we would not deprive any member of his *locus poenitentiae*; but in 1899, after the passage of

the Sherman law, at New Orleans the National Association of Master Plumbers adopted what is known as the "New Orleans resolution," as follows:

"That we, the master plumbers of the United States, in convention assembled, do hereby assert our rights to be protected in conducting our business as plumbers and business men, and in the future will purchase our supplies from those who sell only to members of the national association of master plumbers and manufacturers and jobbers in accord therewith."

As there were about twice as many master plumbers outside the association as inside, though generally speaking the individuals outside had rather a smaller business than those inside, still the business of those outside was so considerable that many of the manufacturers and dealers decided to resist the attempt, which was apparently successful in cutting from the list of their customers the consumers, and now sought to extend this to two-thirds of the plumbers. This resulted in a conference in New York, at which an agreement known as the "New York agreement" was made. Conflicts arising under this agreement, in 1902, at Atlantic City, what was known as the "Cleveland resolution" was adopted, as follows:

"That members of the National Association of Master Plumbers are requested to confine their purchases of plumbing goods to manufacturers and jobbers who are willing to assist in improving the condition of the plumbing business, and who sell plumbing goods in localities where there are members of the National Association of Master Plumbers only to recognized master plumbers whose names appear in the National Directory of Master Plumbers, published under the supervision of the National Association of Master Plumbers."

It thus satisfactorily appears that the National Association was called for the purpose of doing what is now a violation of law, and such purpose was "the pivot of" its position. Instead of withdrawing when it became illegal, members by remaining such, and continuing without objection when the association increased the already illegal restraint, became guilty under the Sherman law without proof of any individual participation in any overt act. The institution, if the law had been as it now is, would have been illegal from its inception, and all who joined it with knowledge of its purposes, and remained members after the Sherman law was passed, and made no effort to withdraw, or have the association withdraw, from its illegal course, are subject to conviction for conspiracy under the law. One who was a member when the act of July 2, 1890, was passed, or who subsequently became a member, and who knew the illegal purpose of the association, and never withdrew from it or repudiated its illegal methods, is guilty under the act in question.

BOYCOTT — BLACKLISTING — CONSPIRACY — COMBINATION IN RESTRAINT OF TRADE — ANTITRUST ACT — *United States v. Hollis et al.*, *United States District Court, District of Montana, Fourth Division* (Mar. 14, 1917), 246 *Federal Reporter*, page 611. — Suit in equity was brought under the Sherman Antitrust Act against Willard G. Hollis and others, alleging them to be engaged in an unlawful con-

spiracy and combination to restrain trade. The defendants were members of the Northwestern Lumbermen's Association, composed of retail lumber dealers in Minnesota, Iowa, North Dakota, South Dakota, and part of Nebraska. It was charged that the objects of their organization were as follows:

(1) To unreasonably eliminate or restrict competition, except as between retail yards, for the trade of (a) contractors and builders, (b) mail-order houses, (c) cooperative yards, (d) the ultimate consumer, except possibly some consumers, such as the United States Government, railroads, grain elevators, etc. (2) To force the ultimate consumer to buy at retail prices from regularly established and organized retail lumber merchants, recognized by retail associations. (3) To force the ultimate consumer to buy from the regular and recognized retail merchant who is operating a yard in the vicinity where such lumber is to be used. (4) To prevent any wholesale dealer or manufacturer from quoting prices, or selling and shipping to consumers.

The association adopted a code of ethics which had been adopted by the National Lumber Manufacturers' Association, one article of which was as follows:

It should be the duty of the manufacturer and wholesaler to take an active interest in the marketing of their products through regular channels only. * * * It is the sense of the conference that the widest trade publicity be given for the purpose of making known irresponsible, irregular, and unscrupulous dealers and manufacturers.

The word "irregular" in the above was in 1909 changed to "unethical."

One method which the activity of the association took was the use of "customers' lists." The members of the association reported the names of wholesalers and manufacturers with whom they dealt, and from this information a list of the customers of each wholesaler and manufacturer was compiled. This was extended by exchange of lists with similar associations in other territory. Through reports of the members and of detectives employed by the association, information was received of sales by wholesalers or manufacturers to consumers, including cooperative and mail-order houses, and this was sent to the customers of the wholesalers or manufacturers concerned, who protested against the "unethical" shipment. The members did not deny the existence of this method, but did deny that it was carried out in furtherance of a conspiracy, or that members receiving such notice were under any obligation to take action upon it. Information as to shipments of lumber directly to consumers was furnished by the secretary of the association to the Mississippi Valley Lumberman, and this journal also published under the heading "selfish dealers," a list of retailers who traded with the offending manufacturers, and a list of the manufacturers and wholesalers who had signed an affidavit that "they

do not sell to catalogue houses, nor solicit trade of the consumers in the territory of the legitimate dealers." One contention of the defendants was that there was no evidence of actual restraint of interstate commerce resulting. The court reviewed the testimony, showing that the manufacturers usually made promises of amendment when reprimanded by the retailers, and that the testimony from the mail-order houses, etc., made it plain that they had difficulty in securing the desired lumber, although in some cases they were able to get what they wanted. In the concluding portion of the opinion Judge Booth, who held the law violated and granted the injunction sought by the Government, said:

The test is, not whether by alleged methods carried out in pursuance of a conspiracy some portion of interstate commerce is annihilated, but whether such commerce is substantially interfered with or restrained.

The responsibility of those who unlawfully place substantial obstacles in the legitimate channels of interstate commerce is not lessened by the fact that some of the persons engaged in such commerce are able by superior agility to surmount the obstacles, and that others by strength are able to break them down.

The court will not feel itself compelled to adjudicate in mathematical terms the extent of the restraint of interstate commerce, if the evidence shows that it is substantial. Nor is it material here that the motives of the defendants in carrying out the activities above described were of the best, and that the acts were inspired by an honest belief that the interests, not only of those engaged in the lumber trade, but of the community at large, would be best served by having lumber and lumber products distributed solely through so-called regular channels. Such matters might very properly be considered by Congress in determining the propriety of enacting proposed legislation. The sole inquiry here before the court at this time, however, is whether the facts disclosed by the record make out a case within the statute already enacted.

In *Eastern States Lumber Association v. United States* the court uses the following language:

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242, 20 Sup. Ct. 96.

In my judgment, the Government has clearly made out a case within the statute, as interpreted in *Eastern States Lumber Association v. United States*, 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53], and *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170 [Bul. No. 169, p. 140], and is entitled to relief by way of injunction.

It is proper to add that the defendants have, each of them, activities other than those above criticized, of wide range and considerable importance, in reference to which no complaint is made.

EMPLOYEES' DISABILITY INSURANCE—COLOR BLINDNESS AS COMPLETE AND PERMANENT LOSS OF SIGHT—*Routt v. Brotherhood of Railroad Trainmen, Supreme Court of Nebraska (Nov. 3, 1917), 165 Northwestern Reporter, page 141.*—Doris Routt was a trainman in the employ of the Union Pacific Railroad Co. and was discharged on June 5, 1913, because he had become affected with color blindness. He was insured by the Brotherhood of Railroad Trainmen, among other things, against "the complete and permanent loss of sight of both eyes," which was declared to constitute total and permanent disability. On refusal of the association to make payment he brought suit, and a verdict in his favor for \$1,740 was rendered by the district court of Douglas County. The brotherhood contended that color blindness was not "complete and permanent loss of sight," since the eyes might be used for other purposes, though the employee was disqualified for railroad service. The court, Judge Hamer delivering the opinion, affirmed the judgment, first examining certain cases analogous to the present one, and then saying in part:

Applying the principle declared in the above cases, complete and permanent loss of the sight of both eyes means loss of the use of the eyesight of both eyes for the purposes of the insured's vocation. [Cases cited.]

The condition is not made that the eyes of the insured shall be taken out of their sockets and away from his physical body, but only that he "shall suffer the complete and permanent loss of sight of both eyes." It does not say that he shall become blind in both eyes, so as to become unable to see objects of any kind, but that he shall lose the "sight of both eyes." This he did when he became color blind.

Where the peculiar malady known as color blindness so impairs the sight that the member of such [railroad trainmen's] association who is insured therein is disabled and is unable longer to continue in the train service, and is discharged therefrom on account of such defect in his vision, it will be held that he is entitled to the benefits provided by the certificate, the constitution, and by-laws and rules of the society. In such case, while the sight of the insured may not be entirely destroyed for some purposes, it will be deemed destroyed and lost as to the particular avocation of a railroad trainman, and he will be held entitled to recover upon the benefit certificate which he holds.

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—BREACH—AMOUNT OF DAMAGES—COMMISSIONS—*Barry v. New York Holding & Construction Co. et al., Supreme Judicial Court of Massachusetts (Jan. 24, 1917), 114 Northeastern Reporter, page 953.*—Richard F. Barry brought action against the company named for damages for breach of a contract of employment for one year from September 22, 1913. He was employed to secure contracts for the use of a fire-proof building material known as "ribbed concrete." He was to

receive a salary, and in addition commissions on contracts secured by him. During the previous contract, which was in force from January 1 to September 22, 1913, and under which he devoted half his time to this work, the auditor to whom the case had been referred found that he had procured contracts from which the company received over \$51,000. The auditor also found that a second contract for full time was entered into September 22, and that on November 21 he was unlawfully discharged, not having secured any contracts during this period. Further findings of the auditor were that \$90 was due the employee for salary and cash expenses, and that he had suffered damages to the amount of \$2,000. Judgment was entered for \$2,090, and, the company having gone into bankruptcy just after this judgment was rendered, its trustee took an appeal. The court, Judge Loring delivering the opinion, held that under the circumstances the judgment, including damages for the estimated amount of commissions, was proper. The following is quoted from the opinion:

We are of opinion that on the facts found by him the auditor was warranted in making a finding for more than nominal damages for this breach of the contract on its part. Of course the auditor could not know that commissions would have been earned. But under the circumstances of this case that did not prevent the auditor finding more than nominal damages. The amount of his earnings during 9 months under the first contract might well be taken as a basis for determining what he would have earned under the second contract during the 10 months during which he had a right to earn commissions under that agreement.



EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—BREACH BY EMPLOYEE AFTER RECEIVING ADVANCES—CONSTITUTIONALITY OF STATUTE—INVOLUNTARY SERVITUDE—*Goode v. Nelson, Supreme Court of Florida (Jan. 18, 1917), 74 Southern Reporter, page 17.*—Harry Goode petitioned for a writ of habeas corpus against F. M. Nelson, a sheriff. Goode had been convicted and sentenced to imprisonment on a charge of contracting to perform labor, and, with intent to defraud, securing an advance of \$37 and failing to perform the labor or return the money. He was remanded to custody by the circuit court of Bay County, but in the supreme court the statute (ch. 6528, Acts of 1913) under which the conviction was had was held unconstitutional, and the sheriff was directed to discharge the prisoner. The court based its opinion largely on the decision of the United States Supreme Court in *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145 (see Bul. No. 93, p. 634), that a similar statute violated the provisions of the Federal Constitution forbidding involun-

tary servitude. The court in its opinion differentiated other cases, and in conclusion said:

The statute of the State here assailed by its terms provides punishment, not for obtaining money or other thing of value with intent to injure and defraud, but for failure or refusal, without just cause, to perform labor or service under the contract, or for failure or refusal to pay for the money or other thing of value so received upon demand. By making the failure to perform labor or service under a contract a cause for imprisonment, the statute violates the organic law in a manner that is quite similar to, and not distinguishable from, that condemned in *Bailey v. State of Alabama*. The Alabama statute provided that the failure or refusal to perform the service must be "with intent to injure or defraud." The Florida statute does not contain this element with reference to the failure to perform labor, and is therefore at least as clearly a violation of the Federal law, though the Florida act does not contain other provisions found in the Alabama law that were condemned in the *Bailey* case.

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—EFFECT OF CUSTOM—"STRAIGHT TIME"—*Cormier v. H. H. Martin Lumber Co., Supreme Court of Washington (Oct. 13, 1917), 167 Pacific Reporter, page 1105.*—R. Cormier was a logger of 34 years' experience, for the last 24 of which he had been employed as foreman of crews either on the boom or in the woods. He entered the employ of the company named in August, 1912, at the agreed rate of \$150 per month "straight time." Near the last of August, 1913, he was ordered by the manager of the company to shut down the camp. He testified that he understood that it was to be closed for 30 days, but the manager denied making this statement. Cormier understood that the hiring at "straight time" meant that he was to be paid during all shutdowns, unless at the time of shutting down he was notified that his services were no longer wanted. At any rate, he kept in touch with officials of the company as to reopening, and refused offers from other companies on the ground that he was still in the employ of the Martin Co. In March, 1914, the manager repudiated the agreement as claimed by the employee, and refused to pay him anything more than the balance due on the month of August, 1913. On the trial of the case the plaintiff introduced evidence to support his contention that there was a custom in western Washington that the meaning of the words "straight time" should be as he had interpreted it. The jury rendered a judgment in his favor, though not for the total amount claimed, and it was affirmed by the supreme court. Judge Holcomb delivered the opinion, and in his discussion of the effect of custom said:

Appellant insists that, under the terms of hiring, it had a right to rely upon the understanding that respondent had been discharged

the same as all its other employees; that his employment at \$150 per month was a hiring from month to month, which renewed the contract each month that his services were required, and, on the other hand, discontinued it each month they were not required and furnished. That is not the case when such custom as was here relied upon and shown existed. As the usage entered into the contract, respondent's hiring did not cease until it was discontinued by one or the other of the parties. The jury were authorized to find from the evidence that neither party discontinued the employment until March, 1914.

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—GROUNDS FOR DISCHARGE—*Farmer v. First Trust Co., United States Circuit Court of Appeals, Seventh Circuit (Sept. 4, 1917), 246 Federal Reporter, page 671.*—A. J. Farmer was a mechanical engineer, employed as superintendent of the gas-engine shops of the Milwaukee Motor Co. After serving in that capacity for about two months, a contract for a year was entered into on August 1, 1912, under which Farmer was to superintend and manage the shops, devoting his entire time, and to receive a salary of \$6,500 for the year and a bonus of \$3 per engine if 3,000 engines were produced during the year at a specified factory cost with the original equipment and certain additional equipment to be installed. The company had a contract with the Imperial Automobile Co. for 2,200 engines during the year, with an option for 1,000 more, the contract deliveries during 1912 being—August, 100; September, 130; October, 260; November, 260; and December, 300. The installation of the new machinery was proceeding, and work on engines was being done in December, but only 190 engines had been delivered, and these were not altogether satisfactory. On December 18 the vice president went to Jackson in response to the complaints of the automobile company, taking Farmer with him. The next day the latter started back via Chicago and was urged to get back to the shop as soon as possible. He said he would reach Milwaukee the same day, as he was only going to stop off to purchase a Christmas present for his wife. Instead he remained at Chicago for personal purposes until the 22d, and then, having contracted a severe cold, was not able to go to the shops, and on the 24th he was dismissed. The company becoming bankrupt, he entered with its trustee a claim for more than \$13,000 damages. The findings of the referee on the matter are stated thus:

The referee found that the absence from duty was in no manner on account of his own necessities or of the employer's business, but because of Farmer's own self-indulgence during that time. He found further that his absence and the failure to return to his employment was not such a breach of his contract of employment as to justify his dismissal, and that his conduct during such time was not such as was inconsistent with the nature of his employment, or rendered him unfit

to continue it. He allowed the claim to the extent of \$3,862.50 for the balance of the full year's salary, and disallowed it for the rest of the claim, which was based upon the bonus.

Both parties petitioned for review, and the district court disallowed the entire claim; this order was affirmed by the court of appeals, Judge Alschuler delivering the opinion, from which the following is quoted:

It is maintained for appellant that one serving in a supervisory capacity is not so strictly accountable to the employer for his time as is a clerk or a workman, and that Farmer's absence of two or three days without permission was not such a breach of the contract as warranted its termination. The legal proposition, as generally stated, is sustained by the authorities cited from Wisconsin, the State where this contract was made, as well as elsewhere. [Cases cited.]

But the applicability of such a rule must depend upon the facts of particular cases.

The difficulties under which the shop was operating were pointed out, and the court then said:

The responsible head was Farmer. He had various foremen under him, but he was the only mechanical engineer connected with the plant, and while in authority it was upon his designing, planning, and direction that success or failure depended. This high-priced man faced obstacles, to surmount which would manifestly require his fullest capacity and undivided attention. Surely this was not a situation wherein the man at the helm might needlessly and with impunity abandon his post that he might tread "the primrose path of dalliance."

EMPLOYER AND EMPLOYEE—CONTRACT OF EMPLOYMENT—TERM—DISCHARGE—DAMAGES—*Stewart Dry Goods Co. v. Hutchison*, Court of Appeals of Kentucky (Nov. 16, 1917), 198 *Southwestern Reporter*, page 17.—Mrs. A. L. Hutchison was employed by the company named in January, 1912, as manager of a department of its business. The employment was for a term of one year, at a salary of \$1,500, with an understanding that the amount would be increased as deserved. Increases were made to \$1,800 and \$2,400, the latter in 1914. She continued in the service until August, 1915, when she was discharged, wrongfully as she claimed. She sued the company for damages for the discharge, and a judgment in her favor was entered in the circuit court of Jefferson County. She testified that she had made diligent efforts to secure a position after her discharge, but failed for the reason that contracts for such employment are usually made in January and July. In December, 1915, she went into business for herself, but the attempt resulted in a loss. The judgment of the lower court was affirmed. Judge Clay delivered the opinion, and first, citing many cases, stated the law to be that where the original hiring is for a period, as one year in this case, and employment continues after

the expiration of that period without any different contract, it is presumed that the contract is renewed for a similar period at the expiration of each successive term. The changes in salary were said to make no difference as to this rule. The trial court had instructed the jury to make no deduction for the time near the close of the year when she was in business on her own account, since she was not profitably employed at that time.

The trial judge had refused to instruct the jury that if the plaintiff was discharged because she did not keep the hours usually observed by the other employees, it should find for defendant. This action was held to be justified, since "no witness claiming to know the terms of the original contract of employment testified to any violation thereof by plaintiff."

EMPLOYER AND EMPLOYEE—EXCLUSION OF PERSON FROM STREETS OF MINING VILLAGE—CONTRACT BETWEEN LANDLORD AND TENANT—*Harris v. Keystone Coal & Coke Co., Supreme Court of Pennsylvania (Jan. 8, 1917), 100 Atlantic Reporter, page 130.*—Louis Harris, who traded as the Victor Supply Co., brought action against the Keystone Coal & Coke Co. and others for conspiracy, because he had been prevented from going upon the streets of the village of Greensburg and selling and delivering merchandise there. The company stated that its reason for so excluding him was that he persisted in selling to its employees and tenants explosives, which the rules, made for the safety of the employees and property, forbade being stored in the village. A covenant in the leases by which the employees held their dwellings in the village reserved to the company the right to bar objectionable persons from the streets, which were the private property of the company, it owning all the land in the village. The judge in the trial court directed a verdict for the coal company, saying that any right which the plaintiff had must be derived from the tenants, as customers, and that under the terms of the lease the company had the right to exclude him. The supreme court agreed with this view, saying that since the language of the lease was clear, there was no question to submit to the jury as to its meaning, but the interpretation was a question of law for the court. Judge Mestrezat, in the opinion delivered by him, said further:

We know of no principle of law and have been cited to no decision which prevents the enforcement of this contract. The parties had the same right to contract for the control and supervision of the highways in the village as they had to agree to the terms on which the houses and lots were held by the tenants. The entire premises were the private property of the defendant company. It had the right to impose any lawful terms as to any part of the property, and,

the tenant consenting thereto, the contract became obligatory on both parties.

We have not been convinced that, under the circumstances, the restrictions placed upon the streets and alleys of the village are unreasonable, nor that the provision of the lease imposing the restrictions offends public policy. If, as we think is apparent, these restrictions on the use of the highways were inserted in the contract for the purpose of protecting the property of the defendant company and to secure "the peace, comfort and safety" of the tenants, they did not invalidate the lease. These were objects about which the parties could properly contract and about which they, in view of the purpose for which the village was constructed, might well be expected to contract.

The jury would have been justified in finding, under the evidence, that the plaintiff was delivering to the tenants an explosive for storage in their houses, which was dangerous to the tenants and injurious to defendant company's property, and which was forbidden by an order or regulation of the company. This was persisted in for such a length of time as to convince the defendant company and its officers that the plaintiff could not be trusted to go upon the premises. Such conduct clearly justified the plaintiff's exclusion from the premises.

EMPLOYER AND EMPLOYEE—INTERFERENCE WITH EMPLOYMENT—CAUSING DISCHARGE BY MISTAKEN NOTICE TO EMPLOYER OF ASSIGNMENT OF WAGES—*Doucette v. Sallinger*, *Supreme Judicial Court of Massachusetts* (Nov. 27, 1917), 117 *Northeastern Reporter*, page 897.—Lawrence Doucette brought action against Nathan Sallinger for interference with employment resulting in Doucette's discharge from his employment with the Heyward Bros. & Wakefield Co. Sallinger transmitted to the company a copy of an assignment of wages appearing to have been given by the plaintiff, but which was really made by another person of the same name. The superior court of Middlesex County gave judgment for the plaintiff, and on appeal this was affirmed. Judge Braley for the court said in part:

It further appears and the jury could find, that the defendant upon being notified by plaintiff's counsel of the mistake in identity declined to withdraw the notice until the plaintiff came to his place of business, and satisfied him that he was not the assignor and debtor. The plaintiff was under no obligation in the forum of morals or of law, to make this journey. Nor was the burden upon him to convince the defendant of his mistake and to satisfy him that he was not the debtor. (*Lopes v. Connolly*, 210 Mass. 487, 494, 97 N. E. 80.) The purser having insistently held to his course after being notified that he was in the wrong, must take the natural and probable consequences resulting from his negligence or refusal to institute the necessary inquiries, even if when he declined to act damage to the plaintiff might not have been expected or foreseen. [Cases cited.] The defendant not only was notified September 13, 1915, that the plaintiff was an employee of Heyward Bros. & Wakefield Co., and that he had been discharged

under a rule of the company, properly admitted in evidence, that "any employee executing an assignment of wages will be liable to immediate discharge," but on September 23, 1915, when informed of his loss of employment by the plaintiff's counsel declined to act, and deliberately insisted upon the enforcement of the alleged assignment. It was not until the plaintiff, who, finding that he could not be re-instated unless the assignment was withdrawn, went to the defendant's place of business "and presented himself for identification," and procured an "order for the release of his wages," that his employment was restored October 2, 1915.

EMPLOYER AND EMPLOYEE—SERVICE LETTER—RIGHT OF ACTION FOR FAILURE TO FURNISH—CONSTITUTIONALITY OF STATUTE—BLACKLIST—*Check v. Prudential Insurance Co. of America, Supreme Court of Missouri (Feb. 20, 1917), 192 Southwestern Reporter, page 387.*—Robert T. Cheek brought action for damages against the company named, and judgment was rendered in favor of the company on demurrer, the St. Louis circuit court holding that the two counts of the plaintiff's petition did not properly state a cause of action. The petition set forth that the plaintiff had for 10 years been a solicitor of industrial and other life insurance, and was qualified only for such employment, and especially, on account of several years of residence there, for such work in St. Louis. The first count was based upon the failure of the company on demand after he had quit its service, after 14 years of employment, to furnish him a service letter. Section 3020 of the Revised Statutes of 1909 requires that such a letter shall be given by corporations to employees of over 90 days' standing leaving employment, the letter to state the nature of the service rendered and the true cause of the severance of the relation. The second count alleged conspiracy on the part of the company and its two principal competitors to blacklist employees who had left the service of any one of them. Damage by reason of loss of employment resulting from these wrongs was alleged. The supreme court reversed the judgment of the lower court, holding the petition good and remanding the case for trial. The company contended that the statute relating to the letter of dismissal, while levying a penalty for violation, did not provide a basis for private action for damages; also that the statute was unconstitutional. These contentions were overthrown by the opinion delivered by Judge Woodson, who said as to the purpose of the act:

Prior to the enactment of this statute a custom had grown up in this State, among railroad and other corporations, not to employ any applicant for a position until he gave the name of his last employer, and upon receiving the name, it would write to said former employer, making inquiry as to the cause of the applicant's discharge, if dis-

charged, or his cause for leaving the service of such former company. If the information furnished was not satisfactory, the applicant was refused employment. This custom became so widespread and affected such vast numbers of laboring people it became a public evil, and worked great injustice and oppression upon large numbers of persons who earned their bread by the sweat of their faces.

The statute quoted was enacted for the purpose of regulating that custom, not to destroy it (for it contained some good and useful elements, enabling the corporations of the State to ascertain the degree of the intelligence as well as the honesty, capacity, and efficiency of those whom they wished to employ, for whose conduct they are responsible to the public and their fellow employees), and thereby remedy the evil which flowed therefrom.

As to the right of action by an individual injured because of a violation of the statute, he said in part:

The best and clearest rule I have been able to find governing the construction of such statutes is stated in 1 Corpus Juris, p. 957, in the following language:

"The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute and according to whether it appears that the duty imposed is merely for the benefit of the public and the fine, or penalty, a means of enforcing its duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals, or classes of individuals. If the case falls within the first class, the public remedy by fine, or penalty, is exclusive, but if the case falls within the second class a private action may be maintained, particularly where the injured party is not entitled, or not exclusively entitled, to the penalty imposed."

This statute was enacted for the protection of the public, and for the benefit of the employees of corporations who had become victims of said custom, as shown by the authorities previously cited. The contention is therefore decided in favor of the appellant and against the respondent, and we hold that the statute gives the plaintiff a cause of action.

At this point the court showed that it is not the duty of the superintendent personally, but of the corporation through him, to furnish the letter. Taking up the question of constitutionality, and of the conspiracy to blacklist, it was said:

It is insisted by counsel for defendant that said section 3020 is violative of the "Constitution of Missouri, in that it is discriminatory, class legislation, and infringes right of free speech"; also that it violates the "Constitution of the United States, in that it deprives the respondent of its liberty to contract without due process of law."

The statute under consideration was enacted in pursuance of the police power of the State, and in no manner discriminates against the respondent; it applies to all corporations doing business in this State. Nor can this statute be declared class legislation.

This statute embraces within its provisions all persons and things which naturally and reasonably belong to the same class and simi-

larly situated, and it operates equally and uniformly upon all of them, and is not limited to only a portion of the persons and things which rationally belong to the same class. Similar statutes of Georgia and Kansas have been held unconstitutional and void by the Supreme Court of each of those States. *Wallace v. R. Co.*, 94 Ga. 732, 22 S. E. 579 [Bul. No. 2, p. 201]; *Atchison, etc. R. Co. v. Brown*, 80 Kans. 312, 102 Pac. 459 [Bul. No. 84, p. 416].

In my opinion the Georgia case and the Kansas case are not in line with the spirit of similar statutes nor the spirit of this progressive age, which is to protect and shield the public and the wage earner from bodily injury, and to remove him from injurious cliques and combinations formed by others to control his right to work and labor for himself and those who are dependent upon him; otherwise, the effect would be to pauperize him and his family, as well as all other wage earners similarly situated.

That a foreign corporation has no inherent right to exist or to do business in this State is no longer an open question. It derives those rights from the State, impressed with such conditions and burdens as the State may deem proper to impose, and when such a corporation comes into this State to do business, it must conform to the laws of this State, and will not be heard to complain of the unconstitutionality of our police regulations.

Moreover, when a corporation of this State, or one doing business herein, employs a person to work for it, it thereby, by necessary implication at least, agrees with him to give him a letter of clearance when he leaves the company, as provided for by said statute, for the reason that said statute becomes a part of every such contract.

It is finally insisted by counsel for plaintiff that the demurrer to the second count of the petition was improperly sustained. This count charges that certain foreign corporations, including the defendant, doing business in this State, writing life and industrial policies of insurance, made an unlawful agreement whereby each agreed with the other not to employ within a period of two years any person leaving the service of the other company, or who had been discharged by it, and that said agreement resulted in the inability of the plaintiff to find employment in the line of work in which alone he could earn a living.

It is not contended that such corporation may not employ whomsoever it will; but that is not this case. Here the agreement or combination pleaded gave said companies a monopoly in said business, which prevented the plaintiff from obtaining employment from any one engaged in that business, thereby depriving him of his legal right to follow his chosen occupation.

While the petition may be somewhat inartificially drawn, yet, in our opinion, it states facts sufficient to constitute a good cause of action against the respondent, under the constitution, common law, or the statute, or all of them collectively.

For the reasons stated, we are of the opinion that the action of the court sustaining the demurrer to each of the counts of the petition was erroneous, and that the judgment should be reversed, and the cause remanded for trial.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—INJUNCTIONS—*E. I. Du Pont de Nemours Powder Co., et al. v. Masland et al., Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 575.*—The company named applied to a United States district court for an injunction to prevent Walter E. Masland, a former employee, from using or disclosing secret processes with which he had become familiar while in its service. He admitted that he intended to engage in the manufacture of artificial leather, to which some of the processes related, but denied that he intended to use any trade secrets that he had learned in confidential relations with the company. He, however, averred that many of the things claimed by the company were well known to the trade. At first a preliminary injunction was refused, but the defendant proposed before the final hearing to make disclosures to experts whom he would employ, sufficient to insure proper preparation for his defense. The district court thereupon issued a preliminary injunction against disclosing any of the company's alleged processes to any one except counsel, with leave to move to dissolve the injunction should occasion to consult experts arise. Later a motion to dissolve was denied. The circuit court of appeals reversed the decree, and the matter was taken to the Supreme Court by writ of certiorari. The latter decision was there reversed, it being held that the district court properly granted an injunction against disclosure to experts, leaving the court opportunity to control the extent and method of such disclosure if any should prove necessary. Mr. Justice Holmes delivered the opinion, which, after a statement of the facts, continues as follows:

The case has been considered as presenting a conflict between a right of property and a right to make a full defense; and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defense are adjudged against him before he has a chance to be heard or to prove his case. We approach the question somewhat differently. The word "property" as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence can not be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them. These have given place to hostility, and the first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good.

The injunction asked by the plaintiffs forbade only the disclosure of processes claimed by them, including the disclosure to experts or

witnesses produced during the taking of proofs, but excepting the defendant's counsel. Some broader and ambiguous words that crept into the decree, seemingly by mistake, may be taken as stricken out and left on one side. This injunction would not prevent the defendant from directing questions that should bring out whatever public facts were nearest to the alleged secrets. Indeed, it is hard to see why it does not leave the plaintiffs' rights somewhat illusory. No very clear ground as yet has been shown for going further. But the judge who tries the case will know the secrets, and if, in his opinion and discretion, it should be advisable and necessary to take in others, nothing will prevent his doing so. It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—LIST OF CUSTOMERS—INJUNCTION—"RECEIVING" BUSINESS—*New Method Laundry Co. v. MacCann, Supreme Court of California (Dec. 15, 1916), 161 Pacific Reporter, page 990.*—The company named, engaged in the laundry business in the city of Oakland, bought from John W. MacCann a laundry route formerly operated by him, and employed him as a driver and solicitor upon it. He carried on this route for five years, keeping a list of customers, with the day of the week when each expected his unlaundered articles to be called for. On April 5, 1913, MacCann left the employ of the company, and began soliciting for a rival laundry from the same customers. On petition by the company for an injunction against this practice the superior court of Alameda County granted such an injunction, restraining MacCann "from soliciting, but not from receiving" such work. The company appealed, contending that the injunction should, as had been the practice in previous similar suits, restrain the receiving of business. Judge Lawlor, who delivered the opinion in the supreme court, referred to the leading case of *Empire Steam Laundry Co. v. Lozier*, 165 Cal. 95, 130 Pac. 1180 (Bul. No. 152, p. 51), which established the doctrine that such lists of customers constitute a trade secret, against the violation of which the employer may have a perpetual injunction. He noted that while the injunction in that case prohibited receiving laundry work, the exact point had been raised in the present case for the first time. The conclusion reached was that the judgment below should be affirmed in its original form. As to the question of the prohibition of receiving work, he said in part:

Coincident with the right of the employer to the protection of his trade secrets against their unwarranted disclosure to or unconscionable use by persons not entitled thereto, is the right of all per-

sons, in absence of negative covenants to the contrary, to follow any of the common occupations of life. This right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property. See *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231. "Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner." *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007 [Bul. No. 35, p. 797]. It can not, indeed, be questioned that an employee, in a case such as this, retains the right to work for a rival laundry if he so chooses, or, having established a laundry business himself, to serve all persons who voluntarily offer him their trade. But in such competition, he must act with utmost fairness, resolving every doubt rather in favor of the interests of the former employer than against them, and exercising, at all times, every precaution to avoid violating, in letter or spirit, the confidence reposed in him.

The judgment of the lower court also finds support in sound principles of public policy. To restrain a person, lawfully engaged in a laundry business, from receiving unlaundered goods from certain former patrons is to sanction, to that extent, the establishment of a trade blacklist, thereby depriving such patrons, without any fault on their part, of the right to have their laundry work done where they will. The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen to whom he may desire to extend his patronage, and equity can not invade or take away this right, either directly or indirectly, without due process of law.

Discussing the claim that the permission to receive work would lead to evasion which would amount to a solicitation, Judge Lawlor said in part:

The decree expressly forbids defendant from in any manner soliciting or attempting to induce, directly or indirectly, such customers to withdraw their patronage from plaintiff. Clearly, conduct on the part of the defendant, his agent, or others in his behalf, such as suggested, would be *contra bonos mores* and a deliberate invasion of the injunction issued to plaintiff.

Injunctive relief, in any case, must depend upon broad principles of equity rather than on the particular wording of any decree. Conceivably, cases may arise where the court would be warranted in restraining a person, engaged in a business, from "receiving" trade of certain members of the community, but the facts presented here do not demand such relief.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—USE BY FORMER EMPLOYEE—*Aronson et al. v. Orlov et al.*, *Supreme Judicial Court of Massachusetts (July 3, 1917)*, 116 *Northeastern Reporter*, page 351.—The plaintiffs, Abraham Aronson and others, manufactured petticoats in Boston, and sold them to large retail dealers in various parts of the country. In November, 1912, Aronson invented a method of improving the product by making the seams elastic. The

garments were put on the market under the trade name "Flexo Seam." The defendants Fatherson and Wachtel were employees of the plaintiffs, and learned this trade secret through this connection. Later they withdrew from their employment, and with Orlov began the manufacture of a similar article, calling it by the designation of "Wunder Seam." They advertised by letters to the trade in various States, including those who were customers of the plaintiffs, and were known to the defendants to be such. A decree granting the plaintiffs an injunction was entered in the superior court of Suffolk County, and this was affirmed by the Supreme Judicial Court. Judge Rugg delivered the opinion, which was largely taken up with questions as to the rights of the parties arising out of applications for patents on the invention. The following, relating to the use of trade secrets by former employees, is quoted from the opinion:

Apart from the questions arising because of the applications for patents, it is plain that the plaintiffs make out a case for equitable relief on the facts found by the master. The idea of the improvement in the manufacture of garments was Aronson's. It was not a mere nebulous phantom of the fancy, but a definite conception of a material device so simple that its mere statement would convey as clear a notion as would a model of a complicated mechanism. This idea was used rightfully by the plaintiffs. Fatherson was the first of the defendants to know of that idea and he learned of it solely by reason of and in the course of his employment by the plaintiffs. The doctrine is well settled that an employee can not lawfully use for the advantage of a rival and to the harm of his employer confidential information which he has gained in the course of his employment. This rests upon the implied contract, growing out of the nature of the relation, that the employee will not after the termination of his service use information gained during the period of his employment to the detriment of his former employer. This doctrine has been frequently applied in this Commonwealth and it prevails generally. [Cases cited.]

It is also true, as decided by these and other cases, that equity will enjoin interference with the rights of a manufacturer to his own trade secrets and will prevent continuance of violation of duty by a former employee in divulging them, and will give relief in damages for injury already inflicted. There is a plain distinction between instances where employees leave one employer and use their own faculties, skill and experience in the establishment of an independent business or in the service of another, and instances where they use confidential information secured solely through their employment to the harm of their previous employer. The plaintiffs have a clear cause of action against their former employees, Fatherson and Wachtel. The former, at least, has appropriated the Aronson idea for improvement in dress design acquired solely through his employment. The latter participated in, if he did not frame, the scheme whereby Orlov was to embark in the business of manufacturing petticoats in competition with the plaintiffs by the use of the information which

he and Fatherson had acquired wholly through their employment by the plaintiffs. Orlov in this respect stands no better than the other two defendants. The Aronson idea was communicated to him by one or both of his codefendants. At the first meeting of the three, the previous employment and experience of Fatherson with the plaintiffs formed the subject of the conference. Orlov and Wachtel were well acquainted. The inference is irresistible that one of his dominating motives in forming the arrangement with the other two was the knowledge that there would be at his disposal the Aronson idea of garment design. Under these circumstances he is on the same footing and subject to the same liabilities as Wachtel and Fatherson.

EMPLOYERS' LIABILITY—DEFENSES—CONSTITUTIONALITY OF STATUTE—*Superior & Pittsburg Copper Co. v. Tomich, Supreme Court of Arizona (July 2, 1917), 165 Pacific Reporter, page 1101.*—Frank Tomich, having been injured in the mine of the company named, brought action against it for damages. Judgment was in his favor in the Superior Court of Cochise County, and the company appealed, alleging that the law was unconstitutional. This question, as far as some of the most important considerations were concerned, had been settled by the decision in *Inspiration Consolidated Copper Co. v. Mendez*, 166 Pac. 278 (see p. 85), in which it was held that the enactment of such a law declaring liability without fault was within the power of the legislature. Other complaints as to the constitutionality of the statute were held not to be well founded, Judge Cunningham delivering the opinion and saying:

Appellant contends that chapter 6 of title 14 is void for the reason its terms conflict with sections 5 and 7 of article 18 of the State constitution. Section 5 is that:

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

This section does not restrict the power of the legislature to modify or abolish the defense of contributory negligence. The restriction contained in the section is clear that no law shall be enacted which attempts to make the defenses of contributory negligence or assumption of risk, when interposed, determinable by the courts as matters of law, but such defenses are made to depend upon facts when they are properly interposable, and, interposed; they are required to be established by a preponderance of the evidence to the satisfaction of the jury. Whether the plaintiff's negligence contributed to the wrong, or whether the plaintiff assumed the risk and danger from which the wrong arose, must be determined as a fact from the evidence by the jury.

Section 7 commands the legislature to enact an employers' liability law, by the terms of which any employer shall be liable for the death or injury of workmen employed in all hazardous occupations named, and any other industry designated by the legislature, whenever such death or injury is caused by any accident due to a condition or con-

ditions of such occupation, except when such death or injury has been caused by the negligence of the employee killed or injured. The only restriction placed upon the legislative power in carrying out said constitutional mandate found in the section of the constitution is the exception, viz.:

Liability is incurred "in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

In all other cases the legislative power is unlimited by said section 7.

A careful examination of chapter 6 of title 14 discloses no violation of such limitation on the power of the legislature. The exception is carefully preserved in paragraph 3154 of the statute. If the injury resulted from an accident arising out of and in the course of labor, service, and employment in a hazardous occupation, and was due to a condition, or conditions, of such occupation or employment, and was not caused by the negligence of the employee the liability to damages exists. If, however, the injury was caused by negligence to which the injured workman contributed, the liability of the employer remains to an amount of the full damages, less the amount of damages attributable to the employee's negligence. In other words, the damages are to be apportioned to the parties, employer and employee, as the negligence attributable to the one is to the negligence attributable to the other. "The fact [appearing] that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," are the words of the statute. The statute is in full harmony with the constitutional mandate and with its restrictions.

Questions as to the excessiveness of the damages awarded by the jury, and as to the admission and rejection of evidence, and the conduct of the trial, in which the jurors had been allowed to ask questions of the witnesses rather freely, were resolved also in favor of the plaintiff, and the judgment of the lower court was affirmed.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—ASSUMPTION OF RISK BY SUPERINTENDENT—CONSTITUTIONALITY OF STATUTE—*Bowersock v. Smith, Supreme Court of the United States (Mar. 6, 1917), 37 Supreme Court Reporter, page 371.*—Sumner I. Smith, superintendent of the Lawrence Paper Co., while engaged in adjusting some unguarded dryer rolls, was crushed between them and killed. His administratrix sued J. D. Bowersock, owner of the factory, for damages, relying upon sections 4676 to 4783 of the General Statutes of Kansas of 1909, which provide for the guarding of dangerous machinery, and for recovery where absence of such guards contributes to death or injury. In defense it was pleaded that it was not practicable to guard the dryer, and that Smith was guilty of contributory negligence; also that he had assumed the risk of injury, as it was his

duty as superintendent to safeguard the machinery. Judgment in favor of the plaintiff was affirmed by the supreme court of the State. Mr. Chief Justice White delivered the opinion, again affirming this judgment, and saying for the most part:

The court instructed the jury, over the objection of the defendant, that, under the statute, contributory negligence was no defense, and that the fact that Smith was employed as superintendent of the factory, with authority to safeguard the machinery, would not bar a recovery, and charged with reference to the burden of proof, in accordance with the provision of the statute relating to that subject. It was held, following previous decisions, that the common-law defenses of contributory negligence, fellow servant, and assumption of the risk were not applicable to suits under the statute. The court, further construing the statute, held that it embraced all employees of every class or rank in the factories to which it applied, and that merely because the deceased was employed as superintendent did not exclude him from the benefits of the act nor relieve the owner from responsibility under it. And it was held that a different result was not required because the deceased had contracted with the owner to safeguard the machinery under the circumstances of his employment. In so ruling the court referred to the evidence, and pointed out that although there was testimony as to the authority of the deceased, under his contract, to safeguard the machinery, at the same time the evidence showed that, in the exercise of such authority, he was under the control of three superiors, all of whom had testified that they did not consider it practicable to safeguard the dryer rolls. Attention was also directed to the notice which the defendant posted with reference to guards on machinery, as showing a control over that subject by the owner. 95 Kan. 96, 147 Pac. 1118.

The case is here because of the asserted denial of rights guaranteed by the fourteenth amendment.

That Government may, in the exercise of its police power, provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded, and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, is undoubted. And it is also not disputable that, consistently with due process, it may be provided that, in actions brought under such statute, the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar a recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act. [Cases cited.]

While not directly disputing these propositions, and conceding that the Kansas statute contains them, and that it is not invalid for that reason, nevertheless it is insisted that the construction placed upon the statute by the court below causes it to be repugnant to the due process clause of the fourteenth amendment. This contention is based alone upon the ruling made by the court below that, under the statute, the deceased had a right to recover although he had contracted with the owner to provide the safeguards the failure to furnish which caused his death,—a result which, it is urged, makes the owner liable and allows a recovery by the employee because of his neglect of duty. We think the contention is without merit. It is

clear that the statute, as interpreted by the court below,—a construction which is not challenged,—imposed a duty as to safeguards upon the owner which was absolute, and as to which he could not relieve himself by contract. This being true, the contention has nothing to rest upon, since, in the nature of things, the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered inefficacious. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 52, 32 Sup. Ct., 169 [Bul. No. 98, p. 470].

EMPLOYERS' LIABILITY—LIABILITY WITHOUT FAULT—CONSTITUTIONALITY OF STATUTE—*Inspiration Consolidated Copper Co. v. Mendez, Supreme Court of Arizona (July 2, 1917), 166 Pacific Reporter, page 278.*—Ceferino Mendez brought action against the company named under the Employers' Liability Act of Arizona, chapter 6, title 14, of the Civil Code of 1913. The employee was a miner engaged in underground work. On June 28, 1914, he opened a compressed air valve for the purpose of clearing a compartment of the mine of foul air, and the air, escaping from the valve under heavy pressure carried dirt and other substances into his eyes, injuring them. No negligence on the part of the employer was asserted, but the declaration, based on the provision of law mentioned, alleged that the occupation was a hazardous one, and that the accident was due to a condition of such occupation. The company made claim that the chapter in question was void as in conflict with certain provisions of the State constitution and with the fourteenth amendment to the Constitution of the United States. The company further alleged that the employee's negligence was the sole cause of the injury, that he was guilty of contributory negligence in failing to promptly and properly treat the injuries, that he assumed the risk of this injury as an ordinary risk of his employment, and that the remedy, if any, was under the succeeding chapter of the Code, the Workmen's Compensation Law. The superior court of Yavapai County overruled the objections based on alleged unconstitutionality, and judgment was rendered for the employee in the sum of \$5,500, less an amount already paid over. Certain questions of practice relating to the proceedings on appeal were considered and determined in favor of the employee, after which the main question of the validity of the law was taken up. Judge Cunningham was the spokesman for the court in upholding the law and affirming the judgment below, and from his opinion the following is quoted on this point:

The appellant contends, and I think its contention is correct, that the liability statute must be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous

occupations, due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. The cause was tried upon that theory, and the judgment must stand or fall according to the validity or invalidity of the said statute.

Chapter 6 of title 14 [the statute under consideration] was enacted as a response to the mandate contained in section 7 of article 18 of the State constitution, reading as follows: [Provision quoted.]

This provision is clearly one mandatory upon the legislative branch of the State government as to all the requirements set forth in that provision for affirmative action by the legislature. The only limitation or restriction thrown about the legislature's duty in this respect is that in the enactment of employers' liability laws or other laws of such nature, no employer shall be made liable for the death or injury of any employee, when such death or injury shall have been caused by the negligence of the employee killed or injured.

The statute clearly does not require as a condition of liability that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers, and therefore it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks, although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation.

The decision of the United States Supreme Court in *New York Central R. Co. v. White*, 233 U. S. 188, 37 Sup. Ct. 247 (Bul. No. 224, p. 232), is then quoted from at length. This decision is made the basis for the decision in the present case, as is shown by the following paragraph quoted from Judge Cunningham's opinion, after which he disposes of other matters as to assumption of risks, limitation of amount of liability, and the sufficiency of the evidence to sustain the verdict, and announces the affirmance of the judgment of the court below:

Thus, from the court of ultimate authority over questions affecting constitutional guaranties and rights, we find answers to all of the arguments advanced by the appellant why chapter 6 of title 14 is in conflict with the fourteenth amendment of the Constitution of the United States. I am of the opinion that the statute is free from the objections urged by appellant on the authority of such case.

EMPLOYERS' LIABILITY—MEDICAL TREATMENT—NEGLIGENCE OF PHYSICIAN—*Owens v. Atlantic Coast Lumber Corporation*, Supreme Court of South Carolina (Oct. 29, 1917), 94 *Southeastern Reporter*, page 16.—The company named was sued by Julius Owens, an em-

ployee, for damages for the death of his wife. His complaint alleged that the company collects from the monthly wages of each of its numerous employees the sum of \$1, to maintain a staff of two physicians to render medical services to the employees and their families. Owens' wife becoming ill, he called upon one of the physicians, Dr. Brown, who refused to attend on the ground that he was too busy. Owens tried to find Dr. Sawyer, the other physician, but could not. Three or four days later his wife's condition became critical and being still unable to find Dr. Sawyer, and without means to employ another physician, he begged Dr. Brown to attend her; but the physician would not go with his automobile across the ferry, although it was one regularly operated by the county authorities, and the wife died. Damages were sought in the sum of \$10,000, and the company demurred to the complaint alleging the above as facts. The trial court held that a cause of action was not stated by the complaint, and sustained the demurrer. The supreme court, however, reversed the order, thus placing the case in a position where it might be tried on its merits. Judge Hydrick, in delivering the opinion, said in part:

If the deductions made resulted in direct pecuniary profit to defendant, then, clearly, it would be responsible for the negligence or malpractice of the physicians employed even with due care, on the same principle that a private hospital conducted for gain, or the physician himself, is made liable.

Nothing appearing to the contrary, the allegation that defendant exacted and received pay for the promised services warrants an inference, at least prima facie, that defendant received pecuniary profit from the scheme. Certainly it is not inferable that it was conducted as a charity, even in part. The fund so raised was retained in defendant's treasury and, if there was any surplus, it inured to the benefit of defendant. This put upon defendant the burden of showing that it derived no pecuniary gain in the conduct of the undertaking and administration of the fund to escape the liability arising from that situation.

Construing the allegations of the complaint most liberally for plaintiff, as we must on demurrer, they bring his case, at least prima facie, within the situation described, in which the decided weight of authority and reason holds the master liable for the malpractice or negligence of physicians chosen by him, even with due care; for, in that situation, the master assumes an absolute duty and responsibility to the servant. [Cases cited.]

EMPLOYERS' LIABILITY—MINE REGULATIONS—"KNOWN TO GENERATE EXPLOSIVE GASES"—*Eleganti v. Standard Coal Co., Supreme Court of Utah (Oct. 15, 1917), 168 Pacific Reporter, page 266.*—A. Eleganti brought action against the company named, as administrator of the estate of Giacomo Boetto, whose death, it was alleged,

was caused by the negligence of the company while he was employed in its mine, in November, 1914. The company appealed from a judgment against it, entered in the District Court of Salt Lake County. It was unquestioned that several weeks before the accident explosive gases had been found in the mine, and at that time proper steps were taken to exclude them. A statute requires that inspection for gases be made in all mines "known to generate explosive gases." Such inspection was not made in the mine in which the injury occurred during the interval after the first discovery of gas, and failure in this respect was the negligence charged. There was a controversy as to the meaning intended to be conveyed by the expression quoted. The judge in the trial court had told the jury that the mine was under the circumstances a mine known to generate explosive gases, and the company contended that he should have left this question to be determined by the jury from the evidence. This as well as the other disputed points were resolved in favor of the plaintiff, and the judgment below was affirmed. From the opinion delivered by Judge Frick the following is quoted:

Counsel's theory seems to be that unless the mine in question developed a certain quantity of explosive gases, that is, a quantity which would in the opinion of experts make a mine dangerous or unsafe, it would not constitute a mine known to generate explosive gases within the purview of our statute. In our judgment that contention is clearly untenable. The language of the statute is positive and direct. There is no qualification such as counsel seem to assume. The language of the statute is, "In all mines known to generate explosive gases" the examination and inspection directed by the statute must be made. A moment's reflection will make clear that the statute was intended to and does apply to all mines where explosive gases are known to exist, regardless of the quantity thereof. The legislature thus withdrew the question respecting the quantity of gases, or whether the quantity was safe or otherwise, from the judgment of all classes, whether experts or nonexperts, and imposed the duty of examination and inspection in all mines where explosive gases in any quantity are known to exist.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
INFECTED FROM DECAYED CHICKEN IN CANNERY—*Potter v. Richardson & Robbins Co., Superior Court of Delaware (Jan. 26, 1915), 99 Atlantic Reporter, page 540.*—Annie Potter, an employee of the company named, suffered from blood poisoning and claimed that it was the result of the actionable negligence of the employer in furnishing putrid carcasses of chickens to be prepared by her for canning. She had a scratch or cut on a finger, through which it appeared the poison entered her system. It was alleged that the chickens had been in cold storage, and

that the company knew or should have known their unsafe condition and warned the plaintiff, who did not know of the danger. The company demurred on the ground that a cause of action was not stated in the declaration, and the demurrer was sustained, in effect overthrowing the present suit. Judge Pennewill delivered the opinion, and stated that two questions of law were presented by the case: First, did the defendant exercise due care in furnishing to the plaintiff carcasses of chickens to be cut up and prepared? and, second, was the plaintiff guilty of negligence which proximately contributed to her injury? The opinion was in part as follows:

The first count is based upon the proposition that since the plaintiff was employed by the defendant to clean and prepare the carcasses to be cooked or potted by the defendant, it owed her the duty of furnishing and providing her with reasonably safe and sound carcasses of chickens to be cleaned and prepared. And since these chickens were to be prepared and to be put on the market for food for the public, the plaintiff had the right to rely upon the defendant to furnish her with only such carcasses as might be deemed fit for human food.

We think the plaintiff is here confusing the defendant's duty to an employee with the duty it owes its customers, the buyers of its goods, who can have no knowledge of the condition of the chickens before they are cooked and canned. The defendant's duty to the plaintiff can not be measured by the fitness of the chickens for food. The carcasses were given to her only for the purpose of being prepared for cooking and canning.

The care the defendant should have exercised in procuring and furnishing the carcasses for the plaintiff was reasonable and ordinary care, that is, such care as a reasonably prudent and careful person would have exercised in a like case, or under like circumstances. Such being the duty imposed upon the defendant, it can not be held liable unless there was a failure to exercise such care.

We are clearly of the opinion that the plaintiff's means and opportunities of discovering the danger complained of were even greater than those of the defendant. It is inconceivable that she did not observe and know the condition of the carcasses she handled. Indeed, she must have known else she would not have made the averments she has made in her declaration.

The plaintiff was employed to cut up and prepare chickens to be cooked and canned or potted. She was not employed to cut up and prepare putrid, rotten and decayed chickens. If she found a carcass in such condition it was her duty to report the fact to her employer, the defendant. Instead of doing that she went on and cut up the carcass and her injury resulted therefrom. She was, in the opinion of the court, guilty of contributory negligence.

After carefully considering this case, the court are of the opinion that there is no substantial ground on which the jury would be justified in finding negligence on the part of the defendant; and also, that negligence on the part of the plaintiff approximately contributing to her injury, appears from her declaration.

EMPLOYERS' LIABILITY—POISONOUS FUMES—DUTY OF EMPLOYER TO ELIMINATE—*Fritz v. Elk Tanning Co., Supreme Court of Pennsylvania (May 14, 1917), 101 Atlantic Reporter, page 958.*—Norman A. Fritz was employed from October, 1911, to February, 1913, in the bleaching room of the tannery carried on by the company named. In this room were several vats containing fluids used in bleaching, one being a warm solution of sulphuric acid. His duties required him to be near the vats a large part of the time, and at certain times, when the acid was put in or renewed, or the hides dipped in it, steam or fog arose and enveloped the employee. He developed symptoms of illness six weeks before he quit work, but was assured by the superintendent that there were no injurious fumes. As to the disability which the employee suffered from some cause, the court, speaking through Judge Walling, says:

When plaintiff began this work, he was robust, 26 years of age, and weighed 195 pounds; when he quit he was a physical wreck, and for 16 months thereafter walked upon crutches, and much of that time was confined to the house, and has not since been able to do any work. At the time of the trial in 1916 he could walk with the assistance of a cane, and weighed 140 pounds, and seemed to be permanently disabled.

The testimony of physicians for the plaintiff is reviewed, their opinions being very strongly to the effect that sulphuric acid poisoning could and did result from the constant inhaling of the fumes. Expert testimony equally positive is also summarized in favor of the contention of the company that such poisoning was not the cause of the illness. The court then expressed its view that the judgment should stand, the concluding portion of the opinion for the most part being as follows:

Where seemingly credible evidence tends directly to establish the facts upon which defendant's liability depends, a verdict based thereon is not the result of guesswork, although such evidence is strongly contradicted by that submitted for the defense. And where, as here, a plaintiff's case is supported by positive and circumstantial evidence, and also by expert opinion, it must be submitted to the jury, notwithstanding the strength of the opposing proofs. In such case the remedy, if the verdict be against the weight of the evidence, is a new trial, which was not here sought. The fact that no case like this has come within the knowledge or information of any witness called, while strongly persuasive, is not conclusive against the plaintiff.

As the case was submitted, the verdict implies a finding by the jury, not only that the fumes were poisonous, but that such fact was or should have been known by the defendant, which was the common-law rule; but under section 11 of the act of May 2, 1905 (P. L. 352), it was defendant's duty to know the character of the fumes and gases arising in its bleachroom, and, if poisonous, to provide for their elimination by exhaust fans or other sufficient devices. As no attempt

was made to comply with the statute, and no claim that it could not have been done, if the fumes were poisonous, and plaintiff was injured thereby, without negligence on his part, he was entitled to recover as the provisions of the statute are mandatory. [Cases cited.]

The fact that the plaintiff, under the assurance of the superintendent, continued at his work, did not as matter of law charge him with contributory negligence.

EMPLOYERS' LIABILITY—PROXIMATE CAUSE OF DEATH—PNEUMONIA RESULTING FROM BURNS AND RECUMBENT POSITION—*Sterling Anthracite Co. v. Strobe, Supreme Court of Arkansas (Oct. 8, 1917), 197 Southwestern Reporter, page 858.*—Fred Strobe was injured by an explosion of gas in the mine of the company named on February 18, 1916, and died 11 days later. On the trial of the suit of his administratrix against the company for damages, there was evidence on her behalf that the fire boss, after his required inspection on the morning of the day of the injury, had reported the working place of Strobe to be unsafe, but had marked "O. K." on the board used for that purpose; but for the defense evidence was introduced that a mark was made to indicate that the place was found to be dangerous. When the employee reached the working place and lighted his miner's lamp the explosion occurred. The court stated that since there was substantial evidence of negligence, it could not disturb the jury's verdict, which had been in favor of the plaintiff.

Another question was whether the injury could be considered as the proximate cause of death, which resulted directly from pneumonia. The burns received were about the chest, shoulders, face, and arms. The attending physician testified that in his opinion the pneumonia resulted from the burns and the recumbent position necessitated by the injuries. It was held that there was justification also for the jury's finding on this point. Specific instructions to the jury relating to both matters, which were objected to, were held to have been proper, and the judgment for the plaintiff was affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FREIGHT CONDUCTOR ON RETURN TRIP AFTER MOVING INTERSTATE SHIPMENT—*Illinois Central Railroad Co. v. Peery, Supreme Court of the United States (Dec. 18, 1916), 37 Supreme Court Reporter, page 122.*—Robert H. Peery was injured in a rear-end collision while in the performance of his duties as a freight conductor, and sued the company named, his employer, action being brought under the Federal law, employment in interstate commerce being alleged. Judgment in his favor in the Supreme Court

of Minnesota was reversed on this appeal, the Federal law being held inapplicable. Peery's run was from Paducah south to Fulton, both points being in the State of Kentucky. The train out generally, and on the day in question, had interstate goods on board, but the return trip carried none, and it was on the return that the injury complained of was received. The court held that the two trips were separate movements, "in opposite directions, with different trains." Conceding that the greater probability of getting traffic going south was the chief reason for establishing the run, it was held that this could not dominate the return to the extent of fixing its character as interstate when there was no traffic of that nature being carried.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—GATEMAN—*Southern Pacific Co. v. Industrial Accident Commission of California, Supreme Court of California (Dec. 14, 1916), 161 Pacific Reporter, page 1139.*—An award of compensation was made by the California Industrial Accident Commission to Jessie L. Rolfe on account of the death of her husband, Thomas C. Rolfe, in the employ of the railroad company named. The company petitioned for review on the ground that the employee was engaged in interstate commerce, and that the remedy of his widow was provided by the Federal Employers' Liability Act. Rolfe was a crossing gateman at a point where both interstate and intrastate trains passed over the track. As an intrastate train was about to pass and he had closed one of the gates, he discovered that a horse and wagon had approached so near to the track that he could not close the other gate without striking the horse or the wagon, and he started to cross the track to back the horse away, was struck by the train, and killed. The decision was that this was sufficiently related to interstate commerce so that the Federal act applied, and the compensation award was annulled. Judge Angellotti, in rendering the opinion, called attention to decisions to the effect that a track used indiscriminately for both kinds of traffic is an instrumentality of interstate commerce, and that those engaged in keeping it in repair or in suitable condition for use are engaged in such commerce, and so also as to persons removing obstructions from the track.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—JACKING UP WRECKED CAR—*Southern Railway Co. v. Puckett, Supreme Court of the United States (June 11, 1917), 37 Supreme Court Reporter, page 703.*—H. E. Puckett, an employee of the company named, was injured in August, 1911, and

brought action under the Federal Employers' Liability Act against the company. At the time of injury he was engaged in carrying blocks to jack up a wrecked car, the purpose being to release another employee who was pinned down by the car, and to assist in clearing away the wreck. He stumbled over some large clinkers beside the track, and struck his foot against some old ties overgrown with grass, fell, and was seriously injured. The court held, the Chief Justice dissenting, that he was employed in interstate commerce, and affirmed the judgment of the Court of Appeals of Georgia in his favor, Mr. Justice Pitney saying:

The court held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.

We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—LINEMAN—*Southern Pacific Co. v. Industrial Accident Commission of California*, Supreme Court of California (Dec. 14, 1916), 161 Pacific Reporter, page 1143.—In this case an award of compensation had been made by the industrial accident commission to Jessie Covell for the death of her husband, Victor Covell. At the time of the fatal accident he was at work for the company as a lineman, and engaged in removing a telephone wire which had fallen upon a trolley wire, the removal of which was necessary before trains could be operated on an electric railway constituting a part of the passenger system, both interstate and intrastate. It was decided that the principles controlling in this case were the same as those applied in the case of the same title relating to a gate-man (161 Pac. 1139; see p. 92), and the award was annulled, it being held that the matter was governed by the Federal Employers' Liability Law, and that the commission had been without jurisdiction to make an award. The following is quoted from the brief opinion delivered for the court by Judge Angellotti:

It was necessary that this telephone wire be removed in order that cars might be operated, as it was impossible to operate cars over the line until such wire had been removed. Deceased being thus engaged directly in removing an obstruction to the use of an instrumentality in actual use for purposes of interstate commerce was engaged in interstate commerce at the time of the accident.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRING LOCOMOTIVE—*Minneapolis & St. Louis Railroad Co. v. Winters*, Supreme Court of the United States (Jan. 8, 1917), 37 Supreme Court Reporter, page 170.—George H. Winters, a machinist's helper, was injured while working in a round-house repairing an engine. Judgment in his suit against the company was in his favor, and the company appealed. The record in the case did not make it clear whether the verdict was rendered in accordance with a view that the case was within the scope of the Federal act or the State law. In order to give the Supreme Court jurisdiction on appeal to consider questions raised by the company it was necessary to find that the facts, which had been agreed upon in the trial court, showed an employment in interstate commerce and a consequent applicability of the Federal act. The court held that this was not shown, Mr. Justice Holmes saying in the opinion delivered by him:

The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. The engine "had been used in the hauling of freight trains over the defendant's line. . . . which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CAR TO BE LOADED WITH INTERSTATE SHIPMENT—SAFETY APPLIANCES—UNCOUPLING FOR FLYING SWITCH—*Christy v. Wabash R. Co.*, Kansas City Court of Appeals, Missouri (Jan. 29, 1917), 191 Southwestern Reporter, page 241.—Laura Christy brought action for the death of her husband, occurring while in the employ of the railroad company named. In the circuit court of Randolph County a jury rendered a verdict in her favor, and judgment was entered thereon. It was evident from this verdict

that the jury found the facts alleged on the part of the plaintiff to be true, and the court in this decision held that they were sufficient to support the conclusion that the car which was being switched was to be taken the next morning to a point a few miles away, there to be loaded with eggs and sent to Chicago, an interstate movement. The court held that this situation made the employment interstate service, Judge Ellison, who delivered the opinion, saying as to it:

No sound reason can be suggested why that was not interstate service. We think it was such service in a special and immediate sense. For the use to which the car was to be put was the already ascertained service of a specific shipment into another State; and that shipment was to be made on the day the car was being switched out of the yards for that use.

The fatal injury to the deceased occurred in the making of a flying switch of the car. The car was placed behind the engine, and after they were in motion the engine was uncoupled and its speed increased, so that they became separated a sufficient distance for the switch to be thrown after the engine passed, turning the car upon the siding. The engine and car were both equipped with automatic couplers, as required by law, but it was held that the safety-appliance act was violated by this method of switching, which required the employee to assume a position between the engine and the car, a thing which the law was designed to prevent. In this instance, as a matter of fact, the employee fell off, probably in the act of pulling the coupling pin, and was run over and killed. All questions were decided in favor of the plaintiff, and the judgment was affirmed. As to the violation of the safety-appliance provisions Judge Ellison said:

There was abundant evidence to show that a "flying switch" made by the employee standing on the footboard in front of the moving engine could not be accomplished without standing between the engine and car, or without hanging to the end of the car by placing one foot in a stirrup and reaching some part of the body around between the two. We think in these circumstances a case was made for plaintiff. For, notwithstanding an interstate carrier complies with the Safety Appliance Act, yet if it operates the cars so that the appliances can not be used without doing the thing the act seeks to avoid, i. e., going between the cars, it violates the statute as fully as if it had failed to install the appliances.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SHIFTING CARS WITH COAL FOR ENGINES—*Lehigh Valley R. Co. v. Barlow*, *Supreme Court of the United States* (May 21, 1917), 37 *Supreme Court Reporter*, page 515.—James H. Barlow was awarded damages for personal injuries in his suit against the company named, the action having been brought under the Federal Employers' Liability Act. The judgment in his favor was

affirmed by the various courts of New York State, the decision by the court of appeals being reported in 214 N. Y. 116, 107 N. E. 814, and summarized in Bul. No. 189, p. 110. The only question carried to the United States Supreme Court was as to the employment of Barlow in interstate commerce at the time of the injury. The facts are stated, and the decision of the court that he was not occupied with interstate commerce at the time of injury, but that the judgment must be reversed, is set forth in the brief opinion delivered by Mr. Justice McReynolds:

The accident occurred July 27, 1912, when, as member of a switching crew, he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, New York. These cars belonged to it, and with their contents had passed over its line from Sayre, Pennsylvania. After being received in the Cortland yards—one July 3 and two July 10—they remained there upon sidings and switches until removed to the trestle on the 27th.

We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517 [Bul. No. 224, p. 105], did not materially differ from those now presented. There we sustained a recovery by an employee, holding he was not engaged in interstate commerce; and that decision is in conflict with the conclusion of the court of appeals.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—STATION AGENT SECURING MAIL BAGS FROM INTERSTATE TRAIN—*Lynch v. Boston & Maine Railroad, Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 401.*—Julia Lynch brought action under the Massachusetts Employers' Liability Act for the death of her husband, Jeremiah Lynch, in the employ of the railroad company named. Lynch was employed at the station at Newburyport during the night, and it was a part of his duty, after lowering the gates across a street near the station, to cross the tracks in front of the train and get the mail bags for that station. The engineer saw Lynch start to run across ahead of the engine and pass out of sight in front of it; his body was later found where it had been dragged by the engine before the train stopped for the station. The train was an express running from Portland to Boston, stopping only at Biddeford, Me., and Portsmouth, N. H., before reaching Newburyport. The judgment was for the company, on the ground that the widow's right of action, if any, was under the Federal Liability Act, since the injury occurred during employment in interstate commerce. This was also

the view of the supreme judicial court, Judge Crosby in the opinion saying:

This train was a passenger train and carried mail and baggage which it was the duty of Lynch to take from the train and place in the baggage room at the station. It is plain that the train not only was an interstate train but was engaged in the transportation of interstate passengers and property—and so was engaged in the business of interstate commerce. It can not be doubted that the transportation of mail stands upon the same footing as the transportation of freight, baggage, or other commodities. It is common knowledge that railroad companies carry mail under contracts entered into with the Federal Government authorized by statute and that such transportation is paid for in accordance with the terms of such contracts. The fact that the carriage is for the Federal Government does not stand different than if the service is rendered to an individual; it is a part of the regular business of railroads from which they derive a substantial revenue.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIMITATION—AMENDMENT OF ACTION BEGUN AT COMMON LAW—*Hogarty v. Philadelphia & Reading Ry. Co., Supreme Court of Pennsylvania (Oct. 9, 1917), 99 Atlantic Reporter, page 741.*—William J. Hogarty lost his right arm on February 1, 1910, while in the employ of the company named, as conductor of a shifting crew. He was thrown under a car by striking a telegraph pole when he leaned beyond the side of a car to uncouple it, and alleged that the pole was negligently placed too near the track. His original declaration was at common law, stating no facts indicating that the employment was in interstate commerce. The company defended on the ground that he had accepted benefits from its relief society. It had admitted, however, that the employment at the time of the injury was in interstate commerce, and he called attention to the fact that the Federal Employers' Liability Act does not permit the defense of release by payment from relief funds. The company replied that the Federal statute had no application, since he had sued at common law. The rejoinder of the plaintiff claimed the right to amend by pleading the statute, which the trial court denied. On appeal the supreme court reversed the trial court's judgment for the company and ordered a new trial. This decision was reported in 245 Pa. 443, 91 Atl. 854, and noted in Bulletin No. 169, p. 84. On the second trial judgment was for the employee, and the supreme court in the present decision reversed its previous decision as well as the judgment, saying that in the meantime the United States Supreme Court had settled the question in *Seaboard Air Line Co. v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, which was to the effect that if the amendment

introduced a new and different cause of action, the statute of limitations must be considered; so that, since more than the statutory period of two years had elapsed between the injury and the attempt to make the amendment, such amendment would not be allowed. Judge Moschzisker, who delivered the previous opinion, dissented from the present view. The majority opinion was delivered by Judge Brown, who, referring to the admission by the company that the employment was in interstate commerce, said:

At the time the admission was made, and for nearly three years before, all liability of the defendant under the act of Congress had ceased; for none could have been enforced against it except by an action brought within two years from the time the injuries were sustained. The admission was not that the plaintiff had a cause of action under the act of Congress, but merely that at the time of the accident, and for two years thereafter, the defendant might have been liable under the act, which, however, was no longer available to the plaintiff.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—RIGHTS OF PARENT OF MINOR—*New York Central & Hudson River R. Co. v. Tonsellito*, *Supreme Court of the United States* (June 4, 1917), 37 *Supreme Court Reporter*, page 620.—The Court of Errors and Appeals of New Jersey affirmed judgment for damages awarded in a suit brought by Michael Tonsellito, an injured minor employee of the company named, for personal injuries; and in a separate suit by his father, James Tonsellito, for loss of his son's services and for medical expenses incurred. These cases were reported in 94 *Atl.* 904, and noted in *Bulletin No.* 189, p. 98. The Supreme Court affirmed the judgment in the former case, but reversed it in the latter for reasons made plain in matter quoted from the opinion of Mr. Justice McReynolds as follows:

The court of errors and appeals rule, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York C. etc. R. Co. v. Winfield*, 37 *Sup. Ct.* 546 [see p. 260], and *Erie R. Co. v. Winfield*, 37 *Sup. Ct.* 556 [see p. 265]. There we held the act "is comprehensive and also exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to operate uniformly in all the States as respects interstate commerce, and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—HOURS OF SERVICE ACT—VIOLATION—DEFENSES—*Baltimore & Ohio Railroad Co. v. Wilson, Supreme Court of the United States (Dec. 18, 1916), 37 Supreme Court Reporter, page 123.*—James B. Wilson was injured while in the employ of the railroad company named. It was alleged that he was kept on duty for more than 16 hours, and subsequently, apparently 14 hours later, was again called on duty, and was at that time so exhausted from the strain of the previous work that he was not able to protect himself, and was injured as a consequence. The jury which rendered a verdict for the plaintiff was instructed that if it found that the violation of the Hours of Service Act proximately contributed to the injury, it should not consider contributory negligence on the part of the plaintiff in determining the amount of the damages. After stating the above facts, Mr. Justice Holmes, who delivered the opinion affirming the judgment of an appellate court of Illinois in favor of the plaintiff, spoke as follows:

The first step in the railroad's real defense was that the plaintiff was not kept on duty more than 16 hours,—a proposition that there was substantial evidence to maintain. But that having been overthrown by the verdict, it contends that the injury must happen during the violation of law, or at least that the Hours of Service Law fixes the limit of possible connection between the overwork and the injury at 10 hours by the provision that an employee, after being continuously on duty for 16 hours, shall have at least 10 consecutive hours off. It also objects that the plaintiff, if feeling incompetent to work, should have notified the defendant. But no reason can be given for limiting liability to injuries happening while the violation of law is going on, and as to the 10 hours, the statute fixes only a minimum, and a minimum for rest after work no longer than allowed. It has nothing to do with the question of the varying rest needed after work extended beyond the lawful time. In this case there was evidence that whether technically on duty or not, the plaintiff had been greatly overtaxed before the final strain of more than 16 hours, and that, as a physical fact, it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liability Act, secs. 3 and 4, questions of negligence and assumption of risk disappear.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—COUPLERS—PROTECTION OF EMPLOYEES NOT COUPLING AND UNCOUPLING—*Louisville & Nashville R. Co. v. Layton, Supreme Court of the United States (Apr. 30, 1917), 37 Supreme Court Reporter, page 456.*—O. Y. Layton sued the railroad company named for damages for personal injuries, and judgment in his favor was affirmed by the Supreme Court of Georgia. The action was brought under the Georgia Employers' Liability Act, which provides that

the employee shall not be held to be guilty of contributory negligence, nor to have assumed the risk, where violation of any statute enacted for his safety contributed to the injury—the reference being, it was assumed, to the Federal Safety Appliance Act. The employee was admittedly in the performance of his duty when injured. He was a switchman, and was on top of one of two standing cars, when an engine and car were backed against five other standing cars near by to couple on to them. Through defect of the coupling apparatus, the connection was not made, but the five cars were set in motion against the car on which he was, throwing him to the track, where his right arm was crushed by the cars. The question disputed was whether the provisions of the Safety Appliance Act relating to couplers is intended for the benefit of all who may be injured through failure to conform to its regulations, or only of those whom such failure compels to go between the cars. The Supreme Court adopted the former view, sustaining the position taken by the court below, saying that while the immediate occasion of the enactment of the laws was the protection of the class of employees who were required by their duties to go between the cars, their benefits were by no means confined to such persons.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCES—PRESUMPTION OF NEGLIGENCE—FATHER'S RIGHT TO DAMAGES FOR DEATH OF MINOR SON—*Minneapolis & St. Louis R. Co. v. Gotschall*, *Supreme Court of the United States* (May 21, 1917), 37 *Supreme Court Reporter*, page 598.—Merlin E. Gotschall, 20 years of age, was head brakeman on a freight train transporting merchandise in interstate commerce. He was near the rear end of the train, proceeding over the tops of the cars toward the engine, when the train became separated because of the opening of a coupler on one of the cars, the emergency brakes automatically became set, and the sudden jerk caused thereby threw him off the train and under the wheels, killing him. Nora Gotschall brought suit as administratrix against the railroad company, and the Supreme Court of Minnesota affirmed a judgment in her favor. Whether the mere fact of the failure of the coupler to hold was sufficient to enable a jury to infer negligence was in dispute, as was also the necessity of evidence of pecuniary loss on the part of the father, in whose interest the action was brought. The judgment was affirmed, Mr. Chief Justice White delivering the opinion, and saying:

The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since, as there was no other

evidence of negligence on the part of the company, the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as *res ipsa loquitur*. We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars. [Cases cited.]

Again it is insisted that error was committed in submitting the case to the jury because there was no evidence of pecuniary loss resulting to Gotschall's father, on whose behalf the suit was brought. But this disregards the undisputed fact that the deceased was a minor, and as, under the Minnesota law, the father was entitled to the earnings of his son during minority, the question is one not of right to recover, but only of the amount of damages which it was proper to award.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—STATE AND FEDERAL STATUTES—JURISDICTION OF FEDERAL SUPREME COURT—*Missouri Pacific Railway Co. v. Taber*, *Supreme Court of the United States* (May 21, 1917), 37 *Supreme Court Reporter*, page 522.—Charles L. Small was killed while employed as a switchman by the railway company named, and Margaret L. Taber, the guardian of his minor children, brought suit in their behalf to recover damages. Action was brought under the statutes of the State of Missouri, and no objection was made to this by the company in its answer or at the trial. The company appealed from a judgment in the plaintiff's favor, but the State supreme court refused to consider the contention that, since Small was engaged in interstate commerce, the Federal act should have been relied upon, and affirmed the judgment of the court below. The Supreme Court of the United States also held that it was too late to raise the question. Mr. Justice McReynolds, in delivering the opinion, stated that "Unless some right, privilege, or immunity under the Federal act was duly and especially claimed, we have no jurisdiction," and concluded as follows:

The original action was based upon a State statute; the answer did not set up or rely upon the Federal act; the trial court's attention was not called thereto, and although urged to hold liability dependent upon it, the supreme court declined to pass upon that point because not presented to the trial court. This ruling seems in entire accord with both State statutes and established practice. [Cases cited.]

The case was therefore dismissed for want of jurisdiction, leaving the judgment of the State courts undisturbed.

EMPLOYERS' LIABILITY—SAFE PLACE TO WORK—INSPECTION OF PILING—*South v. Seattle, Port Angeles & Western Ry. Co., Supreme Court of Washington (Nov. 20, 1917), 168 Pacific Reporter, page 896.*—Benjamin R. South was fireman on a locomotive of the company named, when, on January 28, 1916, it was precipitated into the bay at Port Angeles by the giving way of a trestle. He brought suit for damages, and a verdict in his favor for \$16,000 was rendered by a jury in the superior court of King County, which sum was reduced by the court to \$10,000. The company contended that no negligence on its part was shown. The trestle was built for the passage of trains hauling logs to a mill, and was constructed in May or June, 1914. It was claimed by the company that since such piling should last for three years there was no duty to inspect before the expiration of that time; also that the trestle had been repaired in fulfillment of any duty owed by it, about December 1, 1915. A man of experience testified, on the other hand, that while the life of piling varied in different waters, it was not safe to rely on its being in good condition for more than a year. The repairing referred to was upon the side next the bay, where one or two piles were replaced and fender piles built to prevent damage from floating logs. There was testimony that on the other side, next the shore and the log dump—the side where the engine went off—the piling was soft and spongy under the water from the action of teredos and submarine growths; and that several weeks before the accident a pile was seen to be loose, and to be separated about 2 feet from the cap which should rest on its top, and that some days before the accident it disappeared entirely; it was at this point that the break occurred and the engine went down. The court affirmed the judgment, holding that the duty of inspection and attention to the weakness of the trestle was cast upon the company by the conditions shown.

EMPLOYERS' LIABILITY—SAFETY PROVISIONS—LIABILITY OF ELECTRIC COMPANY TO EMPLOYEE OF PATRON—*Clayton v. Enterprise Electric Co., Supreme Court of Oregon (Dec. 5, 1916), 161 Pacific Reporter, page 411.*—W. S. Clayton was killed by electric shock while turning a switch, and his widow sued the company named for damages, and prevailed. He was in the employ of Carl Roe, the owner of a pumping plant used for purposes of irrigation, power being derived from the transmission wires of the electric company. It was asserted that the company failed to properly insulate its switches and other apparatus, and that it was therefore liable under the provisions of the employers' liability law of the State. On the other side it was claimed that the statute applies only to the relation

of employer and employee, and that the judgment of the court below for the plaintiff was not warranted for this among other reasons. Judge Bean, who delivered the opinion of the supreme court, deciding the points raised in a manner which sustained the decision below, said on the question stated:

From the language of the statute, which makes three special references to the safety of the general public, or the public, it seems there can be no doubt but that the provisions of the law are intended to safeguard members of the public from injury by coming in contact with wires or appliances owned and controlled by an electric company and used in the transmission and application of electricity of a dangerous voltage. The title of the act plainly shows the purpose, more fully set forth in the body of the act, to protect all persons working around high voltage wires, without regard to whether they are employees of the electric company or not. The enactment is for the protection of life and limb, and should be given a fair and liberal construction in the interest of public safety and protection of human life.

EMPLOYERS' LIABILITY — WORKMEN'S COMPENSATION ACT — EFFECT — APPLICATION TO WORKMAN ON SHIP ON NAVIGABLE WATERS — *Shaughnessy v. Northland Steamship Co., Supreme Court of Washington (Jan. 24, 1917), 162 Pacific Reporter, page 546.* — George Shaughnessy recovered a judgment for \$3,500 as damages in a common-law action in the superior court of King County for injuries suffered by him in the employ of the company named upon the steamship *Aiki*, which he was assisting in unloading at a wharf located in the navigable waters of Puget Sound. He was obliged to descend into the hold for his work by a ladder, which was perpendicular and set back under the edge of a hatch a few inches so as not to interfere with the movement of the cargo sling when it was raised and lowered through this hatch. Above the hatch coaming was a rope supported by stanchions so as to form a railing. When he bore his weight upon the rope in order to get a footing upon the ladder one of the stanchions gave way, and he was precipitated into the hold 20 feet below, suffering the injuries complained of. The supreme court first held that there was no reason for disturbing the findings of the jury, which, in rendering a verdict for the plaintiff, necessarily found that the company was negligent in allowing the rope, of which an employee might be expected to take hold in climbing to his work, to be insecure, and also that the employee was not guilty of contributory negligence in relying upon its support.

The important question, it is said, is whether the workmen's compensation act has withdrawn such cases from the consideration of the courts in a common-law suit, as was contended by the defendant company. It is pointed out that the act is compulsory, neither em-

ployer nor employee having any option in the matter where the occupation comes within the scope of the act. This, says Judge Parker, who wrote the opinion, "points to a legislative intent to make the act applicable only to those relations of employer and employee which are in the legislative control of the State untrammelled by the laws of the United States and the jurisdiction of the courts of the United States." It would follow, in the view of the court, that contribution is not required to the fund by the company, so far as the maritime service of its employees is concerned, and, though the ship was in the harbor, it was in a position which would subject the matter to the admiralty jurisdiction if the employee saw fit to pursue that remedy. The opinion cites the case, *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648 (Bul. No. 189, p. 250), in which it was held that such maritime service was not within the act, and an attempt to compel the compensation commission to collect a contribution from the employer and for the fund, in order that the claim might be paid from the fund, was unsuccessfully prosecuted. The decisions in other States are for the most part differentiated because the laws are elective, and it is held that the compensation act does not apply to such cases under the Washington statute. The judgment for the employee was therefore affirmed.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION ACT—EFFECT OF REJECTION—PRESUMPTION OF NEGLIGENCE—*Mitchell v. Phillips Mining Co.*, *Supreme Court of Iowa* (Nov. 16, 1917), 165 *North-western Reporter*, page 108.—This was an action for damages for the death of a miner employed by the company named, who received fatal injuries from the fall of slate from the roof of the mine. The Iowa workmen's compensation law provides:

In actions by an employee against an employer for personal injury sustained, arising out of and in the course of the employment, where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

The plaintiff in this case did not at first introduce evidence of the negligence of the company, but relied upon the presumption created by the paragraph of the law quoted above. The company then introduced evidence which it claimed was sufficient to overthrow the presumption and disprove its negligence. Further evidence was then in turn given by both parties. Without presenting any question to the jury, the court directed a verdict for the company,

and the plaintiff appealed. Judge Preston delivered the opinion of the court, which held that the evidence should have been submitted to the jury for determination of certain questions of fact and remanded it to the trial court for that purpose. The subject of presumption is first discussed in a more general way, after which the court says:

The act, and particularly the section now in question, should be construed so as to carry out the purposes and objects of the act. This being so, there is little room for doubt that the legislature intended that the evidence of the injury should be considered as evidence of negligence, and to prove the fact of negligence by operation of the presumption. The presumption is rebuttable, and the defendant may show by evidence that it was not guilty of negligence, and that the negligence was not the proximate cause of the injury. We shall see later that it is a question for the jury to say whether the presumption has been overcome. Ordinarily this will be so, but there may be exceptional cases.

We are of opinion that under the record made the case should have been submitted to the jury for its determination as to whether the statutory presumption of negligence had been overcome, and that the case should be reversed on this ground. We think, too, there are some circumstances in the record which it would have been proper for the jury to consider in aid of the presumption, and, see later that it is a question for the jury to say whether the presumption there was sufficient evidence to take the case to the jury.

The opinion then reviews the evidence, and holds that, even disregarding the statutory presumption, there was evidence tending to show negligence, sufficient to take the case to the jury.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION ACT—INTERSTATE COMMERCE—SEAMAN ON TOWBOAT HANDLING INTERSTATE BARGE—*Morrison v. Commercial Towboat Co.*, *Supreme Judicial Court of Massachusetts* (May 26, 1917), *116 Northeastern Reporter*, page 499.—Francis B. Morrison brought action for personal injuries, against the company named, under the provisions of the Workmen's Compensation Act of Massachusetts which apply to cases in which the employer is not a subscriber under the act, and which abrogate common-law defenses. The act exempts seamen, etc., on vessels engaged in interstate or foreign commerce. The employee was, at the time of injury, mate of a towboat which operated in Boston Harbor. This boat was to tow a barge which also belonged to the company from its wharf to the flats in the harbor, after which the barge, loaded with coal, would be taken to Norfolk, Va., by an ocean-going tug. Preliminary to this the towboat went under the bow of the barge to deliver a bundle of fish for consumption on the trip, and while there an engine on the barge was started without

warning, and the employee was injured by the steam and boiling water. The court held that since the compensation act and amendments except interstate commerce and seamen from their operation, no action could be brought thereunder in the present instance, and ordered judgment for the company. The following are extracts from the opinion delivered by Judge De Courcey:

Interstate commerce in a legal sense embraces not only the transportation of freight from one State to another but every link in that transportation, whether or not some of the links are entirely within one State.

At the time of the plaintiff's accident the tug *Hersey* had run under the bow of the barge *Helen*, preparatory to towing it down to the flats. The captain of the *Helen* was on the wharf for the purpose of casting off the hawser; and the donkey-engine, which was used in heaving in the hawser, was started. At the time the purpose of the movements of the plaintiff and of the tug was to reach and move an interstate vessel.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION ACT—MINORS LEGALLY PERMITTED TO WORK—DANGEROUS EMPLOYMENT—*Westerlund v. Kettle River Co.*, *Supreme Court of Minnesota* (May 18, 1917), 162 *Northwestern Reporter*, page 680.—Hilding Westerlund, a minor, brought action by his guardian to recover for personal injuries alleged to have been due to the negligence of his employer, the company named. The company operated stone quarries, and the plaintiff was at work for it, at the age of 14 years and 4 months, when he was injured. He was assisting in the work of loading waste material and dumping it outside the plant. He attempted to stop a car which was being shunted and whose brakes were out of order, by placing a block in front of the moving wheels, and was run over by it. This method was alleged to be in accordance with the custom in handling cars. He was not engaged in operating machinery of any kind, but was in close proximity to it much of the time when at his work. The compensation statute includes in its definition of the term "employee" "minors who are legally permitted to work under the laws of the State." The laws forbid employment of boys under 16 in operating or assisting to operate dangerous machinery and in other specified work, and the provision concludes with a prohibition of their employment in "any other employment dangerous to their lives or limbs or their health or morals." It was argued on behalf of the company that this, under the rule of *ejusdem generis*, refers only to employments similar to those enumerated. The lower court had held the complaint sufficient, over the objection that the matter was covered by the compensation law, and dismissed a demurrer to the complaint; and this order was on this appeal affirmed, the court holding that the boy was employed in an occupation dan-

gerous within the meaning of the provision quoted, and was therefore not legally employed nor an "employee" under the compensation act.

EMPLOYERS' LIABILITY INSURANCE—LIABILITY, REGARDLESS OF SATISFACTION OF JUDGMENT—DIRECT RECOVERY—CONSTITUTIONALITY OF STATUTE—*Lorando v. Gethro et al.*, *Supreme Judicial Court of Massachusetts* (Sept. 13, 1917), *117 Northeastern Reporter*, page 185.—Albert Lorando had recovered a judgment against Joseph C. Gethro for personal injuries. While the report of the case does not disclose whether or not Lorando was an employee of Gethro, the principles involved would cover, in their most usual application, instances of injuries to employees. The present suit was brought in equity against Gethro and the insurance company carrying his liability risk, under chapter 464 of the acts of 1914, which provides that, upon the occurrence of loss on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of the loss shall not depend upon the satisfaction of the judgment by the assured; and that the judgment creditor shall be entitled to bring suit in equity to have the insurance money provided in the contract of insurance applied to the satisfaction of the judgment. The insurance company demurred to the bill on the ground that the statute was unconstitutional, and in the trial court an order was entered overruling the demurrer. This order was affirmed by the supreme judicial court, the validity of the law thus being upheld. Judge Rugg delivered the opinion, and called attention to the reason for the existence of the law in the protection offered to the injured person in case of the bankruptcy or financial irresponsibility of the assured. He resolved difficulties in ascertaining the meaning of the law by an authoritative interpretation of certain expressions. The question of constitutionality was then taken up, and the following quotation shows the grounds taken by the court:

The statute is reasonable in its purpose and effect. Its obvious design is to afford to the assured of modest resources the direct benefit of his insurance. It well might be a practical impossibility for an assured who has complied with every other term of his contract and has paid all premiums demanded by the insurer, first to pay the loss and damage for which he was liable and against which he was insured. The man without capital or credit might be powerless to meet his obligation and put himself in position to recover against the insurer. The man of slender resources or doing a considerable business on small capital might be forced into bankruptcy, and get little or no benefit from the insurance for which he had paid. The persons injured by accidents, for which such classes of assured might be liable, would be in effect remediless as to practical results for the

damages sustained by them. It well might be thought by the legislature a sound public policy that casualty insurance should become an effective instrumentality for both the assured and the injured, and not be a snare to the assured and a barren hope to the injured. If the legislature believed this, it reasonably might decide to frame the terms of policies of casualty insurance and to provide means for their enforcement to the end that these results might be avoided, and to declare that policies lacking these requisites should not be written, or if written should be ineffective as to these terms.

The instant statute is a declaration of public policy by the general court respecting one aspect of casualty insurance. It is a declaration as to a subject within its general power of regulation. It governs contracts made after it took effect. It is not retroactive. Its terms are reasonable and violate no right secured by the Constitution. It is well within the principle of numerous decisions where statutes more or less interfering with the freedom of contract have been upheld. [Cases cited.]

EMPLOYERS' LIABILITY INSURANCE—PROVISIONS OF POLICIES—SUBROGATION OF INJURED EMPLOYEE TO EMPLOYER'S RIGHTS—*Verducci v. Casualty Co. of America, Supreme Court of Ohio (May 15, 1917), 117 Northeastern Reporter, page 235.*—Antonio Verducci was injured while in the employ of the firm of Ensminger Bros. He sued them, and recovered a judgment in the sum of \$10,000 and costs. In the present suit he brought action against the company named, which had executed a policy of liability insurance in favor of the employers, and had conducted the defense in the prior suit. It was alleged that no part of the judgment had been paid, and that the employers were insolvent. The answer admitted the execution of the policy, but stated that the policy provided that it could be enforced only by the insured firm, and then only on condition that a judgment rendered against it had been satisfied. On the authority of *State ex rel. Turner v. Employers' Liability Assurance Corporation* (see p. 293), the court held that these stipulations, inconsistent with the statute, were void. A judgment had been rendered in favor of the defendant insurance company in the court of appeals of Cayuhoga County, but this was reversed, and judgment entered for the employee, on the facts contained in an agreed statement.

EMPLOYMENT OFFICES—PROHIBITION OF RECEIPT OF FEES FROM WORKMEN—CONSTITUTIONALITY OF STATUTE—*Adams v. Tanner et al., Supreme Court of the United States (June 11, 1917), 37 Supreme Court Reporter, page 662.*—The people of the State of Washington enacted in 1914 Initiative Measure No. 8, popularly known as the Employment Agency Law. On December 3 of that year the gov-

ernor issued his proclamation announcing that the majority had been in favor of its passage, and declaring it a law effective from that date. In brief, the act forbids the taking of fees from workmen for securing employment for them.

Even before the official proclamation of the passage of the law proceedings were instituted, on November 25, to secure an injunction preventing its enforcement, on the ground that it was invalid as in conflict with the provision of the fourteenth amendment to the Federal Constitution protecting property rights. The injunction was denied and the bill dismissed by a Federal district court, whereupon the case was taken to the Supreme Court of the United States on the constitutional question. This court, divided 5 to 4, reversed the decision below, and declared the law unconstitutional.

The majority opinion was delivered by Mr. Justice McReynolds, who stated the facts as to the proceedings in the lower court. With reference to the decisions of the State supreme court construing the law rendered in the meantime, and to the question whether the law, if valid, would practically prohibit the business of the complainants, he said:

In *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523 [Bul. No. 189, p. 123], the supreme court held school teachers were not "workers" within the quoted measure and that it did not apply to one conducting an agency patronized only by such teachers and their employers. And in *State v. Rossman*, 161 Pac. 349, the same court declared it did not in fact prohibit employment agencies since they might charge fees against persons wishing to hire laborers; that it was a valid exercise of State power; that a stenographer and book-keeper is a "worker"; and that one who charged him a fee for furnishing information leading to employment violated the law.

The bill alleges "that the employment business consists in securing places for persons desiring to work," and unless permitted to collect fees from those asking assistance to such end, the business conducted by appellants can not succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants' occupation as agent for workers can not exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. "You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."

Decisions of the court recognizing that employment agencies are subject to regulation and control are cited at this point, but Justice McReynolds failed to find a reason for their absolute suppression, since "there is nothing inherently immoral or dangerous to public welfare in acting as a paid representative of another to find a position

in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand." He quoted with approval the opinion in the California case of *In re Dickey*, 144 Cal. 234 [Bul. No. 57, p. 693], which characterizes the business as "not only innocent and innocuous, but highly beneficial." The extent of the business of the plaintiffs, who furnished positions for 90,000 persons in one year, and received applications from at least 200,000 laborers, is referred to. Continuing, Justice McReynolds said:

A suggestion on behalf of the State that while a pursuit of this kind "may be beneficial to some particular individuals or in specific cases, economically it is certainly nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work," while possibly indicative of the purpose held by those who originated the legislation, in reason gives it no support.

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution can not be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few.

Only a portion of one of the quotations made at this point in the opinion is here reproduced:

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. * * *

If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail. *McLean v. Arkansas*, 211 U. S. 539, 547, 548, 29 Sup. Ct. 206 [Bul. No. 81, p. 419].

The opinion concludes as follows:

We are of opinion that Initiative Measure No. 8, as construed by the Supreme Court of Washington, is arbitrary and oppressive, and

that it unduly restricts the liberty of appellants, guaranteed by the fourteenth amendment, to engage in a useful business. It may not therefore be enforced against them.

Mr. Justice McKenna dissented on the ground that "the law in question is a valid exercise of the police power of the State directed against a demonstrated evil." A dissenting opinion of considerable length was prepared by Mr. Justice Brandeis, Mr. Justice Holmes and Mr. Justice Clarke concurring. Mr. Justice Brandeis referred to the frequently expressed doctrine that "The action of the legislature is final unless the measure adopted appears clearly to be arbitrary or unreasonable or to have no substantial relation to the objects to be attained," and added that these facts and conditions can not "be determined by assumptions or by a priori reasoning. The judgment should be based upon the consideration of relevant facts, actual or possible—*ex facto jus oritur*" (the law arises from the fact).

In carrying out this method of inquiry into the facts, the evils, the remedies, the conditions in the State of Washington, and the fundamental problems were discussed in order, with numerous citations from Government reports and from studies of the questions of unemployment and the procurement of employment. The sources cited included Bulletins Nos. 68, 119, 192, and 211 of the Bureau of Labor Statistics; the report and testimony submitted to Congress by the United States Commission on Industrial Relations; reports of the Washington State Bureau of Labor; the American Labor Legislation Review, etc. Thus the economic grounds for the act were brought under review and the actual facts and conditions involved considered. The concluding division of the opinion, under the head "The Fundamental Problem," is quoted in full, exclusive of footnotes giving citations and quotations from the authorities for the statements made:

The problem which confronted the people of Washington was far more comprehensive and fundamental than that of protecting workers applying to the private agencies. It was the chronic problem of unemployment—perhaps the gravest and most difficult problem of modern industry—the problem which, owing to business depression, was the most acute in America during the years 1913 to 1915. In the State of Washington the suffering from unemployment was accentuated by the lack of staple industries operating continuously throughout the year and by unusual fluctuations in the demand for labor, with consequent reduction of wages and increase of social unrest. Students of the larger problem of unemployment appear to agree that establishment of an adequate system of employment offices or labor exchanges is an indispensable first step toward its solution. There is reason to believe that the people of Washington not only considered the collection by the private employment offices of fees from employees a social injustice, but that they considered the elimination of the practice a necessary preliminary to the establishment of a constructive policy for dealing with the subject of unemployment.

It is facts and considerations like these which have led the people of Washington to prohibit the collection by employment agencies of fees from applicants for work. And weight should be given to the fact that the statute has been held constitutional by the Supreme Court of Washington and by the Federal district court (three judges sitting)—courts presumably familiar with the local conditions and needs.

In so far as protection of the applicant is a specific purpose of the statute, a precedent was furnished by the act of Congress, December 21, 1898 (30 Stat. 755), which provides, among other things:

"If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than one hundred dollars."

In so far as the statute may be regarded as a step in the effort to overcome industrial maladjustment and unemployment by shifting to the employer the payment of fees, if any, the action taken may be likened to that embodied in the Washington workmen's compensation law (sustained in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. No. 224, p. 252]), whereby the financial burden of industrial accidents is required to be borne by the employers.

As was said in *Holden v. Hardy*, 169 U. S. 366, 387, 18 Sup. Ct. 383 [Bul. No. 17, p. 625]:

In view of the fact that from the day Magna Charta was signed to the present moment amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees as they arise."

In my opinion, the judgment of the district court should be affirmed.

FACTORY REGULATIONS—FIRE ESCAPES—CRIMINAL RESPONSIBILITY OF TENANT—*People v. Shevitz et al.*, *Supreme Court of New York, Appellate Division, First Department* (Apr. 13, 1917), 164 *New York Supplement*, page 603.—Hyman Shevitz was convicted of having unlawfully conducted a factory in a building which did not conform to the requirements of section 79b of the Labor Law of New York State in respect to fire escapes and exits. The respondent argued on the appeal that, as the exits complained of were outside the workplace occupied by him, it could not be said that there was a failure to observe the provisions of the section "within his holding." The court, however, pointed out that the section provides in its first sentence, "No factory shall be conducted in any building heretofore erected unless such building shall conform to the following requirements." The conviction was affirmed, Judge Scott in the opinion saying further:

The evidence showed that the loft occupied by defendant had access to no means of exit such as are required by the statute; consequently no point within the loft occupied by defendant and used by him as a factory is or can be within 100 or 150 feet "from the entrance to one such means of exit." It follows that the factory is unlawfully conducted in this loft, and the defect is within the defendant's holding. This makes him responsible and punishable for a violation of section 79b, and under section 1275 of the Penal law his offense is a misdemeanor.

It may be, as urged in defendant's behalf, that the defects in the building were not such as he was called upon or authorized to remedy; but, even so, it does not serve to excuse him. He need not have established his factory in a building which did not comply with the law; but, having done so, he can not escape the consequences.

HOURS OF LABOR OF WOMEN—CONSTITUTIONALITY OF STATUTE—EXEMPTION OF RAILROAD RESTAURANTS—*State v. Le Barron, Supreme Court of Wyoming (Jan. 18, 1917), 162 Pacific Reporter, page 265.*—William I. Le Barron was charged with having employed a woman in his restaurant for more than 10 hours in one day. The statute prohibits the employment of women in certain establishments, including restaurants, for more than 10 hours, but excepts railroad restaurants. The contention of the respondent was that this was an improper classification, which made the statute void as in contravention of the fourteenth amendment to the Federal Constitution, and similar provisions of the State constitution. It was held that the statute was unconstitutional, in so far as it applied to restaurants, for the reason given, and the case was returned to the district court from which it had been certified for the answering of questions relating to this subject. Judge Beard delivered the opinion, from which the following extracts are taken:

As to classifications which are permitted and which do not violate constitutional provisions, it is the uniform rule that the reason for the classification must inhere in the subject-matter, and must be natural and substantial, and must be one suggested by necessity, by such difference in the situation and circumstances of the subjects as to suggest the necessity or propriety of different legislation with respect to them.

Keeping in mind the purpose of the act under consideration—the protection of the health of females employed in restaurants by a regulation of the hours of their employment—there is nothing appearing either upon the face of the act, the pleadings, or in our own observation (if we may take that into consideration) rendering restaurants operated by railroad companies any more healthful to females therein employed than in those conducted by private individuals or other companies or corporations. It is a matter of common and general knowledge that most of the female employees in restaurants are waitresses, and the kind and character of the labor performed in

each is the same. A waitress in a restaurant operated by a railroad company is entitled to the same consideration in law and the same safeguards to her health as one employed in a restaurant conducted by a department store or a private individual.

At this point the opinion quotes from other opinions, and points out that the fact that railroad restaurants are a convenience for the traveling public and for railroad employees has no bearing on the classification, which in order to be valid must be based on a difference in the healthfulness of the employment. In the concluding portion Judge Beard says further:

We are of the opinion that the statute in question arbitrarily and without any substantial basis therefor discriminates between those engaged in the same class of business; that it deprives restaurant keepers, other than railroad companies, of the equal protection of the law and imposes upon them and their employees burdens not imposed upon railroad companies engaged in the same class of business and in substantially the same situation; that it is class legislation and does not operate uniformly upon all of the same class, and in so far as it applies to the hours of labor in restaurants—that being the only question before us—it is unconstitutional and void.¹

HOURS OF SERVICE—RAILROADS—COMPUTATION OF TWENTY-FOUR HOUR PERIOD—*United States v. Missouri Pacific Ry. Co., United States Circuit Court of Appeals, Eighth Circuit (June 15, 1917), 244 Federal Reporter, page 38.*—This action was brought to recover penalties for violations of the Hours of Service Act. The railway company objected to several counts of the complaint on the ground that the prosecution had adopted an erroneous method of computing the 24-hour period. The dispute was illustrated by the facts in the third count. The employee Coughlin's regular hours were from 7 a. m. to 4 p. m., so that he was employed the nine hours which the law fixes as the limit. On September 6, 1914, he remained on duty from 7 a. m. until 1.30 p. m., when he was definitely excused from duty until 3 p. m., at which hour he again went on duty and worked until 5.10 p. m. The next day he worked the regular hours. By starting to compute the 24-hour period at 3 p. m. on the former day, the prosecuting officers calculated that the operator exceeded the legal maximum by 1 hour and 10 minutes. The company contended that the computation should be made from 7 a. m., the time when in regular course the man entered upon his work. Judge Carland, who delivered the opinion of the majority, ruled that the method adopted by the railroad company was the proper one, saying in part:

In the Congressional Record for March 3, 1907, vol. 41, p. 4543, it appears that while Senator Patterson was speaking on this same statute he asked Senator Flint, who was acting as spokesman for the

¹An amendment of 1917 extends the law to females employed in restaurants of all classes, thus avoiding the fault of classification pointed out in this case.

conference committee having the bill in charge, the following questions: "Is the twenty-four hour period to be fixed arbitrarily by the company? Is the twenty-four hour period a calendar day? Is the twenty-four hour period to commence with each individual workman as he enters upon the duties of his twenty-four hours of labor?" Senator Flint answered the questions as follows: "The last statement of the Senator is the correct statement." We are of the opinion that the trial judge did not err in his ruling upon this question.

HOURS OF SERVICE—RAILROADS—NIGHT AND DAY OFFICES—*Illinois Central R. Co. v. United States, United States Circuit Court of Appeals, Eighth Circuit (Mar. 14, 1917), 241 Federal Reporter, page 667.*—The company named was convicted of violations of the Hours of Service Act by employing operators conveying train orders, in an office continuously operated, for more than 9 hours out of the 24. The defense was that the employees were not in an office operated night and day, and as they worked only 12 hours, there was no excess. The cases related to three stations in Iowa, but the facts were similar in each case. The agent and operator worked at the station from 7 a. m. to 7 p. m., when another operator took the train register and order book and carried them to a tower a few hundred feet away, where he was engaged in dispatching from 7 p. m. to 7 a. m., then returning the books to the depot. The court held that the two locations constituted but one office, and that the act had been violated, affirming the judgment of the court below.

HOURS OF SERVICE—RAILROADS—RELEASE BETWEEN RUNS OF ROUND TRIP—*Minneapolis & St. Louis R. Co. v. United States, United States Circuit Court of Appeals, Eighth Circuit (July 21, 1917), 245 Federal Reporter, page 60.*—The railroad company named was convicted in a district court on several counts for violation of the Hours of Service Act. The facts in all the cases were similar, and involved the employment of crews of freight trains on round trips, the time elapsing between the start and finish of these trips being from 17 to 18 hours. At the other end of the line the crews were absolutely released for from 2 to 2½ hours, and if this time were deducted, the total would be less than the 16 hours of service permitted. The facilities for rest during the period of release were not good. The company having waived a jury trial, the judge of the trial court found that the service was continuous; and his judgment of conviction was affirmed, one of the three judges dissenting. The following is from the majority opinion delivered by Judge Carland:

That an employee is absolutely relieved from service is not of controlling importance, if the time is so short or the opportunities for

rest are so meager that for all practical purposes an employee does not have the opportunity for rest which the law requires.

We are of the opinion that the periods of release were periods of waiting which gave no proper opportunity for rest. The service was what is termed a "turn-around" service. If the train crew can be given an absolute dismissal for the time which elapses at any particular terminal before the return trip is made, with only the opportunity for rest which is shown by the evidence in this case, and such time is held to break the consecutive hours of service, then the purpose of the law will be largely defeated, and the employees permitted to remain on duty for a longer period than is lawful.

HOURS OF SERVICE—RAILROADS—REPORTS OF OVERTIME—HONEST MISTAKE—*United States v. Northern Pacific Railway Co., Supreme Court of the United States (Dec. 4, 1916), 57 Supreme Court Reporter, page 22.*—Five employees of the company named were called at 8.10 o'clock p. m., October 29, 1911, to take charge of a wrecking train. Before they reported it was ascertained that the train would not be needed, but they were notified that they should report at 10.35. During the interval they rendered no service except to keep alive the fire in the engine. They then started on a freight run, which was delayed by hot boxes so that they did not arrive at the destination until 1.15 p. m. the next day. If the time were reckoned from 8.10 it would make 17 hours and 5 minutes on duty. The railroad company, in making its next report as required by section 20 of the act to regulate commerce, believing that the time should be reckoned from 10.35, omitted the names of these men from among those who had exceeded the limit of 16 hours. In another suit judgment had been rendered for the Government for the forfeitures for excessive services by these men, thus determining that the employees were on duty from 8.10. The Government then sued for a penalty of \$500 as for an omission to report the facts for 5 days, although as a matter of fact they were not reported for 289 days after omission in the report of November 30, 1911. In affirming the judgment of the circuit court of appeals in favor of the company, the Supreme Court assumed that the names were omitted because it was in good faith believed that the hours of service should be computed from 10.35. It was held that it was not the intent of the law in such a case to exact the penalty, Mr. Justice Clarke delivering the opinion and saying in part:

The statute is a penal one and should be applied only to cases coming plainly within its terms. While the reports filed must be truthful reports, yet, since they must be made under oath, the penalties for perjury would seem to be the direct and sufficient sanction relied upon by the law-making power to secure their correctness.

There are, to be sure, many statutes which punish violations of their requirements regardless of the intent of the persons violating

them; but innocent mistakes, made in reporting facts, where the circumstances are such that candid-minded men may well differ in their conclusions with respect to them, should not be punished by exacting penalties, except where the express letter of the statute so requires; and we conclude that the section under discussion contains no such requirement.

The fact that the Government sues for only one-fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it should make us slow to attribute to Congress a purpose to enact what is thus admitted to be a punishment greatly disproportionate to the offense.

It being very clear that it is not the purpose of the law under discussion to punish honest mistakes, made in a genuinely doubtful case, the decision of the circuit court of appeals is affirmed.

HOURS OF SERVICE—RAILROADS—REST PERIODS—*Pennsylvania R. Co. v. United States, United States Circuit Court of Appeals, Third Circuit (Dec. 19, 1917), 246 Federal Reporter, page 881.*—The company named was convicted in a district court of violation of the Hours of Service Act. The employees alleged to have been employed for more than 16 hours out of 24 were engineers and firemen on extra engines used to push freight trains over the mountain grades of the company's line. After pushing one train a certain distance from the starting point, an engine awaited the arrival of a train going in the opposite direction, which it assisted in the same manner. Hostlers took charge of the engines in the interim, and the crews were allowed to take the time for rest, the company furnishing resthouses at some places, and lodging houses being available at others. The men were subject to call at any time and were paid for the entire time. In one instance cited by the court as typical there were two rest periods of 50 minutes each, spent in a resthouse, and the period of duty exclusive of these periods was 15 hours and 10 minutes. In other cases there was no resthouse, but the men went to lodgings near by and were off duty for two hours. The court found that the nature of the work and the circumstances were exceptional, and held that the rest periods should be deducted in computing the working time. The judgment below was therefore reversed. Judge Buffington, who delivered the opinion, also refers to the importance of transportation during the War, and intimates that some consideration should be given to the unusual conditions, in cases where there is no actual overstrain of the employees. He also makes a suggestion that in view of the large number of prosecutions of railroads in "borderline" cases, the authorization of an administrative officer representing the Interstate Commerce Commission, to consult with the railroad officials and use his discretion in advising them as to the boundaries of permissible practices, would much simplify the problems presented in the enforcement of the law.

HOURS OF SERVICE—RAILROADS—SWITCH TENDERS—*Chicago & Alton R. Co. v. United States, United States Circuit Court of Appeals, Seventh Circuit (July 12, 1917), 244 Federal Reporter, page 945.*—The United States brought action against the railroad company named for violation of the Hours of Service Act by the employment of switch tenders in its Bloomington-Normal yard, which is 7½ miles long, for 12 hours per day. The company contended that the 16-hour limit instead of that of 9 hours applied to these employees. Judgment for the Government was, however, affirmed in an opinion delivered per curiam, which was for the most part as follows:

The train dispatchers and operators who direct the movement of the trains elsewhere on the road outside of the yard limit have no function within it. Therein the yardmaster has the general direction of all train movements, his orders being communicated to and executed by his subordinates, the switch tenders, who are stationed at various switch shanties within the yard, each switch tender having special charge of certain switches in the immediate vicinity of his particular shanty, and the service being continuous night and day. The orders for the movement of the trains are transmitted by the yardmaster from his central office by telephone to the various switch shanties, where the switch tenders, at phones therein, receive them, and execute them by transmitting them verbally or by signal to the engine or train crews, and by manipulating the switches, so that trains may take their proper tracks without coming in contact with each other or with the various switch engines and cars being switched and moved thereabout. Defendant had a rule requiring trains passing through the yard to reduce speed and proceed only after the way is seen or known to be clear. This use of the telephones by the switch tenders in connection with the movement of the trains was not occasional or exceptional, but was part of their general and usual duties; each train movement so communicated to the crews, or participated in by the switch tender, being preceded by his reception of a telephoned order directing it.

Our decision of August 6, 1915, in *Chicago, Rock Island & Pacific Ry. Co. v. United States*, reported in 226 Fed. 27 [Bul. No. 189, p. 155], and followed by us in *Chicago & Northwestern Ry. Co. v. United States*, 226 Fed. 30, is against the proposition, advanced for plaintiff in error, that the 16-hour limit, and not the 9-hour limit, applies; and upon the authority of those cases the judgment of the district court must be and is affirmed.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR OCCASIONALLY TRANSMITTING ORDERS FOR INTERSTATE TRAINS—*Denver & Interurban Ry. Co. v. United States, United States Circuit Court of Appeals, Eighth Circuit (Oct. 11, 1916), 236 Federal Reporter, page 685.*—Prosecution was commenced against the company named for alleged violation of the Hours of Service Act by the employment of its telegraph operator at Globeville, Colo., in a day and night office,

for more than 9 hours, he having been employed from 3 o'clock p. m., July 4, 1914, to 1.07 a. m., July 5. The company contended that it and the operator were not engaged in interstate commerce, at any rate, not on the day mentioned. The company hauled interstate freight over a part of its line, but such trains did not pass Globeville. The operator was controlled by the chief train dispatcher of the Colorado & Southern Railway. Some of the trains of the Denver & Interurban Co. ran over the interstate highway of the Colorado & Southern road, and occasional orders were transmitted through the Globeville operator relating to the meeting and passing of the Denver & Interurban trains and the interstate trains of the Colorado & Southern Railway. The judgment of the court below, for the Government, was affirmed, the court holding that the facts brought the matter within the Hours of Service Act. Judge Trieber delivered the opinion, in the course of which he said:

The fact that on that particular day this operator at Globeville had received no orders relating to interstate trains is wholly immaterial.

There was a joint traffic arrangement over this line and that of the Colorado & Southern Railway Co., over certain parts of an interstate highway, and all trains using that highway were under the control of one person, the train dispatcher of the Colorado & Southern, admittedly an interstate railway, from whom this operator received his orders, which he was bound to transmit. The courts have been very liberal in construing who are employees of a railroad engaged in interstate transportation. [Cases cited.] And in our opinion the defendant and its operator were clearly engaged in interstate commerce.

HOURS OF SERVICE—RAILROADS—UNAVOIDABLE DELAY—*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, Supreme Court of the United States (June 4, 1917), 37 Supreme Court Reporter, page 635.—The company named was convicted of a violation of the Hours of Service Act in permitting the employment of a train crew for more than the statutory limit on a run from Parker to Los Angeles, Cal. A delay of over six hours was caused at one point by the breaking of an axle, which was shown to have been an unavoidable accident; but it appeared that the crew might have been relieved at San Bernardino, which was a division terminal, though not the terminal of the train crew. It was held that the company could not be excused for not making, at that point, a change of crews, which would have prevented the overtime work. The following brief extracts are from the opinion delivered by Mr. Justice Day:

The requirement of continued service after the train reached San Bernardino was not occasioned by the unforeseen accident, but was the direct consequence of the failure of the company to relieve the

employees by the substitution of a fresh crew, as the record shows could readily have been done.

If the construction contended for by the company be adopted, it would follow that the employees might be kept in service for indefinite periods, until the termination or end of the run should be reached, which it is not difficult to suppose might require many hours of service beyond the limitations prescribed in the body of the act. This construction would defeat the purpose of the act by permitting the employees to endanger themselves and the public by the continued service of tired and exhausted men. We reach the conclusion that in keeping the crew in service beyond San Bernardino the company was guilty of a violation of the statute.

INSURANCE—SUNSTROKE AS ACCIDENT—*Higgins v. Midland Casualty Co., Supreme Court of Illinois (Dec. 19, 1918), 118 Northeastern Reporter, page 11.*—Clarence E. Higgins was a traffic policeman in the city of Rockford, Ill. On June 4, 1913, a very warm day, he had been standing at the intersection of Main and State streets for some time, when, at 4.30 p. m., he suffered a sunstroke and was compelled to go home. As a result of this stroke he suffered a complete physical and mental breakdown. The company named had issued to him, about a year earlier, a policy of insurance, indemnifying him "against bodily injury (herein called such injury), sustained solely through accidental means." A clause entitled "Special Indemnities, Section D," was included in the policy, and read as follows:

"Blood poisoning, sunstroke, freezing, hydrophobia, asphyxiation, unprovoked assaults, and choking by swallowing, as the result of such injury, shall be deemed to be included in said term 'such injury.'"

Grace Higgins, as his conservator, brought suit on the policy, and an appellate court affirmed a judgment for the company, sustaining a contention of the company that as the injury was received while the insured was doing just what he intended to do and in the way that he intended, it could not be classed as accidental. The case is said to be the first coming before this supreme court raising the question whether sunstroke might be the result of "accidental means." Under the circumstances involved in this case it was held to be such within the terms of the policy, and the judgment was reversed, Judge Carter, for the court, examining numerous decisions and saying:

Did Higgins, in this case, have any reason to assume that the natural and probable consequence of his acts along the line of his duties in controlling the traffic at the street intersection would be a sunstroke? Plainly not. The briefs show that the place where this sunstroke occurred is a busy street intersection, and we have a right to assume from the evidence that many other people were passing

back and forth in the line of their regular duties across this street intersection on that day, and that no other people so passing back and forth were stricken because of the heat. It would seem to require no argument, therefore, to conclude that from Higgins' duties at the intersection in question, although they were intentional and voluntary, a sunstroke would not be considered the natural and probable consequence of his course of action.

INTERFERENCE WITH OCCUPATION—PUBLIC INTEREST—MUNICIPAL FUEL YARDS—*Jones v. City of Portland, Supreme Court of the United States (Dec. 10, 1917), 38 Supreme Court Reporter, page 112.*—The legislature of the State of Maine passed in 1903 a law, incorporated in the Revised Statutes of 1903 as section 87 of chapter 4, and reading as follows:

Any city or town may establish and maintain, within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants. The term "at cost," as used herein, shall be construed as meaning without financial profit.

The authorities of the city of Portland, in February, 1913, duly passed a vote to establish such a yard, the vote following the language of the statute in all respects. It was provided that the money necessary for the purpose should be raised by taxation, and \$1,000 was appropriated. Citizens and taxpayers of the city then brought suit to enjoin the establishment of the yard. The supreme court having decided in favor of the city, sustaining a demurrer to the bill, the case was carried to the Federal Supreme Court on the ground that the statute violated the fourteenth amendment to the Constitution; it was contended that the establishment of municipal fuel yards is not a public purpose, and that therefore taxation to maintain one would be a taking of property without due process of law. Mr. Justice Clarke delivered the opinion of the Supreme Court, and, after stating the facts of the case, said:

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes can not be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. *Citizens' Savings & Loan Association v. Topeka*, 20 Wall. 655.

The act in question has the sanction of the legislative branch of the State Government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the State upon the authority of a previous decision of that court. *Laughlin v. City of Portland*, 111 Me. 486, 90 Atl. 318.

The attitude of this court toward State legislation purporting to be passed in the public interest, and so declared to be by the decision

of the court of last resort of the State in passing the act, has often been declared. In *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 34 Sup. Ct. 522, this court declared that a decision of the highest court of the State declaring a use to be public in its nature would be accepted unless clearly not well founded. [Cases cited.]

In the case of *Laughlin v. City of Portland*, supra, the matter was fully considered by the Supreme Judicial Court of that State. After reviewing the cases which establish the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such community with water, light, and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the State to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that in the instances in which municipal authority had been sustained the use of the public streets and highways for mains, poles, and wires in the distribution of water, light, and heat had been required under public authority, whereas in supplying fuel to consumers, under the terms of the law in question, no such permission was essential, the court saying:

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if, instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution and, if the legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the legislature authorizing the former is constitutional, but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the legislature which is the only question before the court, and not the wisdom of its exercise which is for the legislature alone."

Bearing in mind that it is not the function of this court under the authority of the fourteenth amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision

for their establishment and operation. The right of a municipality to promote the health, comfort, and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in *State of Ohio v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061. We see no reason why the State may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a State authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the State to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed.

LABOR ORGANIZATIONS—BOYCOTT—ADVERTISING THEATER AS UNFAIR—CONSPIRACY—INJUNCTION—*Empire Theater Co. v. Cloke et al.*, *Supreme Court of Montana* (Jan. 25, 1917), 163 *Pacific Reporter*, page 107.—The theater company named sought an injunction against the Musicians' Mutual Union and the Silver Bow Trades Council, their members, and certain named persons, to prevent picketing the theater and publishing it as unfair to organized labor, and carrying on a boycott against the theater. The dispute between the unions and the company was brought about by the refusal of the company to comply with a demand of the musicians' union that five of its members be employed, at a stated rate, at every exhibition of moving pictures. The district court of Silver Bow County dismissed the petition, relying upon previous decisions of the supreme court of the State, which are discussed in the following portion of the opinion delivered by Judge Sanner, affirming the judgment of the court below:

The denial of any relief was expressly based upon the prior decisions of this court in *Lindsay & Co. v. Montana Federation of Labor, etc.*, 37 Mont. 264, 96 Pac. 127 [Bul. No. 78, p. 604], and *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719 [Bul. No. 99, p. 730], and the plaintiff, contending that the second part of the Lindsay opinion is obiter, insists that so much of both decisions as are really effective, as well as the later case of *Peck v. Northern Pacific Ry. Co.*, 51 Mont. 295, 152 Pac. 421 [Bul. No. 189, p. 294], command, upon the facts found, a result exactly opposite.

The court refused to accept this view, however, saying:

The portion of the Lindsay opinion asserted to be obiter holds that injunction does not lie to restrain the publication of a circular denouncing an enterprise as unfair to organized labor, whether such

publication emanate from one or from many persons, a conclusion which is assailed as altogether wrong. Considering how that case was presented, we can not regard the part referred to as obiter.

As to the matter of constitutional liberty of speech and publication, and the operation of the boycott, Judge Sanner said:

Counsel urge, however, that the conclusion is unsound because the constitutional provision postulated as the basis of it (State Const. art. 3, sec. 10) is addressed to the legislature and not to the courts, because it in some way interferes with the power of courts of equity in cases of nuisance, and because it is contrary to the stand repeatedly taken by the Supreme and other courts of the United States. The answer is not difficult. This court founded its decision upon the language of the provision above cited, which not only forbids the passage of any law impairing the freedom of speech, as does the National Constitution, but which also proclaims, as the National Constitution does not, that "every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." We thought, as we still think, that this second clause of our provision conveys the idea of liberty, unchecked as to what may be published, by anything save penalty, and is therefore so material a departure from the meaning given to the national provision that the Federal cases have little, if any, significance; and we were, as we still are, unable to conceive how any one can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so. It is to be remembered, however, that this court was dealing in the Lindsay case with the right to publish at large, not with the propriety of enjoining acts which, though they be in aid of the right to publish, are brought, or sought to be brought, within the category of nuisances. That subject was considered somewhat in the Dilno case and will be referred to later in this opinion.

So premising, we come to the result common in both the Lindsay and the Dilno cases, which is to declare that labor unions are not unlawful in this State; that such unions may publish and pursue a peaceful boycott against any person or enterprise deemed by them to be unfriendly, and that a combination of such unions or their members for such purposes can not be viewed as a conspiracy.

Every person has the right, singly and in combination with others, to deal or refuse to deal with whom he chooses; to reach his decision in that, as in all other matters, upon or without good reason; to regard as unfriendly all those who, with or without justification, refuse to cooperate or sympathize. These rights do not depend upon the character, numbers, or influence of those who seek to exercise them; nor upon the occasion for their exercise; nor upon the consequences which may follow from their legitimate use. They have been recognized by this court as existing in an incorporated railway benefit society (*Peek v. Northern Pac. Ry. Co.*, supra), and it may be said in passing that they likewise belong to merchants' associations, to consumers interested in the cost of living, and, in some measure, to all other persons or groups of persons by whom a boycott may be conceived and practiced. The defendants had these rights,

and, having them, could lawfully announce their intention to assert them. The plaintiff, on the other hand, has no vested right in the patronage of the defendants, or of any one else who may choose to withhold it; and, no more than the plaintiff, have the persons who may choose to patronize it any vested right to such patronage. Such persons may take such patronage on the terms imposed, or not, as they see fit, just as the defendants and their friends may, if they see fit, choose to regard a rejection of these terms as a rejection of their patronage. In short, the "threat" conveyed was to do what the defendants lawfully could do—a mere warning of their intention which they could lawfully give. A combination to do a lawful thing by lawful means is no conspiracy. Counsel for plaintiff point to the occasion for this boycott, and eloquently denounce the effrontery of labor unions in dictating to those who are not held to them by any ties as offensive and as dangerous to our most precious heritage, personal liberty. Offensive such dictation must certainly be, but not more offensive nor more dangerous, we think, than when the like is put forward by agencies of quite a different character. Attempted dictation, more or less disguised, is ever present; but it is not, in contemplation of the law, an invasion of liberty so long as it amounts to nothing more than a demand which one party has a legal right to make, upon the alternative of its displeasure, and the other the legal right to refuse, braving that displeasure. We see nothing in the Peek case to interfere with the conclusions announced in the Lindsay and Dilno cases, but much to confirm them, and we are satisfied that these cases correctly apply the law to present-day conditions. It follows that the judgment must be upheld so far as the boycott and its publication at large are concerned.

As to the complaint that the picketing, etc., constituted a nuisance, it was held that the evidence did not bear out this contention, as there was no proof of intimidation or violence. The judgment of the court below, dismissing the petition for an injunction, was affirmed.

LABOR ORGANIZATIONS—BOYCOTT—ADVERTISING THEATER AS UNFAIR—INJUNCTION—*Steffes v. Motion Picture Machine Operators' Union et al.*, Supreme Court of Minnesota (Feb. 23, 1917), 161 North-western Reporter, page 524.—Albert Steffes, who carries on a motion picture theater in Minneapolis, petitioned for an injunction against the union named to restrain interference with his business, consisting in part of the hiring of a man to carry back and forth in front of the theater a banner with the words, "This theater is unfair to organized labor." The dispute between him and the union was brought about by his employment of a machine operator who was not a union man. As the decision in the district court of Hennepin County had denied the injunction, Judge Hallam, who delivered the opinion for the supreme court, remarked that the truth of facts which were in

dispute must be taken to be favorable to the defendants, and that certain acts charged to them, which were distinctly unlawful, would be held not proven. In expressing the court's decision that the order denying the injunction should be affirmed, he said further:

The term "unfair" as used by organized labor has come to have a meaning well understood. It means that the person so designated is unfriendly to organized labor or that he refuses to recognize its rules and regulations. It charges no moral shortcoming and no want of business capacity or integrity. As applied to a theater it signifies nothing as to the merits of its performances. As a rule one man has no right to interfere in the business affairs of another, but if his act in so doing is in pursuit of a just purpose to further his own interests he may be justified in so doing, and so long as he does not act maliciously and does not unreasonably or unnecessarily interfere with the rights of his neighbor he can not be charged with actionable wrong. *Grant v. St. Paul Building Trades Council*, 161 N. W. 520. [See p. 131.]

In *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663 [Bul. No. 53, p. 955], it was said that whether a publication that an employer of labor is "unfair" is or is not unlawful depends on the circumstances of each case, that a notification to customers that plaintiffs are "unfair" may portend a threat or intimidation, in which case it will constitute a boycott and is unlawful, but that a mere notification of that sort without more is not a threat, is not unlawful, and that the trial court was in error in that case in enjoining such conduct.

The decision in the *Gray* case is controlling and in accordance with it we hold that the court did not err in refusing to enjoin the use of the banner used in this case unless its use upon the public street was unlawful. If the banner itself is lawful we are unable to see how the mere display of it by a pedestrian upon a public street is unlawful. It is plain that one displaying it may easily fall into unlawful practices. If it be accompanied by acts that constitute obstruction of the street or of access to plaintiff's place of business, or if accompanied by any words or acts which constitute intimidation or threats, the whole transaction is unlawful and should be enjoined. There are claims of this kind in plaintiff's complaint and affidavits, but they are all denied. The affidavits on the part of defendants negative any acts of this character. They are to the effect that the banner was displayed on the street and not on the sidewalk, that there has been no interference with patrons of the theater. The trial court has a large measure of discretion in the matter of granting injunctions pendente lite. On this showing we are not disposed to override the order of the trial court in refusing a temporary injunction. This is in harmony with the few decisions we find that bear upon this subject. [Cases cited.]

If, on a full hearing on the trial on evidence produced by the parties, the court shall find that the charges in the complaint are true, proper relief can then be given, but we are of the opinion that in denying an injunction on the pleadings and affidavits submitted there was no abuse of discretion.

LABOR ORGANIZATIONS—BOYCOTT—ADVERTISING THEATER AS UNFAIR—INJUNCTION—EVIDENCE—*Martin et al. v. Francke et al.*, *Supreme Judicial Court of Massachusetts (May 26, 1917)*, 116 *Northeastern Reporter*, page 404.—Martin and Wellbrook, members of the Knights of Labor, and moving picture operators, and Gammon and Harkins, proprietors of the theater in which the operators were employed, sued for an injunction against Wm. C. Francke and others, who, with the exception of two men involved in the display of banners, were members and officers of a local organization of operators affiliated with the American Federation of Labor. It appeared that the defendants attempted to secure the discharge of Martin and Wellbrook, and, when they were unsuccessful in this, published by means of banners statements that the theater was unfair to the organization. Further findings of the master to whom the case was referred for the taking of evidence and determination of facts, also the procedure in the case and the decision in regard to disputed points, are shown in the opinion delivered by Judge Crosby, from which the following is taken:

The master finds:

That "the purpose of the respondents in carrying these banners was to cause, if possible, members of the American Federation of Labor and the public to refrain from purchasing tickets of admission to the Apollo Theater;" that it "was the intention of the respondents in doing the acts hereinbefore described to compel the discharge of the complainants Martin and Wellbrook by the other two complainants, or to cause the complainants Martin and Wellbrook to join the American Federation of Labor, but they were unsuccessful."

It was admitted at the hearing before the master that there had been no diminution in the attendance at the theater due to the acts of the respondents or any of them.

A final decree has been entered in the superior court enjoining the defendants from interfering with rights of the plaintiffs respectively; the only questions presented by the appeal arise from three exceptions to the master's report.

The first exception related to language claimed to have been used by the complainants, characterized as profane, obscene, and vile; but the substance of the same was not stated, so as to enable the master to determine as to its nature. The second exception was as to a finding that the word "unfair" had practically the same meaning as the word "scab," among labor men, which the court held to be a question to be decided on the evidence; while the third point was as to a charge of perjury made against one of the plaintiffs, this exception being overruled on the ground that the master was in the best position to pass upon the credibility of the witnesses. All exceptions being overruled, the decree was affirmed.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — INTERFERENCE WITH BUSINESS—INJUNCTION—*Harvey v. Chapman et al.*, *Supreme Judicial Court of Massachusetts* (Mar. 5, 1917), *115 Northeastern Reporter*, page 304.—James W. M. Harvey brought suit for an injunction and damages against Walter Chapman and others, alleging an unlawful conspiracy to interfere with his business as a retail grocer. A master having taken the testimony and made findings of fact, the case was reported to the court for decision. The master found that there had been no real trade dispute between the Lynn Grocery and Provision Clerks' Association, of which the defendants were officers, and the plaintiff, but that the entire trouble arose out of the failure of his clerks to pay their dues as members of the association. On July 9, 1915, the association called a strike on the store, but none of the three clerks left. The store was picketed, and the labor unions of the city were notified that it was unfair. It was found that the purpose of all the acts, which were ratified by the association as a whole, was to force the plaintiff to discharge the clerks or compel them to pay the necessary amount and be reinstated. The court granted the injunction and also damages in the small amount allowed by the master, Judge De Courcey stating the findings of fact and saying:

It needs no discussion to show that such intentional and harmful interference with the plaintiff's business renders the defendants liable, unless there appears a legal justification for their conduct. No such justification is disclosed. There was no real trade dispute between the parties. As there was, in fact, no strike at the plaintiff's store at any time since July 9, 1915, it is unnecessary to consider what the defendants properly might do under a legal strike. [Cases cited.] The validity and effect of the alleged agreement between the parties is likewise immaterial, because of the finding that if ever in force it had been terminated by mutual consent. [Cases cited.] The Peaceful Persuasion Act need not be considered, as it does not purport to justify attempts to persuade, which are a part of an unlawful or actionable conspiracy. The boycotting of the plaintiff's business by the defendants was based upon the false statement that his employees were out on a strike, and it was carried on for the purpose of compelling the plaintiff, with whom they had no trade dispute, to discharge his employees or to coerce them to pay the sums of money demanded of them by the association. Plainly it was unlawful. [Cases cited.]

The plaintiff argues that the damages awarded by the master are inadequate. But we can not revise that finding in the absence of the evidence. In view of the persistent unlawful acts of the defendants even while the case was on trial, and their intention to continue the same unless restrained by the court, the plaintiff is entitled to have them enjoined from proclaiming the existence of a strike of the plaintiff's employees, and from interfering with his business by keeping pickets and displaying banners about his store for the purpose of preventing the public from trading with him. He is also to recover from the defendants the sum of \$100.

LABOR ORGANIZATIONS—BOYCOTT—INTERFERENCE WITH BUSINESS—*Bossert et al. v. Dhuy et al.*, *Court of Appeals of New York* (Oct. 9, 1917), 117 *Northeastern Reporter*, page 582.—Louis Bossert and John Bossert, copartners as Louis Bossert & Son, brought action against Frederick Dhuy and others, for an injunction against interference with the plaintiffs' business by means of boycotting. The plaintiffs were manufacturers of doors, sash, blinds, trim, and other kinds of woodwork, and maintained an open shop, hiring union and nonunion men indiscriminately. The defendants were officers and agents of the United Brotherhood of Carpenters and Joiners of America. They decided to take nonunion manufacturers of building supplies of this nature one at a time, and, by a boycott, compel them to unionize their factories. In pursuance of this plan they urged builders not to purchase and use the materials of the plaintiffs, and called strikes on jobs where such materials were used. The supreme court in special term granted an injunction against these practices, and its decision was affirmed by the appellate division, 151 N. Y. Supp. 877 (see Bul. No. 189, p. 337). Both parties appealed from the judgment, and in the present decision by the court of appeals the judgment is reversed, thus leaving the representatives of the union free to continue the methods complained of. Judge Chase delivered the opinion, and quoted from the opinion in *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (Bul. No. 42, p. 1118), as to the general principles governing the right to strike. Continuing, he said:

It is unnecessary in the case now under consideration to hold that in all cases and under all circumstances whatever a man may do alone he may do in combination with others, but it was clearly established in the *National Protective Association* case that workmen may organize for purposes deemed beneficial to themselves, and in that organized capacity may determine that their members shall not work with nonmembers or upon specified work or kinds of work.

It was not illegal, therefore, for the defendants to refuse to allow members of the brotherhood to work in the plaintiffs' mill with nonunion men. The same reasoning results in holding that the brotherhood may, by voluntary act, refuse to allow its members to work in the erection of materials furnished by a nonunion shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon nonunion-made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer. An act when done maliciously and for an illegal purpose may be restrained, and held to be within the bounds of reasonable business competition when done in good faith and for a legal purpose. (See *Ruling Case Law*, vol. 16, pp. 431, 432, and 433.)

It appears by findings that are uncontrovertibly established by reason of the unanimous affirmance of the special term by the appellate division that it was not the intent and purpose of the defendants in this case to injure the good will or business of the plaintiffs as individuals or of nonunion manufacturers generally. In refusing to work on nonunion made material, they were conserving their interests as individuals and as members of the brotherhood, and in so doing necessarily interfered to some extent with nonunion manufacturers. Such interference necessarily resulted to some extent also in the National Protective Association case, and such fact did not prevent the court sustaining the action of the defendants therein.

At this point many of the findings of fact by the court below are quoted in support of the proposition that the motive of the union was the furtherance of its own ends rather than the destruction of the plaintiff's business. Judge Chase then went on as follows:

The trial court also found:

"That said brotherhood has adopted and sought to enforce, and in many instances has enforced, rules which forbid and prevent its members from working for any employer who employs any so-called nonunion carpenters and from working on or in connection with any building where materials are used which are purchased from any employer who employs any nonunion carpenters."

In considering this finding of the court we must keep in mind the fact that the action of the brotherhood did not interfere with any contract between employer and employee. Its action was open and clearly defined, and its enforcement was not designed to and did not include any force, fraud, threat, or defamation. Its action was voluntary and concerned labor competition in which the association and its members are vitally interested.

An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action.

Reference was then made to the decision of the United States Supreme Court in the case of *Paine Lumber Co. v. Neal* (see p. 176) as supporting the position taken. Continuing, the court said:

Upon all of the findings before us the statement in the finding that there was a "combination to organize all the nonunion mills of Brooklyn" simply means that the brotherhood determined to carry out the provisions of its constitution relating to nonunion-made material by insisting upon its enforcement and by imposing the penalties provided thereby in case of failure of any of its members to comply therewith. The further statement as to the "orders of the business agents" simply means that the representatives of the brotherhood called the attention of the union carpenters employed on buildings where nonunion material was being erected to the con-

sequences to them as members of the brotherhood in case they continued such employment.

It is now unanimously found that the defendants did not have a primary intent to injure the plaintiffs.

The conclusions of law of the court below are quoted, after which the opinion continues as follows:

By reading the opinion of the court at the special term, adopted at the appellate division, with the findings and conclusions of law, it appears that it was the intention of the court to hold that the facts found would not justify a judgment in favor of the plaintiffs except so far as the defendants discriminated against the plaintiff's mill and refused to handle the plaintiffs' material while at the same time continuing to handle material from other nonunion mills.

We do not think that the conclusion of the court is sustained by the findings of fact in the case.

The second paragraph [of the judgment entered] adjudges that the defendants shall not direct, require, or compel any person, by by-law, rule, or regulation or any act thereunder, to cease working for another because they use material purchased from nonunion shops. And the third paragraph thereof enjoins the defendants from inducing any workmen in their trades to quit work on any building because nonunion carpenters are there employed to install material which comes from nonunion shops. All of the acts enjoined are under the findings of fact in this case lawful acts done for lawful purposes.

We think that the rules laid down by this court in the National Protective Association case require a reversal of the judgment in favor of the plaintiff upon the findings before us. When it is determined that a labor organization can control the body of its members for the purpose of securing to them higher wages, shorter hours of labor, and better relations with their employers, and as a part of such control may refuse to allow its members to work under conditions unfavorable to it, or with workingmen not in accord with the sentiments of the labor union, the right to refuse to allow them to install nonunion-made material follows as a matter of course, subject to there being no malice, fraud, violence, coercion, intimidation, or defamation in carrying out their resolutions and orders.

LABOR ORGANIZATIONS—CONSPIRACY—INJUNCTION—RESTRAINT OF TRADE—*George J. Grant Construction Co. v. St. Paul Building Trades Council et al., Supreme Court of Minnesota (Feb. 23, 1917), 181 Northwestern Reporter, page 520.*—This case related to a trade dispute between the plaintiff company, engaged in business as a builder and contractor in St. Paul, and the council, composed of delegates from local unions in the building trades. The company petitioned for an injunction, which was denied by the district court of Ramsey County, and this position was approved by the supreme court. The supreme court called attention to the allegations in the complaint, as to a conspiracy to injure the company's business and

the means taken and threatened to be used to accomplish that purpose. Since the decision in the lower court was for the union, it is pointed out that the facts put in dispute by the complaint and answer must be supposed to have been found favorable to that organization. Judge Hallam, who delivered the opinion, then said:

On the argument in this court, counsel for the plaintiff admitted that no single act done was claimed to be unlawful; his claim was that the entire set of acts, taken together and in connection with the purpose with which they were done, were unlawful on the theory that they constituted what he termed "organized economic oppression." The restraining power of courts of equity has usually been invoked to enjoin some tangible or specific acts. *Badger Brass Mfg. Co. v. Daly*, 137 Wis. 601, 119 N. W. 328. It is not easy to frame an injunction to restrain "organized economic oppression." It is not easy to forbid a course of conduct based upon acts, lawful when taken alone, on the theory that they are unlawful when taken as a whole. Some courts have held that an act lawful if done by one person may be unlawful if cooperated in by many, but we are not aware that it has ever been held that many lawful acts done by the same person or body of persons can constitute an unlawful whole.

Coming to the established facts we find the situation little more or less than this: A labor dispute exists between plaintiff and the defendant unions and their members. Defendants are not employees of plaintiff. The dispute has arisen mainly from the fact that plaintiff runs what is termed an "open shop," that is, it employs non-union men and it is claimed plaintiff has at some times dealt unfairly with union men and has in some cases refused them employment. It would seem to be a bona fide dispute on both sides. With the merits of it we are not further concerned.

The unions of building trades and their members have agreed among themselves that until these controversies are adjusted they will not work for plaintiff or for any subcontractor on any contract plaintiff may have on hand. We think the lawfulness of this conduct is the one question before the court.

It is not easy to define the point beyond which labor in combination can not go. It is, perhaps, not best that we try to do so. We will do well to confine ourselves to the facts of this case and determine only the rights of the parties arising from those facts. The determination of the questions here involved is not difficult. Plaintiff may employ whom it pleases. It may maintain an open shop if it pleases. It should not be coerced into doing otherwise. Defendants have the right to work for whom they please. It is best that we give to both employer and employee a broad field of action. As said by Judge Cooley:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." *Cooley on Torts* (2d ed.) 328.

Defendants may, if no contract is involved, refuse to work in an "open shop." They may agree among themselves not to do so. [Cases cited.]

May they, because plaintiff employs nonunion labor in construction of a building, agree not to work for a subcontractor of part of the work who does employ only union men? It seems to us this question was answered yes by this court in *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663 [Bul. No. 53, p. 955]. There, as here, the controversy arose out of the effort of the defendant unions to compel the plaintiffs to employ only union labor. It was held that the defendants had acted within their rights and that they might for the purpose of strengthening their unions either singly or collectively refuse to work in places or on buildings on which nonunion labor was employed. We adhere to this decision.

In denying a petition for reargument, Judge Hallam took up the question of restraint of trade, not considered in the previous opinion. As reported on page 1055 of 161 N. W., he said as to this:

In disposing of this appeal the court did not mention the contention that the acts of defendants were contrary to sections 8595 and 8973 of the General Statutes of 1913. Section 8595 makes unlawful any conspiracy to commit an act injurious to trade or commerce, and section 8973 forbids any combination in restraint of trade.

We do not say that the acts of members of labor unions may not be such as to violate either or both of these statutes, but we are of the opinion that the acts which the original opinion considers as established do not violate either. [Cases cited.]

It seems clear that neither of these statutes was intended to prohibit combinations to strike for the purpose of increasing or maintaining wages. It is expressly provided that the conspiracy statute does not. Section 8596. No decision has ever construed a statute like our antitrust statute as containing any such inhibition.

We are of the further opinion that it was not the intent of either of the statutes mentioned to prohibit members of labor unions who have a bona fide dispute with a building contractor from cooperating to withhold their services from such contractor or his subcontractors until the dispute is settled. [Cases cited.]

We may further add that in the original decision we had no intention of holding that the legislature may not prohibit one or many acts which, in the absence of statute, would be lawful, as held in *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3 [Bul. No. 57, p. 678], and *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, nor even that an act, ordinarily lawful if taken alone, may not become unlawful when it is part and parcel of an unlawful plot which is "an act in itself," the usually lawful act in such case being likened by Justice Holmes to "voluntary muscular contraction," which "derives all its character from the consequences which will follow it under the circumstances in which it was done." *Aikens v. Wisconsin*, supra.

LABOR ORGANIZATIONS—CONSPIRACY—MURDER—EVIDENCE—*People v. Schmidt*, District Court of Appeals, Second District, California (June 14, 1917), 165 Pacific Reporter, page 555.—M. A. Schmidt was charged with the murder of Charles Hagerty in the Los Angeles Times Building on October 1, 1910, at which time 21 persons were

killed by an explosion and the fire which succeeded it. He escaped apprehension and trial until 1915, when he was convicted, sentenced to imprisonment for life in the State penitentiary of California, and his motion for a new trial denied. The decision in the present appeal was an affirmance of the judgment and order of the court below. Judge James delivered the opinion, and first detailed at some length the facts of the crime as the testimony for the prosecution tended to prove them. It was shown that J. J. McNamara was secretary and treasurer of the International Association of Bridge and Structural Iron Workers, which in 1905 declared a general strike against the American Bridge Co., one of the objects being to unionize that company's plant. McNamara, apparently without authority from the union, set on foot the destruction of bridges and other work where nonunion labor was employed. Trouble having arisen in California, he sent his brother, J. B. McNamara, to that State in response to a request from an officer of an ironworkers' union for assistance. The McNamaras had devised an infernal machine, using alarm clocks and dynamite in the construction. The Los Angeles Times and the Merchants' Association of Los Angeles were advocates of the open-shop plan. Schmidt became an assistant to McNamara in advertising for a launch and purchasing dynamite, as appeared from testimony offered. In addition to the Times explosion, infernal machines exploded or were found near the residences of the president of the Times Co. and of the secretary of the Merchants' Association, showing by their construction and the make of the dynamite that they were the work of the same parties.

The court then states that the evidence is ample to prove the connection of the defendant with the crime. One contention was that the defendant's constitutional rights had been violated because an ex post facto law had been applied, the law in question taking away the ground of bias or prejudice of grand jurors as a foundation for a motion to set aside the indictment. This was disposed of as not a right material to the defense, but as relating to procedure merely. Other technical matters unsuccessfully urged as grounds for a new trial related to the proceedings before the grand jury and the selection of the trial jury.

The concluding portion of the opinion, relating to the conspiracy and the evidence introduced in proof of the crime, is, with some omissions, as follows:

It is a fundamental rule long settled by decisions that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. [Cases cited.] It is not denied

that, after a conspiracy has been established and it has been established that a person is connected therewith as a conspirator, the latter may be prosecuted as for complicity in any unlawful act thereafter committed by any of the conspirators which is within the scope of the general design or plan. "Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. * * * Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part" of the common design for which they combined. [Cases cited.]

For the reasons we have stated, validity can not be granted to any one of the exceptions taken because of the introduction of declarations of any of the conspirators made after any particular [one] of the explosions had been caused, as being declarations inadmissible because made subsequent to the completion or accomplishment of the object of the conspiracy. The conspiracy was still alive and in effect, and the ultimate results had not been attained, when J. B. McNamara came to the State of California for the purpose of assisting in the work. We have before sketched briefly the salient features of the testimony showing that Schmidt, upon McNamara's arrival in San Francisco, took an active part in securing dynamite for McNamara's use. All of the appellant's acts in that connection were performed as secretly as possible, under assumed names, and with every indication of appellant's complete and active cooperation and sympathy with the work of destruction theretofore done, then being planned, and which was thereafter executed. Schmidt, the appellant, immediately before the Times explosion, had been in the city of Los Angeles aiding in the attempt to close the open shops. That he knew for what purpose the dynamite was to be used is indicated when he said to a witness who testified in the case, in the summer of 1910, that:

"They (in Los Angeles) won't give a union man no chance down there at all. It is a regular Otis town they are running. There is something going to happen to him pretty soon."

And immediately after the Times explosion Schmidt was not to be found and was not found until a long time thereafter, when he was discovered living at the house of Emma Goldman in New York, a portion of the time, under an assumed name. The length of this opinion would be extended to a greater limit than is warranted, were we to attempt to discuss in detail the testimony as it is shown in the 8,000 pages of the reporter's transcript. While there may be portions of the testimony received which in a detached way could properly have been excluded, the weight of the evidence was so overwhelming in its proof of the conspiracy and its objects as to enforce the conclusion that the defendant in the right secured to him under the Constitution did not suffer substantial prejudice.

Rather unusual stress is laid in support of the claim for error in allowing one particular bit of evidence to come in. Several months after the explosion which occurred at the Times building, a suit case was found in the checking room at a ferry station in San Francisco. The suit case was identified by a Mrs. Ingersoll as being one which

she had seen in the possession of J. B. McNamara before the 1st of October. The suit case carried a check label, and upon being opened was found to contain an alarm clock, a coil of black fuse, some blasting caps, a brass plate, some brass bars with screws, and copies of San Francisco newspapers dated October 1. The newspapers contained accounts of the destruction of the Times building. These articles were all exhibited to the jury. We think the evidence was competent. The clock and brass pieces were of a similar kind to those used by the McNamaras in the manufacture of their infernal machines. As proof of the fact that an explosion had been produced as "bargained for," J. J. McNamara, the secretary-treasurer of the association, has always required his men to produce newspaper accounts showing that they had performed their work successfully. In a circumstantial way, these articles were all evidence tending to show the execution of the work of the conspirators and to show J. B. McNamara's connection therewith, and incidentally the connection of Schmidt with the same enterprise.

We are satisfied that the defendant received a fair trial and that his conviction should be sustained.

LABOR ORGANIZATIONS—CONSPIRACY—SECONDARY BOYCOTT—COMPELLING USE OF UNION LABEL.—*Justin Seubert, Inc., v. Reiff et al., Supreme Court of New York, Trial Term, Onondaga County (January, 1917), 164 New York Supplement, page 522.*—The company named sued Charles F. Reiff and others—all the defendants being either individuals or voluntary unincorporated associations—for an injunction and for damages. An injunction was granted against certain of the defendants, and a referee appointed to ascertain the amount of damages, while as to other defendants the complaint was dismissed. The complaint alleged that the defendants combined to compel the use of the union label upon cigars manufactured by the company, and to effect this design by unlawful means. Judge Andrews, in the opinion delivered by him, said for the most part:

If the object to be attained was innocent, and if the means used were also innocent, there was no conspiracy. The plaintiff has no remedy, however greatly it may be damaged. To say that because of fear of such damages it was forced to do this or that, or that the acts that caused the damages were done so it might be forced to adopt a certain course, does not alter this rule. At civil law, with few exceptions, malice does not make an act, otherwise innocent, done to accomplish a result otherwise legal, illegal, even when two or more join in the act.

I must find that certain of the defendants desired the plaintiff to use the union label and did certain things to effect that design. They may have had other purposes in mind. This purpose, also, was behind their acts. But was the design itself illegal? The union label is owned and controlled by the Cigarmakers' International Union. About 10,000 factories in the United States, employing about one-third of all the cigarmakers and producing annually something

like 30,000,000 boxes of cigars, have entered into an agreement to use this label. The label itself certifies:

"That the cigars contained in this box have been made by a first-class workman, a member of the Cigarmakers' International Union."

The rules for the use of the label are then summarized, and the opinion continues:

The contention of the plaintiff is that the observance of these rules by 10,000 manufacturers through agreement with the International Union constitutes an unlawful combination in restraint of trade. Consequently the scheme to compel the plaintiff to join in its use is a conspiracy within the definitions which I have given. I can not find any sufficient basis for such claim. The authority to adopt such a label is given to the unions by statute. The very purpose of this authorized use is to enable purchasers to determine whether or not goods exposed for sale are made by union labor.

The means used to effectuate their purposes were then discussed briefly, and strikes and picketing were said to be not in themselves unlawful. Continuing, the court said:

Efforts were made to prevent customers of the plaintiff from selling its products. This was done by picketing in one instance, by the distribution of cards calling such customers unfair, by disciplining union men who dealt with them, or who were employed by them, and sold the plaintiff's goods for them, and by threatening those customers with loss of trade. It is said these acts violated both the State and the United States statutes.

A distinction must be drawn here. The statute of New York expressly states that the union may adopt a device "for the purpose of designating the products of the labor of the members thereof." Labor law, sec. 15. I have no doubt that the union owning the label, or any one else, may recommend the purchase of goods on which it is placed, in preference to others.

The trouble arises if a further step is taken, and dealers are threatened with loss or injury in case they sell either unlabeled goods generally or such goods made by a certain manufacturer. That may be an injury to commerce—an effort to create a monopoly.

It is true that it may be difficult to state the distinction between a primary and a secondary boycott. I use the word "boycott" without any implication that it is in itself and under all circumstances illegal. It may be said that, if one may persuade customers not to patronize a certain dealer between whom and the union a quarrel exists, so one may persuade customers not to patronize one who deals with the first, and if this is lawful the dealer himself may be told that such a course is to be adopted. It may be said that the statutes referred to simply codify the common law and do not make wrongful what was not wrongful before their adoption.

But often, when it is sought to draw a line between what is permissible and what is forbidden, it is difficult to say logically why a certain act should be placed on the one side or the other. The courts must be governed in their action by common sense and considerations of public policy. An act may, when committed in concert with others under certain circumstances, cause such injury to the public,

and may be so useless or so unfair that these conditions will be decisive.

Such an act is a secondary boycott. It must be held to be an unlawful interference with trade and commerce. Those who agree to bring it about are engaged in a conspiracy. One injured by it may come to a court of equity for relief.

Who then engaged in the conspiracy here complained of? As against many of the defendants there is not the slightest proof. As to them the complaint must be dismissed. But Cigarmakers' Union No. 6, the Central Trades and Labor Assembly, Division 580 of the Street Car Men, Machinists' Union No. 381, Charles F. Reiff, Samuel Crouse, Charles A. Yates, William Zeigler, Dennis and Joseph Charles are involved. The mere fact that certain local unions are members of the Trades and Labor Assembly—that they sent delegates to that body—does not make them parties to the conspiracy, if they took no affirmative action in the matter.

As against the defendants mentioned, therefore, the plaintiff is entitled to an interlocutory judgment continuing the injunction so far as is above indicated, and appointing a referee to determine what damages, if any, the plaintiff has suffered by reason of the so-called secondary boycott.

LABOR ORGANIZATIONS—CONTRACT TO EMPLOY ONLY MEMBERS OF A CERTAIN UNION—INDUCING BREACH—*Tracey et al. v. Osborne et al.*, Supreme Judicial Court of Massachusetts (Jan. 26, 1917), 114 *North-eastern Reporter*, page 959.—The plaintiffs, members of the United Shoe Workers of America, sued in equity to restrain the defendants, former members of the same union, but now members and representatives of the Lasters' Protective Union of Lynn, to restrain the defendants from causing employers to break agreements to employ members of the United Shoe Workers, and particularly from calling a strike for that purpose. Judge Rugg delivered the opinion, which first states the facts involved, and which is for the most part as follows:

The case was sent to a master, whose findings so far as now material are that, for several years prior to 1915, there existed in the city of Lynn several local branches of the United Shoe Workers. Composed of three delegates from each of these branches was a sub-organization known as Joint Council No. 1, designed to secure concentration of authority and efficiency of administration. It was authorized by the constitution of the union "to make agreements with manufacturers when prices and conditions are satisfactory to said joint council. Said agreement [sic] to be of a uniform nature and to be issued by the general executive board." In the early part of 1915, at the initiative of one Enwright, the publisher of a newspaper in Lynn, there was a movement for the purpose of formulating some agreement between manufacturers and workmen to promote industrial peace. As a result an agreement popularly known as the "Peace Pact" was framed. These agreements, identical in form,

each to be signed by a representative of the Joint Council No. 1 of the United Shoe Workers, and by some manufacturer who chose to adopt it, were to continue in force one year with stipulation for further extension and provided for the adjustment of any differences that might arise between the contracting parties and that there should be no strikes or lockouts or cessation of work pending a decision as to differences, and that all work of the employer in certain designated rooms and departments should be done by members of the United Shoe Workers, and that, so long as there was a sufficient number of these to do the work, no other help be employed. Other clauses regulated different aspects of the relations between the employer and the members of the plaintiff union.

The master found that the agreements were prepared and executed in the manner and by the agencies provided by the constitution of the United Shoe Workers.

The contract in its general outlines is similar to that held legal in *Hoban v. Dempsey*, 217 Mass. 166, 104 N. E. 717 [Bul. No. 169, p. 303]. In this aspect the case at bar is governed by that decision. It is putting in the form of an agreement a stipulation that one named labor union shall have, so long as it is able to do it, all the work of a particular employer, a demand held to be within the limits of allowable competition in *Pickett v. Walsh*, 192 Mass. 572, 584, 78 N. E. 753 [Bul. No. 70, p. 747]. The contract does not appear to have been made for the purpose of injuring the defendants, who then were members of the plaintiff union, or for any purpose other than the mutual advantage of the contracting parties. It was entered into freely and not under compulsion or coercion. It was not entered into with a purpose to harm anybody. This does not infringe upon the principles established in *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603 [Bul. No. 60, p. 702], and *Shinsky v. Tracey*, 114 N. E. 957 [see p. 142], for decisive facts there present are not found in the case at bar.

The finding that the defendants have sought to exert pressure upon some of the employers to break their contracts of employment with members of the plaintiff union is direct and unequivocal and is supported by ample facts set forth in the report. Such conduct was a clear invasion of rights of the plaintiff for which the law will provide a remedy. [Cases cited.]

The rights secured to the plaintiffs under their contracts are such as are protected in the ordinary case by injunction. This principle often has been applied to labor cases and is pertinent to the facts here disclosed. [Cases cited.]

Since the contracts between the manufacturers and the United Shoe Workers were found valid and lawful, the decree granting an injunction against interference with those contracts was affirmed.

LABOR ORGANIZATIONS—EXPULSION OF MEMBER—APPEAL TO COURT—*Fales v. Musicians' Protective Union, Local 198, American Federation of Musicians, et al., Supreme Court of Rhode Island (Feb. 14, 1917), 99 Atlantic Reporter, page 823.*—Warren R. Fales

brought suit in equity against the federation named, praying that its orders fining and expelling him be declared void, and for an injunction. Fales was director of the American Band. A traveling band committee has authority, under the laws of the federation, to try members for violation of certain by-laws. Fales was charged with having violated, during the summer season of 1917, section D of Article V of the traveling band laws of the federation, by paying to the members of his band less than the price stipulated in that section, and of conspiring with the members of the band to violate section L of Article V, relating to the providing of sleeping accommodations.

Mr. Fales was notified that his trial before the traveling band committee would begin on Friday, March 21, 1913. He appeared, and requested to be represented by counsel, to be confronted with the witnesses against him, and to have opportunity to cross-examine them. He was informed that the laws of the federation did not allow counsel in such cases, for either respondents or the committee; this phase of the matter does not appear to have been pressed except as it bears on the general question of a proper trial. After a part of Fales's testimony had been taken, he stated that he was obliged to leave, and did so, the trial being continued, and stenographic notes of the testimony taken and an abstract furnished him. On Saturday morning he furnished a medical certificate that his wife was very sick and his presence was required at home. The trial was continued on that day and Sunday, without notification to him that it would be conducted on Sunday.

On Monday he requested that it be postponed until after the close of a superior court trial in which he was defendant and which opened on that day. This request was refused, and the trial went on without his presence. On Wednesday the judge of the superior court suspended that trial for the day, but Fales did not appear before the committee, and the committee's hearings were concluded on that day. He did not take an appeal to the federation. There was testimony to show that after his expulsion members of the union would not work with him and that he lost opportunities to conduct the American Band, as it took some engagements with another leader. The court held that he had not been granted a fair trial, and that the findings of the band committee were void. It therefore affirmed the decree of the superior court granting to Fales the relief prayed for. Judge Johnson delivered the opinion, from which the following is quoted:

As is implied in the authorities, where the proceeding is not pursuant to the rules and laws of the society, or the proceeding was not in good faith, or where there is anything in the proceeding in violation of the laws of the land, so as to render the proceeding void, the

exhaustion of the remedy by appeal within the society is not necessary.

We do not think that the notice to appear before the committee on Wednesday, March 26, when the court took a recess to enable the judge to attend a funeral afforded an opportunity to Mr. Fales which cured whatever of illegality there had been in the proceedings up to that time. His request for a continuance till the end of the trial had been ignored. The committee had continued with the hearing when his case in court was on trial, on the assumption, not borne out by the evidence, that it was not on trial on Monday, and with full knowledge that it was on trial on Tuesday. It had proceeded with its trial on Sunday without notice to him. It could not seize upon an occasion when an unexpected happening caused a break in the continuity of the trial in court to summon the complainant to appear before the committee and conclude his testimony, and thereby validate the violations of the complainant's right involved in the previous proceedings. The opportunity to appear before the committee on Wednesday to complete his testimony was not sufficient to cure his lack of opportunity to be confronted with and to cross-examine the witnesses on the days when the trial before the committee proceeded in his absence on Sunday, Monday, and Tuesday.

The presiding justice correctly abstained from any finding upon the merits of the case on trial before the traveling band committee, and based his decision only on the procedure of the committee in the trial.

In our opinion the presiding justice did not err in holding that the findings of the traveling band committee on the trial before it were void, and that therefore the complainant was exempted from exhausting his remedy within the federation by appeal.

LABOR ORGANIZATIONS—EXPULSION OF MEMBER—CONSPIRACY—LIABILITY OF COMPANY PROCURING EXPULSION—*St. Louis Southwestern Ry. Co. of Texas v. Thompson et al., Court of Appeals of Texas (Feb. 22, 1917), 192 Southwestern Reporter, page 1095.*—The suit of W. Z. Thompson against the railroad company named, the Grand International Brotherhood of Locomotive Engineers, and certain individual defendants, to recover damages for wrongfully and maliciously causing him to be expelled from the brotherhood came to the court of civil appeals on this occasion on the third appeal. Previous decisions were reported in 108 S. W. 453, and 113 S. W. 144, and noted in Bul. No. 78, p. 608, and Bul. No. 80, p. 176. The charges made against Thompson at the time of his expulsion were that he advised a widow to sue a railroad company for the death of her husband, and that he testified in another case against a railroad company, to the detriment of the brotherhood. The most important questions of law were determined in the previous decisions. The judgment appealed from at this time was rendered after a verdict in which the jury made certain findings and assessed actual

damages amounting to \$500 against the railroad company and exemplary damages in the sum of \$250 against the brotherhood, \$1,250 against the railroad company, and \$50 against each of the three individual defendants who were still living.

It was decided that the action of the brotherhood in expelling Thompson for the reasons assigned was wrongful and not in good faith, so that it was liable, and could be sued even though it was a voluntary organization and the individuals composing it were not made parties; also that the question of excessiveness of damages raised by the railroad company was foreclosed by a previous decision that a still larger verdict was not too great.

LABOR ORGANIZATIONS—EXPULSION OF MEMBER—INTERFERENCE WITH EMPLOYMENT—BOYCOTT—DAMAGES—*Shinsky v. Tracey et al.*, *Supreme Judicial Court of Massachusetts (Jan. 26, 1917)*, 114 *North-eastern Reporter*, page 957.—This was an action by David Shinsky against Michael Tracey and others for an injunction and for the damages resulting to him from his expulsion from the United Shoe Workers and the subsequent loss of his employment and inability to secure other work at his trade. A master had made a report assessing the amount of damages, but the superior court of Essex County dismissed the bill. This decision was reversed and a decree ordered in accordance with the master's report. Judge Braley delivered the opinion of the court, as follows:

By becoming a member of the voluntary association known as "the United Shoe Workers of America" the plaintiff engaged to be bound by its rules and subjected himself to its discipline. [Cases cited.] And the trial for alleged infraction of his obligations having been conducted as the master finds in accordance with the constitution, his expulsion is not reviewable and the bill as amended can not be maintained under the first prayer, that the defendants be enjoined "from excluding him from access to their meetings and from membership." But upon severance his interest in the funds and property of the association ended, nor was he bound by the purposes, or amenable to the penal code of the body with which he had been affiliated, and in so far as the defendants were concerned his right to dispose of his own labor according to his own will had not been abrogated or restricted. [Cases cited.]

The first paragraph of the amended bill alleges and the answer admits, that when expelled he had been employed at lasting shoes in a local factory for nearly eight years; and the master reports that his work being satisfactory, he would have been retained except for the concerted action and conduct of the defendants. The dominant purpose and controlling motive in procuring his discharge shortly after expulsion, as well as his discharge when he subsequently obtained employment with another shoe company which knew that he was no longer a member of the United Shoe Workers, is found to have been,

"to punish him and hold him up as an example before their membership," and the letters which they caused to be sent were "to induce the plaintiff's employer in each instance to discharge" him. The justification pleaded in the sixth paragraph of the answer is, that the plaintiff "had been a party to an agreement a copy of which is hereto annexed, and that the employers mentioned by him in his bill of complaint were also parties to said agreement; that the plaintiff violated his agreement and that if any action was taken by his employer or any other person which resulted in injury to him, * * * said action was the direct result of his own unlawful acts in violating and repudiating his agreement."

It is unnecessary to pass on the validity of the agreement which is an instrument under seal, or to decide whether the manufacturers or the members of the association could have compelled specific performance, for in the light of the findings quoted this defense vanishes.

It is true that the fifth, and in this connection the important, article of this agreement or "Peace Pact" entered into by the association when the plaintiff was a member and certain shoe manufacturers including his employers provides, that " * * * so long as these local unions are in a position to furnish help to do the work no other help may be employed." The defendants nevertheless were not seeking its protection for the economic purpose of furnishing work for their own members, where if this were not done there would not be enough work to keep them employed, which was the motive underlying the strike decided to be lawful in *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036 [Bul. No. 99, p. 727]. Nor were they actuated by a desire to conserve and promote the welfare of the plaintiff and his employers through the offer of friendly advice. But to preserve and to compel discipline in their own ranks they intended to proscribe the plaintiff, who had become a member of a rival organization and business competitor of the association. It may be added, that at the date of the agreement the plaintiff had been employed for many years under a contract at will which does not appear to have been dependent upon a condition that he should be and remain a member of any organization. The plaintiff's expulsion did not automatically terminate this employment, and his continuance at his work until retired solely through their efforts did not as between themselves constitute a breach of the peace pact or agreement for which he would be liable to the defendants in damages. [Cases cited.]

The report while stating that the plaintiff has lost the benefit of his contracts of employment goes further. It is specifically found "that by reason of the control which the defendants and their organization exercise over the shoe industry of the city of Lynn it will be impossible for the plaintiff to obtain work with at least ninety per cent of the shoe manufacturers of Lynn in which the labor is controlled by the United Shoe Workers of America and further as a marked man it is highly improbable that he could obtain and keep employment in the remaining ten per cent of the shoe factories of Lynn."

The plaintiff manifestly is a sufferer from the consequences of an intentional and a successful boycott. If he had ceased to work at his calling and had engaged in trade the attempt to deprive him of his customers and to destroy his business by the methods described

would have been under the master's findings an actionable wrong. *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841 [Bul. No. 169, p. 270]. The right to acquire property by labor is coequal with the right to acquire property by contract, and, having the same right to sell his labor as he would have had to sell his merchandise to the highest bidder, it is no less an actionable wrong where the right to his handiwork as a means of subsistence has been malevolently taken away or impaired under industrial conditions which the defendants knew would so operate as to make his further employment in the community where he resides extremely precarious if not practically impossible. [Cases cited.] While it is apparent upon the record that the plaintiff can not be effectively aided by injunctive relief he is entitled to damages. [Cases cited.] The decree dismissing the bill is reversed and a decree is to be entered for the amount assessed by the master.

LABOR ORGANIZATIONS—EXPULSION OF MEMBER—POWERS OF OFFICERS—*Pratt v. Amalgamated Association of Street and Electric Railway Employees of America et al.*, *Supreme Court of Utah* (Oct. 4, 1917), 167 *Pacific Reporter*, page 830.—Clarence O. Pratt brought action against the association named for mandamus to bring about his reinstatement as a member. Pratt had been for several years a member of the local division at Detroit, and had been a member of the general executive board of the association. In September, 1911, desiring to become a member of the division at Philadelphia, he secured a withdrawal card, and, on presenting the same to the Philadelphia division, the by-laws were suspended and he was admitted and elected business agent. The executive board, acting upon a protest filed with it, but without a hearing, ruled that the by-laws were improperly suspended, and Pratt withdrew from his position as business agent. He attempted to appeal to the biennial general convention of the association, but the appeal was not considered. His petition for a writ of mandamus was dismissed by the district court of Salt Lake County, and the supreme court affirmed this decision. Judge Frick delivered the opinion, and quoted the opinion of the court below as summarizing the immense bulk of evidence, largely irrelevant, found upon the record. Following this he said in part:

While plaintiff insists that his rights have been trampled upon and ignored by reason that he was not permitted to present his appeal to the convention held at Salt Lake City, Utah, as before stated, yet what he asked the trial court to do, and what he demands at our hands, is, that the defendants be required to reinstate him as a member in good standing of Local Division No. 477 as well as a member in good standing of the association at large.

Courts may not interfere with the acts and proceedings of the officers of beneficial societies or associations to that extent. What the courts are authorized to do, and what they will do, in that regard is

to compel the officers of such associations, and the associations themselves, to condemn no member and not to forfeit his property or his property rights without a hearing or an opportunity to be heard in his defense according to the laws and rules of the association, and if there are no such rules the court will imply or create such. When such an opportunity is given, however, and the complaining member has been tried and condemned, or has been declared ineligible in accordance with the laws and rules of the order or association, and the acts of the officers of the association in that behalf are free from fraud or duress, courts may not interfere.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—UNIONIZING EMPLOYEES WHO HAVE AGREED NOT TO JOIN UNION—INJUNCTION—*Hitchman Coal & Coke Co. v. Mitchell et al., Supreme Court of the United States (Dec. 10, 1917), 38 Supreme Court Reporter, page 65.*—This suit was brought in 1907 to restrain the defendants from interfering with the company's employees in an attempt to organize the mine by inducing them to join the United Mine Workers of America. Decisions of the lower Federal courts arising therefrom are reported 202 Fed. 512 (see Bul. No. 152, p. 137), and 214 Fed. 685 (Bul. No. 169, p. 315). In Bulletin No. 152 the facts leading up to the suit are given quite fully, and they are reviewed in the opinion of the Supreme Court. It appeared that certain defendants named in the bill had not been served with process, being no longer officers of the United Mine Workers, and the court held that they were eliminated as factors in the case. The remainder were at the time of the bringing of the suit officers and leaders of the union. The Hitchman mine was operated "nonunion" from the time it was opened in 1902 until April, 1903, when it became unionized. Strikes occurred between that time and 1906, resulting from disputes having no relation to the affairs of the operator or employees of this particular mine or section. A strike was called April 15, 1906, as a consequence of the failure of the officers of the union to sanction the making of an agreement by the miners themselves with the company, after the expiration of the term for which a previous wage scale had been effective. On the request of the miners in June to be allowed to go back to work, it was agreed that they should do so on a nonunion basis, and at that time and thereafter each man hired agreed that he would not join the union as long as he continued in the company's employ, while the company agreed that it would pay the same wages as the union mines, but would run the mine nonunion. In January, 1907, the international convention of the United Mine Workers favored a policy of supporting strikes in the Panhandle district of West Virginia (in which the Hitchman mine was located) and certain other unorganized sec-

tions, on the ground that the continuance of production by the unorganized sections, while strikes were in force in other fields, interfered with the securing of desired concessions in the latter. Soon afterwards a meeting of the subdistrict which included the mine voted to take steps toward organization, and Thomas Hughes took up the work as organizer. He began to get secret agreements from some of the men to join the union when a sufficient number should be secured, with the purpose of calling a strike when that was accomplished. The fact that the miners had agreed not to join the union during their employment was known to the organizer. His work was interrupted by a decree of the United States District Court for the Northern District of West Virginia before it was so far completed as to be ready for the calling out of the men. Later the United States circuit court of appeals, fourth circuit, reversed this decree, and it is the opinion of these two courts which are cited above. In the present opinion the Supreme Court, Mr. Justice Pitney delivering the opinion, and Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke dissenting, reversed the decree of the circuit court of appeals and affirmed that of the district court, holding that the interference by the defendants was illegal, and such as might be reached by injunction. From the majority opinion the following is quoted:

The question whether Hughes had "power or authority" to shut down the Hitchman mine is beside the mark. We are not here concerned with any question of ultra vires, but with an actual threat of closing down plaintiff's mine, made by Hughes while acting as agent of an organized body of men who indubitably were united in a purpose to close it unless plaintiff would conform to their wishes with respect to its management, and who lacked the power to carry out that purpose only because they had not as yet persuaded a sufficient number of the Hitchman miners to join with them, and hence employed Hughes as an "organizer" and sent him to the mine with the very object of securing the support of the necessary number of miners. They succeeded with respect to one of the mines threatened (the Richland), and preparations of like character were in progress at the Hitchman and the Glendale at the time the restraining order was made in this cause.

In short, at the time the bill was filed, defendants, although having full notice of the terms of employment existing between plaintiff and its miners, were engaged in an earnest effort to subvert those relations without plaintiff's consent, and to alienate a sufficient number of the men to shut down the mine, to the end that the fear of losses through stoppage of operations might coerce plaintiff into "recognizing the union" at the cost of its own independence. The methods resorted to by their "organizer" were such as have been described. The legal consequences remain for discussion.

The facts we have recited are either admitted or else proved by clear and undisputed evidence and indubitable inferences therefrom.

What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "nonunion," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Adair v. United States*, 208 U. S. 161, 174, 28 Sup. Ct. 277 [Bul. No. 75, p. 634]; *Coppage v. Kansas*, 236 U. S. 1, 14, 35 Sup. Ct. 240 [Bul. No. 169, p. 147]. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

That the employment was "at will," and terminable by either party at any time, is of no consequence. *Truax v. Raich*, 239 U. S. 33, 38, 36 Sup. Ct. 7, 9 [Bul. No. 189, p. 53].

In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating his employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. [Cases cited.]

The right of action for persuading an employee to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers. [Cases cited.]

We return to the matters set up by way of justification or excuse for defendants' interference with the situation existing at plaintiff's mine.

The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike

would not give to defendants the right to instigate a strike. The difference is fundamental.

It is suggested as a ground of criticism that plaintiff endeavored to secure a closed nonunion mine through individual agreements with its employees, as if this furnished some sort of excuse for the employment of coercive measures to secure a closed union shop through a collective agreement with the union. It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ. But it may be worth while to say, in addition: First, that there was no middle ground open to plaintiff; no option to have an "open shop" employing union men and non-union men indifferently; it was the union that insisted upon closed-shop agreements, requiring even carpenters employed about a mine to be members of the union, and making the employment of any non-union man a ground for a strike; and secondly, plaintiff was in the reasonable exercise of its rights in excluding all union men from its employ, having learned, from a previous experience, that unless this were done union organizers might gain access to its mine in the guise of laborers.

Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439, 31 Sup. Ct. 492 [Bul. No. 95, p. 323]. The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others.

Now, assuming defendants were exercising, through Hughes, the right to invite men to join their union, still they had plain notice that plaintiff's mine was run "nonunion," that none of the men had a right to remain at work there after joining the union, and that the observance of this agreement was of great importance and value both to plaintiff and to its men who had voluntarily made the agreement and desired to continue working under it. Yet defendants, far from exercising any care to refrain from unnecessarily injuring plaintiff, deliberately and advisedly selected that method of enlarging their membership which would inflict the greatest injury upon plaintiff and its loyal employees. Every Hitchman miner who joined Hughes's "secret order" and permitted his name to be entered upon Hughes's list was guilty of a breach of his contract of employment and enacted a lie whenever thereafter he entered plaintiff's mine to work. Hughes not only connived at this, but must be deemed to have caused and procured it, for it was the main feature of defendants' plan, the *sine qua non* of their program.

True, it is suggested that under the existing contract an employee was not called upon to leave plaintiff's employ until he actually joined the union and that the evidence shows only an attempt by Hughes to induce the men to agree to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after actually joining. But in a court of equity,

which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to agree to join is but a mode of inducing them to join, and that when defendants "had 60 men who had signed up or agreed to join the organization at Hitchman," and were "going to shut the mine down as soon as they got a few more men," the 60 were for practical purposes, and therefore in the sight of equity, already members of the union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employees were relying, was sufficient.

But the facts render it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines can not be treated as a bona fide effort to enlarge the membership of the union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the union, unless they could organize the mines. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while nonunion men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership.

In any aspect of the matter, it can not be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—can not be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the *Mogul Steamship Case*, 23 Q. B. Div. 613:

"Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. [Cases cited.] Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done. And we can not deem the proffered excuse to be a "just cause or excuse," where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights of which defendants have full notice.

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. [Cases cited.]

It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine,

another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the union; that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the Gompers Case [supra], immediately following the recognition of the right to form labor unions:

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, can not be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

Defendants' acts can not be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union.

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated.

Respecting the sweep of the injunction, we differ somewhat from the result reached by the district court.

So far as it restrains: (1) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to

suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the union, or because plaintiff runs a nonunion mine; (2) interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees; (3) knowingly and willfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a nonunion mine, etc.; (4) interfering or attempting to interfere with plaintiff's employees so as knowingly and willfully to bring about the breaking by plaintiff's employees, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and willfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent; (5) trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such; and (6) compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment therein—the decree is fully supported by the proofs. But it goes further, and awards an injunction against picketing and against acts of physical violence, and we find no evidence that either of these forms of interference was threatened. The decree should be modified by eliminating picketing and physical violence from the sweep of the injunction, but without prejudice to plaintiff's right to obtain an injunction hereafter against these forms of interference if proof shall be produced, either in proceedings supplemental to this action or in an independent action, that such an injunction is needed.

The decree of the Circuit Court of Appeals is reversed, and the decree of the district court is modified as above stated, and as so modified it is affirmed, and the cause is remanded to the district court for further proceedings in conformity with this opinion.

The dissenting opinion was written by Mr. Justice Brandeis, and disagreed with the reasoning of the majority, among other things, in holding that the miners did not violate their contract until they actually joined the union. On this point it is said:

There was no attempt to induce employees to violate their contracts.

The contract created an employment at will, and the employee was free to leave at any time. The contract did not bind the employee not to join the union; and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ, if he joined the union. There is evidence of an attempt to induce

plaintiff's employees to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from individual employees that they would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union together and strike—unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—UNIONIZING EMPLOYEES WHO HAVE AGREED NOT TO JOIN UNION—INJUNCTION—JURISDICTION—*Eagle Glass & Mfg. Co. v. Rowe*, *Supreme Court of the United States* (Dec. 10, 1917), *38 Supreme Court Reporter*, page 80.—This is a case of suit for injunction by the company named, and is the same case decided in the circuit court of appeals, fourth circuit, under the title *Eagle Glass & Mfg. Co. v. Hill*, reported 219 Fed. 719, and reviewed in *Bul. No. 189*, page 334. The controversy was between the company and officers of the American Flint Glass Workers' Union. The bill prayed for an injunction, as in the *Hitchman* case (see p. 145), against interference with employees under contract not to join the union during their employment by the company. As in that case also, a decree of the district court granting a temporary injunction had been reversed by the circuit court of appeals, whereupon the company procured a writ of certiorari, bringing the case to the Supreme Court. Proceedings subsequent to the decision of the circuit court were reviewed, and the technical questions relating to jurisdiction over the case, which was brought in the Federal courts on the ground of diversity of citizenship, were decided so as to support the jurisdiction of the courts. Coming to the merits of the case, the points were decided largely on the authority of the *Hitchman* case. The same three justices dissented as in that case. In concluding the opinion delivered by him for the majority, Mr. Justice Pitney said:

The present case, according to the averments of the bill and amended bill, differs from the *Hitchman* case principally in this: That it appeared that Gillooly, as organizer, had used money and had threatened to use dynamite to reinforce his other efforts to coerce plaintiff into agreeing to the unionization of its works. The system of employment at the *Eagle Glass Co.* factory was precisely the same as that at the *Hitchman* mine. The written contract of employment inaugurated at the *Eagle Glass Works* more than a month

prior to the filing of the bill in this case followed precisely the form established at the Hitchman mine shortly after the filing of the bill in that case. And the activities of Gillooly among the plaintiff's employees, and the motive and purpose behind those activities, as alleged in the bill, show the same elements of illegality to which we have called attention in our opinion in the Hitchman case. Plaintiff is entitled to an opportunity, on final hearing, to prove these allegations as against those defendants who are within the jurisdiction of the court, and to connect them with the activities of Gillooly.

The decree of the Circuit Court of Appeals, so far as it directed that the temporary injunction be dissolved, will be affirmed, but so far as it directed a dismissal of the bill it must be reversed, and the cause will be remanded to the district court for further proceedings in conformity to this opinion.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—*St. Germain et ux. v. Bakery & Confectionery Workers' Union, No. 9, of Seattle, et al., Supreme Court of Washington (July 17, 1917), 166 Pacific Reporter, page 665.*—N. H. St. Germain and wife brought action against the labor union named and certain individuals for an injunction. The superior court, King County, issued a decree forbidding certain enumerated practices on the part of the pickets, including the laying of hands upon any person in the effort to prevent his patronizing the bakeries and restaurants of the plaintiffs and the use of certain statements and the words "scab" and "scabs" with reference to such customer. The permissible actions on the part of the defendants were then set forth in the decree, including the maintenance of two pickets before each establishment, the place upon the sidewalks where they might walk being defined in such a manner that they should not actually block the entrance, and authorization being given for the use of badges or scarfs, also of small cards, with the words "St. Germain's Bakeries and Restaurants Unfair to Organized Labor." The cards, however, were not to be placed or thrown inside the stores. The plaintiffs objected to the part of the decree which allowed these practices and appealed. It appeared that the plaintiffs had been engaged in the bakery and dairy-lunch business in Seattle for 16 years, having two establishments, and had employed union labor. A member of the cooks' union in their employ, however, became in arrears as to his dues, and the dispute arose from the failure of the employers, at the request of the union, to either collect the amount of the arrearage or discharge the cook. A strike was called, and the picketing began, the pickets remaining on duty from 11.30 a. m. until the close of business in the evening in numbers as large upon one occasion as between 40 and 50, jostling the customers, and at times, at one of the stores, which was on a crowded street, making it impossible for anyone to enter or leave the store.

It was shown that the gross receipts had fallen from \$4,000 per month to \$1,000. Judge Mount delivered the opinion of the court, which held, one judge dissenting, that the injunction should have forbidden the issuance of an injunction as prayed for, with nominal damages. showing merely a diminution of gross business, but nothing definite as to profits, was not sufficient to sustain an award for substantial damages. The case was therefore remanded to the lower court for the issuance of an injunction as prayed for, with nominal damages. The following is quoted from the opinion, showing the court's views with regard to picketing:

In the case at bar the facts, as shown by the record, are clear to the effect that the grievance of the respondents was that St. Germain's bakeries and stores were unfair to organized labor. The respondents, for that reason, maintained pickets on the sidewalk in front of the appellants' places of business. The only object of maintaining these pickets was to intimidate these appellants and their patrons. There could have been no other object, because the union laborers had been called out. They were not working there, and, in order to require these appellants to employ union labor, the respondents sought to, and did, intimidate the public from entering the stores and dealing with the appellants. Whether these facts were alleged in a complaint which was undenied, or were proven upon a trial, makes no difference. Whether the picketing was peaceable or otherwise, under the facts in this case, is entirely immaterial, because the sole object of the respondents was to intimidate, not only the public, but also these appellants, and force them to enter into a contract which they were unwilling to enter into. The books are full of cases to the effect that:

"The right to carry on a lawful business without obstruction is a property right, and its protection is a proper object for the granting of an injunction."

The idea upon which picketing by any means can not be sustained is that it intimidates the public from entering into the place, and doing business with a person before whose store or place of business a line of guards is stationed. Where a line of guards, consisting of one or more, is stationed in front of a place of business, everyone knows that such guard is there for the purpose of intimidating and preventing the public from dealing with the person whose place of business is picketed. That this is contrary to the spirit of our institutions, and the right to conduct a lawful business in a lawful way, without molestation of other persons, needs no argument to sustain it. The cases are numerous to that effect.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—INTERFERENCE WITH NONUNION SHOP—*Heitkamper v. Hoffman et al.*, *Supreme Court of New York, Special Term for Trials, Kings County (April 9, 1917)*, 164 *New York Supplement*, page 533.—Theodore Heitkamper brought suit for an injunction against Moritz Hoffman, individually and as treasurer of the Journeyman Bakers' Union and others, to restrain

them from acts detrimental to his business. After Heitkamper had refused to unionize his shop as requested by representatives of the union, various methods were adopted to persuade customers not to patronize him, including persistent marching up and down the street in front of the shop three times a week, advising people to buy their bread elsewhere, etc. A falling off in his trade was shown. An injunction was granted against these acts, while the right was recognized to circularize the friends of union labor and employ other legitimate means to give information as to the desire of the union that the plaintiff should not be patronized. The following is quoted from the opinion delivered by Judge Callaghan:

The facts in this case satisfactorily establish a conspiracy on the part of the members of the union, stimulated by its officers, to ruin the plaintiff financially. There is nothing particularly wrong in a number of men marching on the sidewalk; but a continuance of that act, three times a week for a number of months, the interviewing upon the sidewalk of intending customers of plaintiff, the advising of them not to purchase bread from the plaintiff, and the gathering of a large number of men in front of the plaintiff's store, can not be regarded as anything but an infringement upon the plaintiff's rights.

The union was within its legal rights in publishing and distributing the circular, soliciting its sympathizers and friends to withdraw their patronage, or to refrain from patronizing the plaintiff. [Cases cited.]

At this point the method of suing the association, through its treasurer as a representative, is shown to be a proper one by reference to the statutes and the decided cases, though no decision was made as to damages. The opinion concludes as follows:—

No just complaint can be made by the plaintiff against the union's circularizing the neighborhood, asking the friends of union labor not to patronize the plaintiff, nor can the plaintiff seek to restrain the union, its members, or agents from peaceably persuading proposed patrons of the plaintiff from trading in his shop. The doing of those things will not be restrained. But a judgment will be entered here restraining the individual defendants named here, and the defendant union, its officers, members, agents, and employees, from congregating in front of plaintiff's shop, from marching up and down upon the sidewalk in front of his shop, from blockading the entrance to his store, and from in any way or manner preventing intending customers from entering or departing from plaintiff's shop, or in any manner by threats, violence, intimidation, or force, interfering with plaintiff's employees or those who may seek employment from plaintiff.

LABOR ORGANIZATIONS—PICKETING—MUNICIPAL ORDINANCE—*Ex parte Stout*, Court of Criminal Appeals of Texas (Nov. 21, 1917), 198 Southwestern Reporter, page 967.—Tom O. Stout was convicted of violation of an ordinance of the city of El Paso, Tex., and brought

habeas corpus proceedings for his release. The ordinance in question forbade walking up and down the sidewalk in front of any place of business, with signs carried for the purpose of persuading any persons from entering such place to transact business therein. Another section of the ordinance specifically provided that it should not be construed as rendering it unlawful for members of trade-unions to attempt to peaceably induce others to quit employment or refuse to enter any particular employment, etc. Stout, being a member of the local body of the Cooks, Waiters, and Waitresses' Union, had walked on the sidewalk before a certain restaurant, bearing "sandwich" signs stating that the establishment was unfair to organized labor, the fact being that nonunion help was employed there. The opinion of the court was delivered by Judge Prendergast, who first examined the city charter and found in it authority to pass ordinances of the kind in question, unless some constitutional or statutory provision should be found to prohibit it. Many decisions are considered, and the conclusion reached that the ordinance does not violate the provisions of the Texas constitution relating to freedom of speech and publication, nor those of the Federal fourteenth amendment. Finally, the ordinance is held not to conflict with the statute of the State making lawful the formation of labor unions, and confirming their right to peaceably persuade, etc., it being shown that the section of the ordinance itself, above referred to, is clearly intended to safeguard the same rights. The ordinance was therefore held valid, and the relator remanded to the custody of the city marshal. From the concluding portion of the opinion the following is quoted:

Such conduct as his would naturally lead to disturbances, and had a tendency to intimidate and prevent all persons from entering said restaurant, and would necessarily injure the proprietor in his business. It was the duty of the city of El Paso by such an ordinance to protect him in the conduct of his business.

LABOR ORGANIZATIONS—PICKETING—MUNICIPAL ORDINANCE—*In re Sweitzer, Criminal Court of Appeals of Oklahoma (Feb. 17, 1917), 162 Pacific Reporter, page 1134.*—Eva Sweitzer was arrested and held in custody by the chief of police of Oklahoma City as a result of picketing in front of the Lyric Theater. There was a trade dispute between this theater and its former employees. No charge was made of violence or disturbance on the part of the respondent, but it was claimed that she violated an ordinance of the city which prohibited loitering about the streets and sidewalks and attempting to induce persons not to patronize any place of business. She sought in this proceeding for a writ of habeas corpus, which was granted and she was discharged. The court held that

section 3764, Revised Laws 1910, which authorizes labor agreements and declares not criminal acts done in combination, if such acts would not be criminal if committed by one person, governed the matter, and said in regard to it:

The very thing for which the petitioner was arrested and convicted is sanctioned by statute; and the statute further declares that it shall not "be deemed criminal."

We think no other construction can be placed upon this statute than that it stays the hand of both civil and criminal process from interfering with the peaceable and legitimate endeavors of labor to further their interests, in trade disputes between them and their employers.

But counsel for respondent further insist that the statute is not applicable because:

"The ordinance prohibits picketing only incidentally, and its scope and effect are much broader. It prohibits as well the merchant or theatrical manager from filling sidewalks and streets adjacent to his place of business with pedestrians, who annoy passers-by with importunate solicitations."

But the learned counsel certainly know that in law we can not do indirectly that which may not be done directly. If the city commissioners can not directly prohibit picketing in furtherance of a trade dispute, they certainly can not accomplish that end indirectly, or, as counsel puts it, "incidentally."

LABOR ORGANIZATIONS—STRIKES—ASSAULT—EVIDENCE—*Cranford v. State, Supreme Court of Arkansas (June 25, 1917)*, 197 *South-western Reporter*, page 19.—R. C. Cranford, having been convicted in the circuit court of Saline County on a charge of assault upon H. W. O'Kelly with intent to kill, and sentenced to imprisonment for one year, appealed from the judgment on the ground that evidence had been admitted of his remarks prior to the alleged assault. Cranford was a striker, and O'Kelly one of the class known to the strikers as "scabs." The words of Cranford, to the admission of testimony as to which at the trial he made objection, were to the effect that if the scabs knew what he knew they would be at home with their families. The court had also allowed it to be shown that a sign had been put up at his place, over which there was a commonly used passageway, reading "No scabs allowed to cross this way." It was held that these matters had been properly admitted, as tending to show the feeling of the accused toward the class of persons of which the assaulted man was a member. Testimony as to the action of bloodhounds in tracking Cranford was held also to have been legally admissible, and the evidence as a whole to have been sufficient to sustain the verdict. The judgment and sentence of the lower court was therefore affirmed.

LABOR ORGANIZATIONS—STRIKES—CONSPIRACY—INJUNCTION—PICKETING—*Tri-City Central Trades Council et al. v. American Steel Foundries, United States Circuit Court of Appeals, Seventh Circuit (Jan. 24, 1917), 238 Federal Reporter, page 728.*—Suit was brought by the American Steel Foundries against the Tri-City Trades Council, and individual defendants who were either the company's former employees or members of the Council, to secure an injunction. The object was to prevent alleged threatened injury to the company's business and destruction of its plant at Granite City, Ill., claimed to be worth \$1,000,000. It was alleged that pickets had assaulted the present employees and threatened them and prospective employees, and the like. A decree was entered in a district court, which enjoined not only violence, threats, etc., but all picketing. The district judge, in rendering his opinion, said:

This evidence clearly shows that this union, this trades council, by the testimony of its officers, entered upon the work of preventing this complainant from getting men to run its factory, run its plant, except upon the condition that it pay a certain scale, the November scale. That combination was illegal. * * * Upon this question, I should say a word about picketing. There is no such thing as peaceful picketing. You might as well talk about peaceful violence. You may as well think of peaceful war as peaceful picketing.

On appeal to the circuit court of appeals the decree was modified and affirmed. The first point decided was that the Federal courts had jurisdiction, as the necessary diversity of citizenship was shown, and the amount of property threatened with destruction, though not the amount already destroyed, was in excess of \$3,000. Judge Evans, who delivered the opinion, then quoted authorities, including the language of a text-writer and a Federal decision affirming the right of peaceful picketing, and cited many other decisions of the same tenor. Continuing, he said:

But it is contended that the decree in these respects was proper because:

(a) The restraining order does not prohibit picketing per se, but restrains defendants from carrying out an unlawful conspiracy to destroy plaintiff's business; that in order to prevent the defendants from accomplishing the unlawful object of the conspiracy, it was necessary for the court to restrain the defendants from picketing the plaintiff's works, and prohibit them from arguing their cause with plaintiff's employees.

(b) Defendants were not plaintiff's employees, but were mere outsiders, intermeddlers, who were not truly representing the employees, but were trouble makers, fomenting strife and trouble where labor conditions and wages were entirely satisfactory to the employees.

Plaintiff's contention that a court may restrain lawful acts of striking employees, when committed to carry out the purpose of an unlawful conspiracy to destroy the employer's business, is supported

by many authorities. If the record disclosed the existence of an unlawful conspiracy on the part of the defendants to injure or destroy plaintiff's property the court would be clearly justified in restraining lawful as well as unlawful acts committed in furtherance of such a conspiracy. If the purpose of the undertaking complained of were purely and simply, or even primarily, interference with the plaintiff in the conduct of its business as alleged, no act, however innocent in itself, directed to that end can be said to have a lawful purpose for its doing. Indeed, it may well be said that any act directed to that end is not a lawful act. If, on the other hand, the object of the undertaking is lawful, then the acts calculated to effectuate the object do not necessarily become unlawful merely because they interfere with the plaintiff's conduct of its business.

The right to strike to secure higher wages and improved conditions of labor is too firmly established to necessitate further elucidation. From the record here we can reach no other conclusion than that the object of this strike was to secure for plaintiff's employees the November wage scale of the union. Nothing appears in the record to indicate that this was not in good faith, or to raise the suspicion that the strike was a mere cloak to cover a deliberate purpose to interfere with the plaintiff's conduct of its business, or to injure and destroy its business and property. The purpose being lawful, if unlawful means are used to effectuate it, such means can not be made to reach back and taint the purpose itself with unlawfulness, and thus render unlawful all the acts in its furtherance. In the pursuit of a lawful purpose to secure a raise in wages, picketing may be employed, as this court has held, to ascertain whom the late employer "has persuaded or attempted to persuade to accept employment," and persuasion may be used to induce them to refuse or quit the employment.

Undoubtedly picketing and persuasion would interfere with plaintiff's conduct of its business, in that it would make it more difficult for it to retain old employees and to hire and keep new ones. Indeed, the very act of striking often seriously interferes with that "free and unrestrained control and operation of the employer's business" which the plaintiff here alleges as an object of the conspiracy charged; but the lawfulness or unlawfulness of the strike is not to be tested by such incidental effect of it. And so it is with persuasion and picketing, properly carried on in the interest of a lawful strike. The laborer may be strictly within his rights, although he obstructs "the free and unrestrained control and operation of the employer's business." The right to strike must carry with it by implication the right to interfere with the employer's business to a certain extent. The right to persuade prospective employees by legitimate argument must of necessity interfere with the employer's business. Where labor is essential to the successful conduct of a business, any interference with that labor is an interference with the employer's business. But whether the interference with the business is lawful or unlawful depends upon the facts in each case.

The order in the instant case fails to recognize this difference between the lawful means of interfering with another's business as an incident to the party's own right and unlawful means adopted by the same party. Methods may be considered lawful, even though the employer's business is interfered with, because such methods are inci-

dental to the right of the employee, which right should be and is recognized as equal to the right of the employer.

Plaintiff's further contention that the defendants were not its employees at the time of the strike, and therefore had no right to picket or persuade by argument those about to enter plaintiff's employment, is not well taken. It is true a striker is not technically an employee. The relation of employer and employee is temporarily suspended during a strike. The situation has been described as:

"A relationship between employer and employee that is neither that of a general employer and employee nor that of employer and employee seeking work from them as strangers."

Neither strike nor lockout fully terminates during the strike the relationship between the parties. Among the defendants in this case there were some former employees. Many of the plaintiff's employees at the time of the strike were members of the defendants' organization, the Tri-City Central Trades Council. These facts disprove the charge that the defendants were merely intermeddling in the affairs of a company in which they had no interest. Under these circumstances it can not be said that the labor organization was an intermeddler or that its course was contrary to the wishes of its members or the wishes of the plaintiff's employees.

In so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business, it transcends the limit of proper restraint, and should be modified, so as to eliminate therefrom any restraint of defendants from doing lawful acts as indicated herein.

LABOR ORGANIZATIONS — STRIKES — CONSPIRACY — PICKETING — INJUNCTION—*Alaska Steamship Co. v. International Longshoremen's Association of Puget Sound et al., United States District Court, Western District Washington (Sept. 5, 1916), 236 Federal Reporter, page 964.*—The Alaska Steamship Co., in petitioning for an injunction against the association named and others, alleged that it was a common carrier operating steamships between Puget Sound ports and Alaska, connecting with railroads and with other steamship lines, and subject to the Interstate Commerce Act; that subsequent to the striking of longshoremen employed by it in Seattle in June, 1916, belonging to a local of the association, the strikers, by means of violence and threats, prevented, or attempted to prevent, employees from continuing in the company's service, passengers from taking passage upon the company's steamships, and equipment from being taken on board the vessels. Individual defendants were officers of the local association in Seattle, which has a membership of between 700 and 800, and of the Pacific coast district of the international association. On May 1, 1916, the district body adopted in convention a scale of wages and hours, and "it was decided to enforce a wage scale and working rules." The demands were not complied with, and the employees of this company in Seattle, numbering about

100, struck on June 1. The company then "granted all the demands that were asked," and the men returned to work June 10. They struck again on June 22 without making any demand, and an employee in the office of the secretary of the district association told an officer of the company that it must guarantee to give the men all the work upon the smelter, which was one at Tacoma with which the company had nothing to do. The violent acts complained of were found to have been committed, and the court, speaking through Judge Neterer, held that the injunction asked for should be granted. With reference to the matters of conspiracy and picketing, he said in part:

A conspiracy is defined as a combination of two or more persons by concerted action to do an unlawful thing or to do a lawful thing in an unlawful manner. Acts of agents and employees in furtherance of the conspiracy are the acts of the principals.

A picket may be considered an agent of a labor organization, and where a picket is established it could go no farther than interviews, peaceable persuasion, and inducements; and slight violence or intimidation will have much weight with a chancellor in determining the character of a picket, or the acts of men under its direction, since a picket, under the most favorable consideration, is for the purpose of interference between one who wishes to employ and those seeking employment. Courts have invariably upheld the right of individuals to form labor organizations for the protection of the interest of the laboring classes, and such right is recognized by the unlawful restraint and monopoly act. Organized labor is organized capital, consisting of brains and muscle, and has as lawful a right to organize as have the stockholders and officers of corporations who associate and confer together with relation to wages of employees or rules of employment, or to devise other means for making their investments more profitable. Organized labor and organized capital have equal lawful rights to associate, consult, and confer with relation to wages and rules of employment. [Cases cited.]

The defendants had the right, if they so desired, to cease to work. Whether they had good cause or not is not for this court to say. On the other hand, the complainant had the right, upon the defendants ceasing to work, to employ whom it elected, and to be protected against overt acts of defendants against such employees, and to have the unobstructed use and enjoyment of its property. The rights of the several parties, as stated, are reciprocal, and are measured by the same rule.

Judge Neterer then says that consideration must be given to section 20 of chapter 323, known as the Clayton Antitrust Act (38 Stat. L., p. 730), relating to injunctions in labor disputes, and to sections 3 and 10 of the Interstate Commerce Act, relating to the facilitating of traffic and imposing penalties for omission or failure to do anything required by the act or causing such omission or failure.

The sections referred to are quoted, after which the opinion concludes as follows:

Sections 3 and 10 supra [of the Interstate Commerce Act] impose duties on complainant, with penalties attached for violation. The testimony shows that the complainant company is a carrier of interstate commerce. It likewise carries United States mail from the port of Seattle to the various ports and places in the Territory of Alaska, at which ports the commerce and mails are delivered to the various connecting lines of transportation, and as such carrier sustains a special relation to the public. It is clearly established that the defendants did cooperate and confederate together and with others for the purpose of preventing the plaintiff from carrying on its business as a carrier of interstate commerce and United States mail. It is also established that the acts done went beyond the privilege extended and license granted to defendants by section 20, supra [of the Clayton Act], and infringed upon the rights of complainant, and that these acts are attributable to defendants.

While there is no testimony that any of these acts were expressly authorized, there is no evidence that the acts were disapproved, or members disciplined or expelled. The testimony does show that the defendants did have control of the situation, and did not exercise their influence or power to correct the irregularities or disavow the acts until the issuance of the temporary restraining order and service upon the defendants, when all overt acts ceased, which, considered with what defendants did do, confirms the conclusion that the acts were under the authority and within the control of defendants. I think it is clearly shown that the rights of the complainant as an interstate commerce and United States mail carrier were violated, that defendants exceeded the privileges granted by the Antitrust Act, and the duty imposed upon plaintiff by the Commerce Act was jeopardized.

It is not the purpose of this court to undertake the policing of the city of Seattle with relation to the employees of complainant, but the issue here is limited to Piers 2 and A and approaches thereto. Nor is it the purpose of the court to abridge any of the rights given by section 20 of the Antitrust Act. Defendant officers and members of defendant association will be enjoined from unlawfully causing, inducing, or in any way forwarding any of the acts complained of as limited herein, and in accordance with the view here expressed.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—*Cohn & Roth Electric Co. v. Bricklayers, Masons, & Plasterers' Local Union No. 1 et al., Supreme Court of Errors of Connecticut (Aug. 2, 1917). 101 Atlantic Reporter, page 659.*—The company named sued for an injunction to restrain the defendants from intimidating by strikes, threats of strikes, boycotts, or otherwise any property owner, builder, or contractor, for the purpose of inducing the latter to cancel contracts with the company or to refrain from entering into contracts with it. The company conducted an open shop, and it appeared that the union had agreed not to work for any general contractor or on

any job if any open-shop contractor was engaged in furnishing labor or materials. The complaint recited that in one instance the union men had refused to work on all of five buildings in process of erection by one contractor because the electric company's nonunion employees were at work on one of the buildings. The court, however, held that this isolated instance could not be taken into consideration in determining the lawfulness of the acts of the union. The superior court of Hartford County had given judgment in favor of the union, and this is affirmed by the court of errors and appeals in the present opinion, which was delivered by Judge Wheeler, and from which the following is quoted:

The agreement of the defendant unions and their members, that the members would refuse to work with nonunion men, followed by action by the members ceasing to work with the nonunion men of the plaintiff, is the only ground of complaint which the facts found support. Individuals may work for whom they please, and quit work when they please, provided they do not violate their contract of employment.

Combinations of individuals have similar rights, but the liability to injury from the concerted action of members has placed upon their freedom to quit work these additional qualifications: That their action must be taken for their own interest, and not for the primary purpose of injuring another or others, and neither in end sought, nor in means adopted to secure that end, must it be prohibited by law nor in contravention of public policy. *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600 [Bul. No. 152, p. 289], is an example of an agreement which we hold to be contrary to public policy. The members of a union, acting upon their agreement, may refuse to enter upon employment with nonunion labor, or refuse to continue their employment with nonunion labor, provided their action does not fall within the qualifications of their freedom of action already stated. [Cases cited.]

The end the defendants had in view by their by-laws was the strengthening of their unions. That was a legitimate end. There is no indication that the real purpose of the defendants was injury to the plaintiff or the nonunion men it employed. Whatever injury was done the plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants, begun and prosecuted for their own legitimate interests. The means adopted were lawful; no unlawful compulsion in act or word was present.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—CONTEMPT—PUNISHMENT—*Flockhart v. Local No. 40, International Molders' Union of North America, et al., Court of Chancery of New Jersey (Oct. 11, 1917), 102 Atlantic Reporter, page 658.*—On the application of James Flockhart an injunction was granted restraining the union named and others from unlawful practices in connection with a strike. In the present phase of the proceedings Judge Lane had before him for

contempt, consisting of violation of the injunction order, one Stevenson, whom he describes as the "head and front not only of the strike, but of the events constituting the violation of the order." The testimony is held to prove such violation on the part of Stevenson. One Schum had already been adjudged guilty of contempt, and the question of the sentence to be given these men was taken up. As to Stevenson's activities Judge Lane said in part:

He assumed that he could in some way or another get rid of being punished for anything that he did which he thought was necessary to be done in order that this strike should be successful, including persistent violence, violence which possibly did not go to actual injury to life or limb, but insulting remarks, attempts by intimidation to prevent workers from exercising their inalienable right to work where they please and when they please.

The conclusion reached was that the only adequate punishment which would actually prevent recurrence of the offense was a jail sentence, and such sentence was imposed upon Stevenson for 40 days and Schum for 20 days. Three weeks later a plea for remission of sentence was before the same judge, and it was granted, he saying that in his opinion the prisoners and their associates "now realize that the law and orders of the court must be obeyed, and that the length of time that they have been in jail has been sufficient to convince them of that fact."

LABOR ORGANIZATIONS — STRIKES — INJUNCTION — DAMAGES—*Max Ams Machine Co. v. International Association of Machinists, Bridgeport Lodge, No. 30, et al., Supreme Court of Errors of Connecticut (Dec. 16, 1917), 102 Atlantic Reporter, page 706.*—The company named sued for an injunction to restrain the labor union mentioned, its business agent, and two other members from picketing its plant and from preventing persons from entering its employment or continuing therein by threats, intimidation, or otherwise. Temporary and permanent injunctions were successively granted, and a jury trial was had as to the amount of the damages which were demanded by the company in the same action. The verdict was for \$5,000, but the union objected to certain incidents of the trial and appealed, and in the present decision a new trial was granted. A part of the expenses claimed by the company was for the maintenance of guards to protect its property, and, since evidence was admitted and mention made in the charge to the jury of certain "rumors, reports, newspaper statements, and other items" indicating an intention on the part of the defendants to continue unlawful practices after the issuance of the injunction, it appeared that the jury might have considered that the expenses of such guards after the injunction had been issued, as well as before, were chargeable to the defendants.

The court shows that there could be no assumption that the injunction would be violated, and that, though prudence might dictate the continued employment of guards, it was the duty of the company itself to bear the expense. The defendants further complained of the instruction that the company was entitled to a verdict for nominal damages in any event, but this was held correct. Certain orders signed with rubber stamps, but authenticated by other means than the signature, had been admitted for the purpose of showing damages, the conditions arising out of the strike having made it necessary to reject these orders. The admission of this evidence was, over the objection of the defendants, held to have been proper; but on account of the error as to the allowance of damages for the maintenance of guards during the entire period, a new trial was ordered as previously indicated.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—PICKETING—CLAYTON ACT—*Stephens v. Ohio Telephone Co., United States District Court, Northern District Ohio (Feb. 14, 1917), 240 Federal Reporter, page 759.*—A. C. Stephens and others brought suits against the telephone company named, alleging that they were subscribers and representatives of all the subscribers of the telephone company. It was alleged that the company was obligated by its charter and its contracts with its subscribers to give suitable service, but that for some time it had failed to keep its lines in reasonable repair or its working force complete, and to give reasonable local or long-distance service. The bill asked that the company be ordered to observe its duties and obligations as an interstate carrier and a public utility under the acts of Congress governing interstate carriers and its contracts, and that it be determined and decreed that the rights of the public are paramount to the private interests of the company, its officers and employees, and all other persons whomsoever. Another complaint by a telephone company in Michigan which depended on the Ohio company for its Ohio connections was consolidated with the one brought by the subscribers. A preliminary order was issued finding that the cables of the company had during the previous three weeks been cut and destroyed at places mentioned in the complaint, and ordering that they be repaired and thereafter maintained in good condition for operation. A provision found in the order was as follows:

It is further ordered, adjudged, and decreed that the defendant company, its officers, agents, servants, and employees, those in concert or participating with them, and all persons whatsoever, and particularly all persons having notice of this order, be and are hereby enjoined and restrained from interfering in any way, or in any manner, with the cables hereinbefore enumerated, or with the repair of

said cables, or with workmen engaged in repairing said cables, or with the employees of defendant company when in the company's service; and all said persons and parties are enjoined and restrained from doing any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier.

The answer of the telephone company was filed after the entering of the preliminary order and set up that the damage to the lines was done by strikers and their sympathizers, who prevented the employment of a force to keep the lines in order and to operate the system properly. Prior to this answer, however, Bert Hoffman, representing Local 245 of the International Brotherhood of Electrical Workers, petitioned to intervene and was allowed to do so. In this petition the union denied participation in the damage to the lines of the company. It was asserted that the strike was being conducted by peaceful and lawful means, and that "until said company shall comply with said demands of its employees this petitioner will, in every peaceable and lawful manner possible, interfere with the business of said telephone company." The temporary restraining order later became a temporary mandatory injunction, and afterwards testimony was taken as to violations of it by various parties, including Hoffman. The returns of the respondents raised the question whether the injunction was too broad and indefinite in attempting to restrain the strikers from actions which were claimed to be lawful under the sections of the Clayton Act relating to labor disputes. Judge Killits, in delivering the opinion, expressed his views as to the effect of that act upon controversies involving public utilities and their employees. He reached the conclusion that the motions by the union members attacking the informations against them should be denied, and the proceedings continued under such informations as stating grounds for holding the respondents guilty if the allegations made therein should be proved. The following quotations are made from the opinion:

The second paragraph of section 20 [of the Clayton Act] we quote in full as the important one. It has sometimes been called "Labor's Bill of Rights." We may as well call it an "Employer's Bill of Rights," and also, when there is a labor controversy involving a public utility as here, the "Public's Bill of Rights." The "rights" guaranteed by it to the employees, "in any case between employer and employees," are to be set up against and limited by certain "rights" of the employer therein written. He has just as much right, under this section, that his employees shall not exceed the limits of their rights under it as they have to enjoy them. The rights of the employer begin where those of the employees stop. The granting of a "right" by statute always involves an obligation upon the favored one not to exceed its limitations. [Paragraph quoted.]

It is well to note, and not to lose sight of, the fact that the words "lawfully," "peacefully," "lawful," "peaceful," dominate the

thought of the second paragraph of the section in question; they control its meaning, as they control both the court and the parties to a labor controversy. The statute but enacts the position which courts have universally taken; there is nothing new in it, for we hold that no case exists where a court has attempted jurisdiction to control lawful and peaceable action by injunction, although it may seem that sometimes judgment may have been faulty as to what particular action was "unlawful" or provocative of a disturbed peace. The challenge to the court is to define "peaceful picketing" within the limits of this section. This does not seem to be an occasion for an attempt at an academic formula, which, in any detail, would meet all exigencies possible in labor controversies, if one could be drawn up.

Each case presents its own peculiar questions. An act may be lawful and peaceful, or the opposite, according to its setting. It is easier, and far more practicable, therefore, to deal in prohibitions than in affirmations. Broad generalizations, however, are easily framed, because, if we just keep in mind the prevalence in the statute of the qualifying idea of "peaceful" and "lawful" action, we can not be misled. The best we have seen is one lately appearing in a newspaper devoted to labor interests. It is:

"What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked, 'Would this be lawful if no strike existed?'"

We accept this as a very good test, and apply it to the concrete questions of fact arising in this case, as propounded in the several informations, with conclusions certain to come to every "fair-minded man." Suppose no strike were in progress—

Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others—for one to call another a "rat," a "scab," a "thief," an "outcast," or by any other name commonly accepted as offensive, or degrading, or calculated to provoke the other to break the peace in resentment? [Other questions formulated, based upon the evidence and information.]

Because such occurrences are liable to be the result of passions inflamed by such controversies, there is an insistent and undeniable demand that all persons having part in a strike, who are trying to exercise their rights under the law to maintain a strike, should be persistent in their efforts to keep the controversy within lawful bounds and to guard that these inexcusable results do not follow; otherwise, in the estimate of the public generally, they will be held to some considerable measure of responsibility.

The right of free speech does not give anyone the privilege to force his views upon others, to compel others to listen. The right of the others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments.

It is a safe and proper generalization that any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is un-

lawful; every act, of speech, of gesture, or of conduct, which "any fair-minded man" may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether of legislation of Congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable—such must be the verdict of "any fair-minded man"—nothing can be said in justification.

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he has but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character.

The labor organization, party to this case through the representation of Hoffman, came here voluntarily and was admitted upon its application and the statement of its counsel, in the presence of the officers of the organization, that the injunction then in force would be observed and respected until it should be modified or vacated by this court. Indeed, we have, as we have observed, exactly the injunction which the labor defendants in this court agreed should be issued. Yet it pleads that it intends to "interfere" by all "lawful means" with the business of the defendant company. It should know, and act upon the knowledge, that the only "interference" which the law permits is that incidental to a strict observance of the terms of section 20 of the Clayton Act. If it goes beyond the privileges of action therein provided, it comes within the court's restraining and punitive processes. Its only safe course, in pursuing its "interference" methods, is to place intelligently and carefully, in word and conduct, the same emphasis which Congress employed on the expressions "lawful" and "lawfully," "peaceful" and "peacefully," as used in the act.

The Ohio State Telephone Co. is a public utility. Its first duty is to serve the public. Its work meets a vital public necessity. The right of its striking employees to "interfere by lawful means" with its business does not mean a right to cripple performance by it of its duties to the public, if it can find people willing to work for it. If labor can be had, the company must employ, and the strikers must permit it to employ and use, labor to perform its public duties, and any one willing to work for it must be allowed by everybody entire freedom to do so. The public, having a great need for services of the character offered by this public utility, has an enforceable right to demand these conditions of both the company and of those associated in controversy with it. This court is empowered to say to the company that it must meet its public obligations. Coupled with that power of the court is the power and duty of laying its prohibitive and punishing hand upon anyone whose willfully unlawful conduct tends to render abortive the exercise of that power. We can no more say to the company that it must yield to the de-

mands of its striking employees than we can say to them that they must meet the company's exactions. The controversy must be carried on, on both sides, without substantial detriment to the company's public service.

We are unable to agree with respondent's counsel that the order is deficient, because it does not conform to the provision of section 19 of the Clayton Act that an injunction order should specify in "reasonable detail" the things enjoined. That portion most vigorously attacked as too broad and indefinite is the provision restraining the doing of "any acts or things which may interfere in any respect with the performance of the duties and obligations of the defendant company as a common carrier."

This provision is as definite as it is possible to make it. It is this paramount interest in the public which may not suffer interference as the result of the controversy, and it is impossible to set out every act or line of conduct which might work interference. Labor controversies are not unexpected or unusual; courts recognize that they are possible; courts also notice that the existence of one produces some embarrassment to the employer affected in the management of his business. Whether that embarrassment arises to a state of "interference," as that term means in cases of this sort, depends upon how the controversy is conducted on either or both sides. A total cessation of the employer's business, even of that of a public utility, might not indicate an illegal interference under some circumstances. A strike lawfully conducted is not an illegal interference, although it might effect even a total paralysis of a public utility's activities, resulting in great public suffering and loss. The right to abandon employment, by individuals singly or in association, is unquestioned, and the law maintains the right of such late employees, commonly known as strikers, to "peacefully" persuade others to abandon the same employment, or to refrain from engaging in employment, and to that end "peaceful picketing" is permitted for purposes of observation and information and "peaceful persuasion." But no single act, to which we have alluded above, can be possibly considered to be a necessary, and hence an excusable, accompaniment of peaceful picketing. Such acts tend inevitably to that "interference" which the law condemns.

In this view, we suggest that the bald statement in the pleading of the labor organization referred to that its purpose is to "interfere" by lawful means with the business of this public utility comes perilously near a confession that an unlawful conspiracy is in progress, and the only way that such a conclusion can be avoided is a line of conduct during the further continuance of this strike which will secure the public against that interference with the business of this public utility which is the direct result of the unlawful acts of the character of those to which we have alluded. If its members will confine their strike activities within the limits of the Clayton Act, then whatever embarrassment ensues to the company will be no illegal interference.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—PICKETING—LABOR COMMISSIONER AS WITNESS—*White Mtn. Freezer Co. v. Murphy et al.*; Supreme Court of New Hampshire (May 1, 1917), 101 Atlantic

Reporter, page 357.—Suits were brought by the company named and two other companies engaged in manufacturing to obtain injunctions against Eugene L. Murphy and others. The defendants were officers and members of Local No. 257 of the International Molders' Union of North America, Murphy being the business agent. The union demanded, on October 11, 1916, that the companies compel their molders not members of the union to join, and that they conduct their factories thereafter as closed shops. This was refused, and the union members struck. The strike was still in effect at the time of the hearing on the cases, and, it was alleged, the strikers were using means to intimidate the remaining employees, including picketing. The cases were sent to a master for the finding of facts, and questions as to evidence arose during the proceedings before him. The superior court of Hillsborough County refused to rule that a strike organized to compel the employment of union men only constituted a conspiracy in law, and likewise refused to hold that organized picketing was unlawful. The cases were transferred to the supreme court for decisions on the questions raised by exceptions to these rulings. Judge Parsons was spokesman for the court, and first stated that the agent, Murphy, though a party to the proceedings, was a competent witness and could be compelled to testify, though not to incriminate himself. He then discussed the matter of the obligation of the labor commissioner to testify as to proceedings before him in an attempted conciliation of the controversy. An examination of the statute showed no provision that such proceedings should be given secrecy prior to the amendment adopted in 1917, which is as follows:

"Neither the proceedings nor any part thereof before the labor commissioner by virtue of this section shall be received in evidence for any purpose in any judicial proceeding before any other court or tribunal whatever."

Mr. Davie, the commissioner, had refused to answer whether at a conference called by him the representatives of the companies had requested of Murphy a statement in writing of the demands of the union. The court held that the commissioner was, previous to the taking effect of the amendment noted, in the same category as a subordinate court and could not claim the privilege of refusing to testify.

The court then took up the two rulings submitted to it, holding as to the implication of a conspiracy in the purpose of the strike that the strikers were called upon to give evidence as to the lawfulness of their motive. With regard to picketing the court agreed with the lower court, holding that picketing in itself is not necessarily unlawful, the matter of legality depending on the actual occurrences which might be shown on the trial.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—POWER OF OFFICERS OF UNION TO CONTRACT—DAMAGES—*W. A. Snow Iron Works (Inc.) v. Chadwick et al., Supreme Judicial Court of Massachusetts (June 11, 1917), 116 Northeastern Reporter, page 801.*—The company named brought action in equity for an injunction and damages against Leonard B. Chadwick and others, and a decree granting an injunction but denying damages for the most part, entered upon the report of a master to whom the case had been referred, was by this decision affirmed. Chadwick was the business agent of an unincorporated labor union. The eight other defendants were members of this union and had been employed by the company in the installation of wrought-iron work. The manufacturing or inside work was conducted on the open-shop plan, the result being that the employees were nonunion men; but the company was on friendly terms with the union, and customarily employed some union men on its outside work. On a large contract with one Crane the eight union men formed part of a force of 20. There was no complaint about wages or hours. While the job was in process, however, a vote was passed by the union instructing its secretary "to send out new agreements to all the contractors in their line," and another instructing the business agent that "no member be allowed to work for unfair firms until they had been signed up by the business agent." At a conference between the employer and Chadwick the former refused to sign the agreement, which provided for the employment of union labor only on outside work. The eight men then struck. As to their right to do this the court says:

If the right of the employees to cease work of their own volition is unquestioned, the object or motive for which the strike was precipitated is a question of fact.

The findings of fact by the master are then examined, and Judge Braley, who prepared the opinion, goes on as follows:

It is now plain that the paramount motive actuating all the proceedings of the defendants and their fellow members was by means of the strike to force the plaintiff to employ only union men on all of its "outside work" under the penalty, if compliance was refused, that full performance of the contract with Crane would be seriously embarrassed if not rendered impossible, while its name would be published by the union in the labor market, and among architects and contractors for its products, as an employer of nonunion labor, making the obtainment of future contracts and the necessary union labor exceedingly precarious if not practically impossible. The right of the plaintiff to the benefit of its contract and to remain undisturbed by the union during performance, as well as to hire and retain such employees as it might select, unhampered by the interference of the union acting as a body through the instrumentality of a strike or of a secondary boycott or black list, is a primary right which has not been abrogated by any of our decisions. [Cases cited.]

The claim that there had been a contract with the union to furnish men as required, and that damages might be collected for loss of profits on all other contracts which the plaintiffs might have taken if the amicable relations had continued, was disposed of by showing that the officers had had no power to make such a contract. The court said in part on this subject:

The officers of the union could not create either by word or conduct a binding bargain in behalf of the members of their union to furnish labor to be individually performed, unless they had been authorized expressly or impliedly by the members in some form sufficient to show mutuality of will and consent.

The "custom and practice" of furnishing men when the plaintiff communicated its needs directly, or by its foreman, the defendant Husband, to the responsible officers of the union, even if known to the union, and never formally disapproved, did not constitute a contract for breach of which damages could be recovered or specific performance enforced by either party.

The court added that while losses incurred in the shop by reason of the failure to secure the additional contracts afforded no ground for claiming damages, damages might have been awarded if separately claimed for the loss caused on the job on which the strike was called.

LABOR ORGANIZATIONS—STRIKES—PICKETING—VIOLENCE—INJUNCTION—*Niles-Bement-Pond Co. v. Iron Molders' Union, Local No. 68, et al., United States District Court, Southern District Ohio (Oct. 9, 1917), 246 Federal Reporter, page 851.*—About 115 members of the union named, at work for the Niles Tool Co., at Hamilton, Ohio, struck on May 24, 1917. The company was at work on contracts amounting to about \$3,000,000, given priority under the National Defense Act, for heavy machinery urgently needed by the United States Government, which it was impracticable for the company to have manufactured elsewhere. The company named as plaintiff in this suit stood in the relation to the tool company of a holding company, and it also secured the contracts and in turn contracted with the tool company to produce the required machinery. The prayer of the company for an injunction was granted by Judge Sater, who stated his findings of fact and commented upon the situation at length. The findings showed much violence on the part of the strikers and their sympathizers and incidentally little effort to prevent such action on the part of the public authorities. It is stated that the strikers returned to work on July 23 for about four days, but again left, claiming that bad faith was exercised by the company in the attempt to arrange the final terms of settlement. It was claimed by the defendants that because of this and because the arrangement between the two companies was a

violation of antitrust laws the company did not come into court with "clean hands" and was therefore not entitled to its relief. This contention was not upheld by Judge Sater, who, after setting forth the right of workmen to strike and to picket peaceably and to converse with prospective employees who are willing to engage in conversation, added that this gave no right of compulsion or of interference with those unwilling to talk, and that threats, abuse, and intimidation had no place in the conduct of such a strike as the courts held lawful. He then said:

The record shows it was necessary to escort workmen for their protection with guards, and that even then some of them were assaulted and beaten up.

The existence of such a condition shows that there was something radically wrong with the conduct of the strike, with the committee charged with its management, and the enforcement of the law.

A belief that labor can not win a strike without resort to unlawful means does it injustice. A statement that such means are necessary to succeed is a slander. It is the reckless and lawless few (and their like is found in all vocations) that foment trouble, which leads to wrongdoing and often ultimately throws the weight of public opinion against the striker. Labor is entitled to its just deserts, and may lawfully strike to get them; but neither labor nor any other aggregation of beings should permit its cause to be injured by the misbehavior of mischief makers, whether they be merely sympathizers or found within its own ranks. It should stand for the reign of law.

Relief must be granted as prayed for against all of the defendants. Its effect will be to restrain them from doing what any good citizen will not wish to do. The evidence of the active participation of many members of Local No. 68 is abundant. There is also evidence that members of that union were instructed to keep within legal bounds, but neither its officers nor its strike committee enforced the instructions. Indeed, Schalk, a member of that committee, participated in violent conduct. Some of the members of Local No. 283 also actively shared in the matters of which complaint is made. There is no showing that any officer or member of that body by word or deed discouraged the wrongful conduct herein mentioned. The efforts of the plaintiff to bring about a full disclosure of the unhappy occurrences connected with the strike received no assistance from that union, which defended at the hearing. If it deprecated the disorder that prevailed, or disapproved of wrongdoing on the part of its members, as it ought to have done, it should have cleared its skirts when the opportunity offered.

LABOR ORGANIZATIONS—STRIKES—PROSECUTION FOR MURDER—
SELECTION OF JURORS—*Zancannelli v. People*, Supreme Court of
Colorado (June 4, 1917), 165 *Pacific Reporter*, page 612.—Louis
Zancannelli was convicted of having murdered one Belcher in the
city of Trinidad, Colo., during the industrial conflict between the

coal-mine owners and their employees, and sued for a writ of error to secure a reversal of the judgment. The Attorney General filed a confession of error, and the opinion of the supreme court, delivered *per curiam*, states that ordinarily under such circumstances it would enter judgment of reversal without comment, but that the nature of the case was such that "we think a good purpose will be served by briefly stating the facts and commenting upon the same."

The deceased man was a detective in the employ of the mine owners. The prosecution introduced evidence to the effect that the defendant had stated that he killed him "for the good of the union," but there was also evidence that one of two men who were seen fleeing from the place was the guilty party, and that the arrest and prosecution of the present defendant was the result of mistaken identity. The judge of the district court of Las Animas County, in which the case was tried, was disqualified for interest and prejudice, and the same objections were unsuccessfully urged with regard to the additional judge appointed by the governor to try the case. However, the occurrences at the trial over which he presided, with relation to the impaneling of the jury and the conduct of certain jurors, were considered as sufficient to invalidate the proceedings. Several jurors were seated after refusal to permit the defense to ask the following question:

"Can you start out on the trial of this case giving to the defendant the benefit of the legal rule that a defendant must be presumed to be innocent until he is proven to be guilty?"

The court refused to permit the putting to the jurors of many other inquiries relating to their bias or prejudice, participation in the troubles connected with the strike, etc. From the opinion the following is quoted as to the principles involved:

While a person is not necessarily disqualified to serve as a juror in a criminal case by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused (sec. 8691 et seq., R. S. 1908), it would seem always important to ascertain the state of the proposed juror's mind as to the defendant's rights under the law, for, without this, how would it be possible for the court, within the meaning of the law, to be satisfied that the juror has no other interest or motive in the case than to render a true, fair, and impartial verdict? However, be that as it may, the defendant had a right to propound questions to the proposed jurors to show not only that there existed proper grounds for a challenge for cause, but also to elicit facts to enable him to decide whether or not he would make a peremptory challenge.

There was testimony that Juror Burkhardt had business relations with the coal companies, that he had said that if he was on the jury there would be "a hung jury or a hung Dago," that he had offered to make bets that the defendant would be convicted, etc. This mat-

ter is gone into at considerable length, and the opinion concludes as follows:

The errors above noted invalidated the proceedings almost at their very beginning. Moreover, the errors are so numerous, so obvious, and so fatal to the validity of the proceedings that unless they were written into the record as they are, under the seal of the trial court, we could not believe that such things had occurred in the trial of a cause in a court of record.

LABOR ORGANIZATIONS—SUSPENSION OF MEMBER—INJUNCTION—*Holmes et al. v. Brown, Supreme Court of Georgia (Feb. 13, 1917), 91 Southeastern Reporter, page 408.*—A. Brown brought action against Martin Holmes, president of the Bricklayers, Plasterers, and Masons' Union of America, and others for an injunction to restrain them from refusing him the rights and privileges of a member of the local union of the organization in the city of Atlanta. He had been a member for about 14 years. He preferred charges against another member which he was not able to sustain, because, as stated in the court's opinion, the members who furnished the information were intimidated by persons outside the union. He in turn was accused of maliciously preferring an unfounded charge against a member, and was tried and found guilty and fined \$50 at a meeting at which he was not present. No notice was given him of the preferring of the charges nor of the trial; in fact, he did not learn of the matter until a month later. He then made complaint, and was informed that he must pay the fine to the local union before an appeal could be taken, although the 30-day limit for appeals would be waived. He was unable to pay the fine, and was not allowed to be heard before the local union, nor to attend the meetings or pay his dues, which he tendered. The superior court of Fulton County entered an interlocutory judgment ordering that he be given the privileges of membership pending a trial, and this judgment was affirmed by the supreme court, Judge Evans delivering the opinion and saying, in part:

The constitution and by-laws of the international union provide that no member shall be tried except upon a written charge stating the specific offense against the accused member, and that the trial shall be had on a stated day; if the member refuse to be present, he shall be notified of the time when the trial shall occur. Upon conviction and sentence the same operates as a suspension of all benefits and privileges until compliance with the terms of the sentence, with a right of appeal to the judiciary board on payment of the fine. The constitution and by-laws further provide for a beneficiary and mortuary fund maintained on a mutual plan, for the benefit of members who have been connected with the union for a period longer than 6 months; for a pension system providing for

a benefit to members who have reached the age of 60 years, and who have been in continuous good standing for a period of 20 years; and for a disability benefit to members of 10 years' standing.

The court found as a conclusion of fact that the evidence authorized an inference that the plaintiff had been illegally tried and sentenced, and that he had tendered all of his dues in arrears; in other words, his status was that of a lawful member of the union. In the court's order the plaintiff was required to pay these dues to the local union, and upon compliance with this condition by him the union was temporarily enjoined from interference with his rights as a member. The order does not finally adjudicate the plaintiff's status as a member, and should not be construed as so doing.

LABOR ORGANIZATIONS—UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE—INJUNCTION—PREVENTION OF COMPETITION—*Paine Lumber Co. (Ltd.) et al. v. Neal et al.*, *Supreme Court of the United States* (June 11, 1917), *37 Supreme Court Reporter*, page 718.—The company named and other corporations of States other than New York brought a bill in equity against Elbridge H. Neal and others, officers and agents of the United Brotherhood of Carpenters and Joiners of America and its New York branch; union manufacturers who were members of the Manufacturing Woodworkers Association; and master carpenters who were members of the Master Carpenters Association. The bill was dismissed in a Federal district court, and the decree of dismissal was affirmed by the Circuit Court of Appeals for the Second Circuit. (Same case, 214 Fed. 82, Bul. No. 169, p. 164.) The Supreme Court took the same view, four justices dissenting. Mr. Justice Holmes delivered the prevailing opinion, as follows:

The bill alleges a conspiracy of the members of the brotherhood and the New York branch to prevent the exercise of the trade of carpenters by anyone not a member of the brotherhood, and to prevent the plaintiffs and all other employers of carpenters not such members from engaging in interstate commerce and selling their goods outside of the State where the goods are manufactured, and it sets out the usual devices of labor unions as exercised to that end. In 1909 the master carpenters, coerced by the practical necessities of the case, made an agreement with the New York branch, accepting a previously established joint arbitration plan to avoid strikes and lockouts. This agreement provides that "there shall be no restriction against the use of any manufactured material except nonunion or prison-made;" the arbitration plan is confined to shops that use union labor, and the employers agree to employ union labor only. The unions will not erect material made by nonunion mechanics. Another agreement between the manufacturing Woodworkers' Association, the brotherhood, and the New York branch, also adopts the plan of arbitration; the labor unions agree that "none of their members will erect or install nonunion or prison-made material," and the woodworkers undertake that members of the brotherhood shall "be employed exclusively in the mills of the Manufacturing

Woodworkers' Association." It is found that most of the journeymen carpenters in Manhattan and part of Brooklyn belong to the brotherhood, and that, owing to their refusal to work with nonunion men, and to employers finding it wise to employ union men, it is very generally impracticable to erect carpenter work in those places except by union labor. It also is found that, owing to the above provisions as to nonunion material, the sale of the plaintiff's goods in those places has been made less. The workmen have adopted the policy complained of without malice toward the plaintiffs, as part of a plan to bring about "A nation-wide unionization in their trade."

An injunction is asked against the defendants (other than the master carpenters) conspiring to refuse to work upon material made by the plaintiff, because not made by union labor; or enforcing by-laws intended to prevent working with or upon what is called unfair material; or inducing persons to refuse to work for persons purchasing such material, or taking other enumerated steps to the same general end; or conspiring to restrain the plaintiffs' interstate business in order to compel them to refuse to employ carpenters not members of the brotherhood. It is prayed further that the provision quoted above from the master carpenters' agreement and another ancillary one be declared void and the parties enjoined from carrying them out. No other or alternative relief is prayed. The ground on which the injunction was refused by the district court was that, although it appeared that the agreements above mentioned were parts of a comprehensive plan to restrain commerce among the States, the conspiracy was not directed specially against the plaintiffs and had caused them no special damage, different from that inflicted on the public at large. The circuit court of appeals, reserving its opinion as to whether any agreement or combination contrary to law was made out, agreed with the judge below on the ground that no acts directed against the plaintiffs personally were shown.

In the opinion of a majority of the court, if the facts show any violation of the act of July 2, 1890 [Sherman Antitrust Act], a private person can not maintain a suit for an injunction under section 4 of the same (*Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 71, 24 Sup. Ct. 598); and especially such an injunction as is sought: even if we should go behind what seems to have been the view of both courts below, that no special damage was shown, and reverse their conclusion of fact. No one would maintain that the injunction should be granted to parties not showing special injury to themselves. Personally, I lay those questions on one side because, while the act of October 15, 1914 [Clayton Act], establishes the right of private parties to an injunction in proper cases, in my opinion it also establishes a policy inconsistent with the granting of one here. I do not go into the reasoning that satisfies me, because upon this point I am in a minority.

As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. *National Protective Asso. v. Cumming*, 170 N. Y. 315, 63 N. E. 369 [Bul. No. 42, p. 1118]. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture

or building, since the more successful it is the more competitors are introduced into the trade.

Decree affirmed.

Mr. Justice Pitney wrote a dissenting opinion, in which Mr. Justice McKenna and Mr. Justice Van Devanter concurred, Mr. Justice McReynolds also dissenting. Mr. Justice Pitney disagreed with the view of the majority that a private person can not maintain a suit for an injunction under the fourth section of the Sherman Act, saying that the case cited, *Minnesota v. Northern Securities Co.*, is not "an authority against the right of complainants to an injunction to prevent special and irreparable damage to their property rights through a violation of the Sherman Act, the effect of that decision being merely to deny relief by injunction to individuals not directly and specially injured." He held that a right to apply for such injunction is given, not by any specific provision of the statute, but by the absence of any provision denying it and by the settled principles of equity. The special injury necessary, he thought, was present in this instance. His view of the effect of the provisions of the Clayton Act is shown by the following quotation:

The suggestion, in behalf of defendants, that section 6 of the Clayton Act establishes a policy inconsistent with relief by injunction in such a case as the present, by making legitimate any acts or practices of labor organizations or their members that were unlawful before, is wholly inadmissible. The section prohibits restraining members of such organizations from "lawfully carrying out the legitimate objects thereof." What these are is indicated by the qualifying words: "Instituted for the purpose of mutual help, and not having capital stock or conducted for profit." But these are protected only when "lawfully carried out." The section safeguards these organizations while pursuing their legitimate objects by lawful means, and prevents them from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade. The section, fairly construed, has no other or further intent or meaning. A reference to the legislative history of the measure confirms this view. (House Rep. No. 627, 63d Cong., 2d sess., pp. 2, 14-16; Senate Rep. No. 698, 63d Cong., 2d sess., pp. 1, 10, 46.) Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members or in the measures adopted for accomplishing them.

It is altogether fallacious, I think, to say that what is being done by the present defendants is done only for the purpose of strengthening the union. Conceding this purpose to be lawful, it does not justify or excuse the resort to unlawful measures for its accomplishment. A member of a labor union may refuse to work with nonunion men, but this does not entitle him to threaten manufacturers for whom he is not working, and with whom he has no concern, with loss of trade and a closing of the channels of interstate commerce against their

products if they do not conduct their business in a manner satisfactory to him.

And the suggestion that, before the Clayton Act, unlawful practices of this kind were usually and notoriously resorted to by labor unions, and that for this reason Congress must have intended to describe them as "legitimate objects," and thus render lawful what before was unlawful, is a libel upon the labor organizations and a serious impeachment of Congress.

Nor can I find in section 20 of the Clayton Act anything interfering with the right of complainants to an injunction. It refers only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment." These words evidently relate to suits arising from strikes and similar controversies, and the committee reports upon the bill bear out this view of the scope of the section. But this is not such a suit. There is no relation of employer and employee, either present or prospective, between the parties in this case. Defendants who are employees are in one branch of industry in New York City; complainants are employers of labor in another branch of industry in distant States. Nor is there any dispute between them concerning terms or conditions of employment. Section 20 prohibits an injunction restraining any person "from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; * * * or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

Clearly, this provision is limited to the participants in a dispute of the character just indicated. And, quite as clearly, only "lawful" measures are sanctioned—that is, of course, measures that were lawful before the act. There is no grant, in terms or by necessary inference, of immunity in favor of a boycott of traders in interstate commerce, violative of the provisions of the Sherman Act, to which the Clayton Act is supplemental.

MECHANICS' LIENS—ASSIGNMENT BY CONTRACTOR OF AMOUNT DUE HIM—*London Bros. et al. v. National Exchange Bank of Roanoke et al.*, Supreme Court of Appeals of Virginia (Sept. 20, 1917), 93 *Southeastern Reporter*, page 699.—The King Lumber Co. constructed for the city of Roanoke a municipal building, and before the laborers, supply men, and subcontractors had been paid the company assigned \$15,000 of the amount due it from the city to the bank named. The city brought a bill of interpleader, praying for a decision directing it as to the distribution of the balance of nearly \$21,000 due from it under the contract. The company having become bankrupt, its trustees were among the claimants made parties defendant. The laborers, etc., made their claim under "An act to protect subcontractors, supply men, and laborers," Code of 1904, section 2482a, pro-

viding that assignments of the amounts due to contractors can not be enforced until the demands of such claimants have been satisfied. The bank contended that this act must be construed in connection with the mechanics' lien law, sections 2475-2481, inclusive, of the Code, so that the claimants, not being able to perfect mechanics' liens because the owner of the building was a municipal corporation, were not protected by the law against assignments. The law and chancery court of the city of Roanoke took a view adverse to the laborers and the other claimants associated with them, and they appealed. The supreme court of appeals, for which Judge Prentis delivered the opinion, reversed the decision and held the assignment invalid until the claims had been met, saying on this point:

The words of the statute are written into such assignments as effectually as if the assignment in terms stated as a condition precedent that it should be void and ineffective until after the payment in full of all debts due by the assignor to subcontractors, supply men, and laborers for the construction of the building, and in its legal effect is a direction to the owner thus to distribute the fund.

MOTHERS' PENSIONS—CONSTITUTIONALITY OF STATUTE—TAXATION—*Denver & R. G. R. Co. v. Grand County, Supreme Court of Utah (Dec. 21, 1917), 170 Pacific Reporter, page 74.*—The railroad company named brought suit against the county to recover the sum of \$912.66, collected from it during the year 1914 under the mothers' pension act passed by the legislature of Utah in 1913. This tax was levied in addition to a tax for general county expenses, one for school purposes, and one for poor relief. The district court of the county held that the county officers were without authority to levy such a tax, and rendered judgment for the company; this judgment, however, is reversed by the present decision. The law provides for the levying by the counties of taxes sufficient to provide funds for the purpose contemplated. It was first contended that this was not a "public purpose" for which a tax may lawfully be assessed, and that therefore the act provided for the taking of private property for other than a public purpose. As to this Judge Gideon, who delivered the opinion, said:

It will be conceded, we take it, that the proper rearing and bringing up of children, their education, their moral welfare, can all be subserved better by giving to such children the companionship, control, and management of their mothers than by any other system devised by human ingenuity. The object of the act is to provide means whereby mothers who are otherwise unable may be enabled to give such attention and care to their children of tender years as their health, education, and comfort require. The act further provides that no such money shall be appropriated or given unless the mother is a fit person morally and physically to be intrusted with the rear-

ing of young children, and that only during the years when the children are unable to determine right from wrong or to earn a livelihood. The act having for its object the better care for the training, mental and physical, of children who are to become citizens of the State, would at least leave the constitutionality of such act doubtful, and it is the duty of courts in determining the constitutionality of any act to resolve every doubt in favor of its constitutionality. We are not prepared to hold that the act, in effect, does not define and declare a policy of the State, nor that it is not within the province of the legislature to so define and declare a State policy. Having in mind the public welfare by assisting in surrounding children of tender years with home associations, with the care and nurture of their natural protector, the mother, the legislature, by this act, has determined that to be a policy of the State. Such being the object of the act, this court would not be justified in declaring the act invalid and that the funds so used are not used for a public purpose.

A contention as to the power of the legislature to devolve upon the county commissioners the right to levy the taxes necessary to carry out the provisions of the act was resolved in favor of the act, and it was held constitutional. The judgment of the court below was reversed and the case remanded.

MOTHERS' PENSIONS—DEATH OF HUSBAND—PRESUMPTION FROM ABSENCE—*Commonwealth ex rel. Trustees of Mothers' Assistance Fund of Philadelphia County v. Powell, Auditor General, Supreme Court of Pennsylvania (Feb. 12, 1917), 100 Atlantic Reporter, page 964.*—A mothers' pension law of Pennsylvania enacted in 1913 provided for payments to "indigent, widowed, or abandoned mothers, for partial support of their children in their own homes." This was, however, changed in 1915 so that such assistance was to be given "to women who have children under 16 years of age and whose husbands are dead or permanently confined in institutions for the insane." The present proceeding was one in mandamus to compel the auditor general to draw his warrant upon the State treasurer for the payment of a sum to the mother of four children. The father had disappeared in 1906, and had not been heard from since. The trustees of the fund, in view of his unexplained absence for more than seven years, found that he was dead, and approved the application for relief, which action was sustained by a lower court, which granted a mandamus. The supreme court held that the law should not be construed to warrant payment in this case and reversed the award of mandamus on the ground that the act used the word "dead" in its popular sense, without regard to legal presumptions not mentioned in the act.

OLD-AGE PENSIONS—CONSTITUTIONALITY OF PROPOSED LEGISLATION—*In re Opinion of the Justices, Supreme Court of New Hampshire (Feb. 15, 1917), 100 Atlantic Reporter, page 49.*—New Hampshire, in common with others among the New England States, has a provision of law which permits the branches of the legislature, in cases of importance, to ask the supreme court to pass in advance upon the constitutionality of bills proposed for adoption. The constitution of the State contains the following reservation out of the supreme legislative power granted, being article 36, part 1, of the constitution:

Economy being a most essential virtue in all States, especially in a young one, no pension shall be granted but in consideration of actual services; and such pensions ought to be granted with great caution by the legislature, and never for more than one year at a time.

The house of representatives adopted a resolution calling for an opinion on the following questions:

1. Can the legislature authorize the granting of old-age pensions, for one year at a time, to be paid either (a) by the State or (b) by any political subdivision thereof?
2. Do the restrictions in the article as to "actual services" and as to "one year at a time" apply to political subdivisions of the State as well as to the State itself?
3. Can the legislature, at one session thereof, authorize the granting of a pension for a year, and by a separate act authorize the granting of a like pension for another year?

The questions propounded were answered in the negative on account of the provisions of the constitution, probably somewhat unusual, above quoted. The opinion is in part as follows:

Pensions are not to be granted except in consideration of actual services and never for more than one year at a time. A pension ordinarily suggests the idea of a bounty or reward for service rendered, but the term might include a grant which was a mere gratuity. This latter is expressly excluded. Pensions are not to be granted except in return for services which are fairly describable as actual, not constructive, or imaginary. * * * If "old-age pensions" means pensions the right to which depends upon age alone, our answer is in the negative.

As the legislature may grant a pension for only one year at a time, legislation in the same year, whether in one bill or several, granting in the whole pensions to the same persons for more than one year, is beyond legislative power, and wholly void. We answer the third question also in the negative.

The nondelegable character of the lawmaking power vested in the legislature is subject to the exception that limited powers of local legislation may be conferred upon minor subdivisions of the State. But "in the nature of things, such legislation must be not inconsistent with the laws of the State." (*State v. Noyes*, 30 N. H. 279, 293.)

The local legislation of towns and cities is equally subject to a reservation made before any legislative power was granted. Obviously the legislature can not delegate a power it does not possess. Because there is no exception of the power of local legislation from the general reservation limiting the pension-granting power of the State, the second inquiry is answered in the affirmative.

PENSIONS FOR EMPLOYEES—DEDUCTIONS FROM SALARIES OF COUNTY EMPLOYEES—*Helliwell et al. v. Sweitzer, Supreme Court of Illinois (Apr. 19, 1917), 115 Northeastern Reporter, page 810.*—The Legislature of Illinois in 1915 enacted a law providing for a pension fund for employees of counties having a population of 150,000 or more. Cook County is such a county, and Sidney L. Helliwell and others, who were appointees of the county treasurer, sheriff, and other county officials, brought a suit against the county clerk to prevent him from deducting from their salaries, in accordance with the act, the sum of \$2 per month each for such pension fund. In the superior court of Cook County a decree was entered overruling the demurrer of the county clerk to the bill, and declaring the act void as to all officers and employees provided for in it. The supreme court, however, made a distinction as to the power of the legislature in respect to such employees as the petitioners, over whose salaries the county board has authority by virtue of a constitutional provision, and those over which the legislature itself has power. It therefore ordered the decree modified, but held that the lower court had properly upheld the contention of the petitioners as far as their own cases were concerned. The following extracts are taken from the opinion delivered by Judge Duncan:

It is clear that the "officers and employees" referred to in this statute do not include public county officers, who are elected to their offices by the voters of the county.

It is equally clear from the said provisions of the statute that the words "officers and employees" in the act are broad enough to include all that large class of officers and employees to which appellees belong—i. e., all the officers and employees employed in the various public offices of the county, and designated in section 9 of article 10 of the constitution as "deputies and assistants," whose number shall be determined by rules of the circuit court and whose compensation shall be determined by the county board.

This act is very similar in all its provisions to the Civil Service Pension Fund Act of 1911 (Laws 1911, p. 158) that was sustained by this court in *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431 [Bul. No. 169, p. 56]. It was in that case held that the effect of the law was to reduce the salaries of the officers and employees coming within the provisions of the act \$2 per month, or \$24 per year. The same holding must necessarily be made in this case, as every reason and argument for the holding in that case will be

found applicable to this case. The rule of law universally obtains that the legislature has complete and absolute power, not only over public officers and officials, but also over the compensation attached to the office and the manner and character of its duties, and their performance, in the absence of a constitutional provision limiting that power or placing it elsewhere. [Cases cited.] The legislature, however, has no such power or right over the class of officers to which appellees belong. Said section 9 of article 10 of the constitution has expressly lodged the power and authority in the county board of Cook County to determine the salaries of appellees and all other deputies and assistants appointed under said section of the constitution, and the legislature has no power or right to fix the salaries of such deputies and assistants or to raise or lower their salaries. The act in question, therefore, can have no binding effect as to appellees, and as to all that class of deputies and assistants provided for by said section of the constitution, and whose salaries the legislature has no power to determine, it is void.

The presumption must be indulged that the legislature only intended the act to apply to those officers and employees whom the legislature had the right or power to control and provide for in such a bill, and we are not warranted, therefore, in holding that it would not have passed the act had it known that the act could not apply to the class of officers to which appellees belong. Appellees, however, have a right to have appellant perpetually enjoined from deducting and retaining \$2 per month, or any other sum, from their salaries and the salaries of any of the other officers and employees in the class to which appellees belong; but the act should not be held absolutely void as to all officers and employees of Cook County, as was done by the decree of the court in said cause.

For the reasons aforesaid, the appellees were entitled to equitable relief, as was apparent from the allegations of their bill. The court, therefore, properly overruled the demurrer to the bill. Appellees were not entitled, however, to have the act declared entirely void as to all such officers and employees provided for therein.

PENSIONS FOR EMPLOYEES—REMOVAL FROM PENSION LIST BECAUSE OF ALLOWANCE OF COMPENSATION—*Dickey v. Jackson et al.*, *Supreme Court of Iowa* (Dec. 11, 1917), 165 *Northwestern Reporter*, page 387.—George W. Dickey was a member of the police force of the city of Des Moines, and a contributor to the policemen's pension fund, for which 1 per cent of his wages was regularly deducted. On October 9, 1914, in pursuance of orders, he engaged in certain physical tests, in the course of which he fell and received disabling injuries. He was placed upon the pension roll at the rate of \$41.25 per month, which was one-half his salary. This sum was paid until July 7, 1916, when the trustees of the pension fund removed him from the pension roll and refused further payments. The reason for this action was that an award had been made to Dickey under the workmen's compensation act of \$10 per week for 52 weeks until

October 23, 1915; \$8 per week from that date until March 23, 1916; and \$5 per week until the entire period of compensation should reach 300 weeks. The district court of Polk County, on trial of the suit of Dickey against the trustees and the city treasurer, annulled the order taking him from the roll, and directed the treasurer to make payment of the monthly pension. This judgment was affirmed by the supreme court after a review of the provisions of the pension act, which is compulsory on all cities having an organized police department, and of the compensation law, and the conclusion was reached that the distinction between the forms of benefit was such as to make the rulings against the right to double pensions inapplicable.

Attention was also called to the amendment of the compensation law, effective July 4, 1917, by which officers and employees of cities who are eligible to pensions are excluded from the operation of the act, thus indicating the right of the claimant to both benefits under the law as it existed when his rights arose, but also preventing a continuance of such a situation in cases occurring in the future.

PEONAGE—HOLDING TO WORK BY THREATS AND PUTTING IN FEAR.—
Bernal v. United States, United States Circuit Court of Appeals, Fifth Circuit (Apr. 6, 1917), 241 Federal Reporter, page 339.—Aurelia B. Bernal was convicted on a charge of peonage and sentenced to imprisonment for two and one-half years. It was alleged that when Rosenda Nava, a Mexican alien, was at work as a domestic servant at Laredo, Tex., for \$4 per week, the respondent represented to her that she was the proprietor of a small hotel at San Antonio, and engaged her to work as a chambermaid at \$6 per week. The respondent paid her railroad fare and took the woman to a house of prostitution operated by her. The witness refused to practice prostitution and was set to work at menial domestic tasks, without pay and with very little to eat, and told that she could not leave the house until she paid back the amount of the fare, and that, if she tried to leave the immigration officers would be notified and would imprison her. The employee did not have any money and did not know her way around town and remained in fear of the respondent. Finally she succeeded in sending a note to a cousin, and the latter sent a policeman who removed her from the house and eventually restored her to her family. Her testimony as to these facts were corroborated by two girls at the house, and in part by the respondent herself. The jury which considered the case reported, after deliberating from Saturday until Monday, that they stood 8 to 4. The judge charged them as to their duty to agree, and they finally brought in a verdict

of guilty. The court, one of the three judges dissenting, affirmed the judgment, Judge Foster saying in the opinion delivered by him:

The law takes no account of the amount of the debt or the means of coercion. It is sufficient to constitute the crime that a person is held against his will and made to work to pay a debt. (*Clyatt v. U. S.*, 197 U. S. 207, 25 Sup. Ct. 429 [Bul. No. 60, p. 695].) The court charged the jury clearly and explicitly on the law. The credibility of the witnesses, the weight and sufficiency of the evidence, and the resolving of the conflicts in the testimony were matters for the jury. If they believed the witness Rosenda Nava, her testimony was sufficient to support the indictment.

The defendant complains most loudly, however, because the jury was held from Saturday until Monday, and of the supplemental charge of the court. It is not unusual for juries to be held over Sunday in criminal cases; but, in any event, this was a matter resting in the sound discretion of the court, and no abuse of discretion is shown. Neither was there error committed in giving the supplemental charge.

RAILROADS—HEADLIGHTS—FEDERAL AND STATE LAWS—*Louisville & Nashville R. Co. v. State, Court of Appeals of Alabama (June 30, 1917)*, 76 *Southern Reporter*, page 505.—The railroad company named was convicted by the criminal court of Jefferson County of violation of the State law enacted in 1915, relating to locomotive headlights. The court of appeals, however, being itself of the opinion that the law was invalid, certified to the supreme court the question of its validity. The supreme court, Judge Thomas delivering the opinion, agreed that the statute had no application to engines engaged in interstate commerce, because, Congress having acted in the field, all State legislation on the subject was of no force.

The act of Congress of March 4, 1915, was by its terms to take effect six months after its passage. It extended the provisions of the act of February 17, 1911, relating to locomotive boilers and their appurtenances, "to apply to and include the entire locomotive and tender and all parts and appurtenances thereof." The inspectors were given the same powers as to these matters as they had had with reference to boilers. The original act provided for the proposal of rules by the chief inspector to be binding upon the carriers after approval by the Interstate Commerce Commission. The commission took under consideration, and finally approved rules similarly proposed under the amendment of 1915, Nos. 29 and 31, relating to headlights, but these were at first objected to by the carriers, and the approval was delayed until after the commission of the offenses under the State law, for which the company was convicted. It was held, however, that Congress had by the passage of the act occupied the field from the time of such enactment.

RAILROADS—SAFETY APPLIANCES—HANDHOLDS—SUSPENSION OF OPERATION OF STATUTE—*Illinois Central Railroad Co. v. Williams, Supreme Court of the United States (Jan. 8, 1917), 37 Supreme Court Reporter, page 128.*—George R. Williams, a switchman for the company named, brought action against it for injury, alleging as negligence a violation of the Safety Appliance Act. The employee was climbing to the top of a box car by means of a ladder on its side for the purpose of setting the brake, when a handhold at the top of the ladder and on the roof of the car gave way, causing him to fall to the ground. Judgment in his favor in the trial court was affirmed by the Supreme Court of Mississippi, and the company again appealed. The second section of the Safety Appliance Act of April 14, 1910, requires, among other appliances, secure handholds or grab irons at the top of ladders. The third section provides for the fixing by the Interstate Commerce Commission of standards for the appliances mentioned in section 2. By an order of March 13, 1911, the commission set such a standard and allowed an extension of time of five years from July 1, 1911, for conformity to the same. The company contended that this order suspended the operation of section 2 also until the date named. This construction the Supreme Court did not accept, and it affirmed the judgment below. Mr. Justice Clarke delivered the opinion, the concluding portion of which is as follows:

To change these safety appliances on all the cars in the country from what they were as contemplated by sec. 2—"secure," but differing "in number, dimensions, location and manner of application"—to what they must be when standardized to meet the requirements provided for in sec. 3, was regarded by Congress as a work so great and expensive that it wisely committed to the informed discretion of the Interstate Commerce Commission the power and duty of determining the length of time which the carriers should be allowed in which to accomplish it. To give this discretion to the commission is the function, and the only function, of the proviso of sec. 3, and the claim that, by construction, power may be found in it to suspend sec. 2, is too forced and unnatural to be seriously considered.

SEAMEN—CONTRACTS—RELEASE—*The Moana, United States District Court, Northern District California, First Division (Oct. 30, 1916), 236 Federal Reporter, page 809.*—John Suarez and three others libeled the British steamer *Moana* for their wages on a return trip from New Zealand to San Francisco. They were engaged by the assistant engineer to take the place of four others who had been employed but at the last moment failed to appear. They claimed that they were told by him that the voyage upon which they were entering was to be from San Francisco to New Zealand and return,

and that otherwise they would not have gone on board. They could not read English, nor speak it to any extent, and on signing articles for the voyage three days later they were again told, as they testified, that the articles were for a round trip; as a matter of fact they were for one way only, and the purser testified that this was explained to them. At New Zealand they were discharged, received their wages, and signed releases accordingly. They wished to return on the boat as employees, but were not permitted to do so, and returned as third-class passengers. They were awarded damages to the amount of their wages on the return, Judge Dooling saying in the opinion written by him:

The only testimony before the court concerning what the engineer's assistant told them at the time he procured them to go on board shortly before the vessel sailed is the testimony of the libelants. From this and the attendant circumstances the court must find that libelants understood before they went aboard the *Moana* that they were shipping for a voyage from San Francisco to New Zealand and return, and under the circumstances the finding will be that such was their contract. That being so, it is not of much materiality to determine just what was done on board ship at the time of signing the articles, although I believe the libelants then understood they were signing articles for the return trip. There was, however, little else that they could then do, save to sign such articles as were presented to them. The ship in San Francisco was short-handed, and the time for her departure was near. It was necessary to have men, and the assistant engineer was apparently authorized to secure them, and did so. Under such circumstances his contract was the contract of the ship. That these seamen, speaking little English, signed off in a distant land before they could get the money then earned, does not seem to me to be a matter of much importance. They were prevented from returning as employees of the ship because of the opposition of the Sailors' Union in New Zealand, of which they were not members. The master, perhaps, did not know just what arrangement the assistant engineer had made with libelants; but, as such assistant was apparently authorized to employ the men, and did so, the ignorance of the master as to the terms of such employment can not lessen the responsibility of the ship. Libelants were employed for a round trip from San Francisco to New Zealand and return, and are entitled to the wages prayed for.

SEAMEN — WRONGFUL DISCHARGE — OVERTIME — WAGES — *Alaska Steamship Co. v. Gilbert, United States Circuit Court of Appeals, Ninth Circuit (Oct. 23, 1916), 236 Federal Reporter, page 715.*— Arthur J. Gilbert proceeded by libel against the steamship *Seward* to recover his wages for a voyage beginning and terminating at Seattle, his fare from Juneau, Alaska, to Seattle, his expenses at Juneau, and damages alleged at \$500. He was employed on board the vessel as night watchman at Seattle September 25, 1915. No

hours of service were fixed, but on a previous trip he had been on duty from 6 p. m. to 6 a. m., and he began to observe the same hours on this trip. On October 3, while preparing, at 5.45 p. m., to go on watch, the first mate asked him why he was not on watch. He replied that it was not 6 o'clock yet, and the mate told him he was supposed to be on watch at 5 o'clock. The watchman remarked that that would mean an hour's overtime for him, and before the conversation ended the mate asked him whether he would keep the hours demanded without pay for overtime, and he replied that he would not. He proceeded with his duties, and the next day he was put on shore at Juneau. Wages up to that point were tendered and refused. It was 10 days before he was able to get passage for Seattle. The court adopted the opinion of Judge Neterer, of the district court, which held that the seaman was entitled to his wages, his necessary expenses at Juneau, and his fare back to Seattle. A part of this opinion is as follows:

The fact that no definite hours were prescribed for him by the shipping articles, or by the agreement between the Puget Sound Shipping Association and the Sailors' Union of the Pacific, and the hours of 6 to 6 having been given him on a prior voyage, and he having continued under the same hours upon this voyage, and the first intimation he had that the hours should be changed was at the time of this conversation, would indicate suggestion for extra time, as it would add an hour to the time previously required of him. There is no showing of disqualification or unfitness for service, nor mutinous or rebellious or contumacious conduct. Under the circumstances, the mate should have dealt with the libelant in a more indulgent spirit. Libelant should not have used the expression to his superior officer which he did, and yet there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime, and the mate would not, under the circumstances, have the right to discharge him.

SUNDAY LABOR—"FACTORY"—PASTEURIZING AND BOTTLING MILK—
People v. R. F. Stevens Co. (Inc.), Supreme Court of New York, Appellate Division, Second Department (May 11, 1917), 165 New York Supplement, page 39.—The company named was convicted in the court of special sessions, city of New York, of a violation of the section of the labor law prohibiting the operation of factories on Sunday. The question was presented whether an establishment for pasteurizing and bottling milk is a factory. Judge Blackmar delivered the opinion, in which the decision of the lower court was reversed, and the employment of a man in pasteurizing was held not to constitute a breach of the statute. The definition of a factory in section 2 of the labor law, as interpreted in a former decision, was first quoted, showing that to bring an establishment within that definition "there must

be some manufacturing." That the operations referred to are not manufacturing was held to be determined by a previous decision, though it related not to the regulation of labor but to taxation.

One subsection of the act contains an exception of certain establishments, including milk-bottling plants. It was argued that the exception would be useless and meaningless unless such establishments were factories under the act. The court held, however, that this would not be presumed, since the exceptions were not originally included, and "that the exemptions were passed from excess of caution." It was also remarked that the person upon whose employment the charge was based in the present case was engaged in pasteurizing rather than bottling.

SUNDAY LABOR—NECESSITY—MOVING-PICTURE THEATER IN CITY NEAR TRAINING CAMP—*Rosenbaum v. State, Supreme Court of Arkansas (Dec. 10, 1917), 199 Southwestern Reporter, page 388.*—Louis Rosenbaum was convicted of violation of a statute in operating a moving-picture show in the city of Argenta, Ark., on Sunday, July 29, 1917. The statute of the State forbidding Sunday labor is similar to the usual one, and excepts services of "daily necessity, comfort, or charity." It was sought to make the point that the opening of moving-picture houses in Argenta and Little Rock was a necessity under the circumstances existing, since some thousands of soldiers in Camp Pike and Fort Logan H. Roots near by, were at liberty on Sundays only, and in need of such recreation. Judge Wood delivered the opinion, and reviewed at some length the history of the institution of the Sabbath, or Sunday, and the reasons for its observance. The conclusion was that no necessity for the labor done was shown, and the judgment of conviction was affirmed. A brief quotation is made from the concluding portion of the opinion, as follows:

Excluding from our consideration the opinion evidence, reasonable minds under a correct interpretation of the statute could not reach any other conclusion than that the labor performed by appellant and his employees was not that of daily necessity, comfort, or charity. The qualifying word "daily" is significant of the kind of necessity. It must be such as is required to meet a daily need.

In construing the term "necessity," we have given it a liberal rather than a literal interpretation, holding that an absolute unavoidable physical necessity is not meant, but rather an economic and moral necessity. It is said in *Shipley v. State*, 61 Ark. 219, 32 S. W. 489, 33 S. W. 107:

"If there is a moral fitness or propriety for the work done in the accomplishment of a lawful object, under the circumstances of any case, such work may be regarded a necessity, in the sense of the statute."

Judge Wood then refers to decisions upon facts very closely resembling those in the present case, where necessity was held not to exist.

SUNDAY LABOR—OBSERVANCE OF JEWISH SABBATH—SUIT TO RESTRAIN PROSECUTION—*Cohen v. Webb, Court of Appeals of Kentucky (Mar. 23, 1917), 192 Southwestern Reporter, page 828.*—Samuel Cohen brought suit against U. G. Webb, police judge, to obtain an injunction or a writ of prohibition to prevent the latter from enforcing the Sunday law against the former. Cohen, in good faith, kept the Jewish Sabbath, transacting no business from sundown on Friday until sundown on Saturday. Repeated prosecutions were instituted against him, and the judge instructed the jury that such observance did not exempt a person from the operation of the Sunday laws, as it did not constitute the observance of any other calendar day as the Sabbath. On conviction fines were levied, each less than \$20, so that no appeal could be taken to a higher court, and on nonpayment Cohen was imprisoned, and sought a remedy as stated. The court held that injunction or prohibition would not lie under the circumstances, but also held that the keeping of the Jewish Sabbath was sufficient to exempt one from keeping Sunday, and remarked that undoubtedly the police judge would be governed in the future by this opinion of the supreme court. Judge Clay, who delivered the opinion, said in part:

Clearly, it was not the purpose of the legislature to interfere with the Jewish conscience and require the members of that sect to continue to rest after their day of rest had ended. Of course, in speaking of Sunday, the statute refers to Sunday according to the Christian calendar and provides for its observance as such. When it comes to provide for an exemption, the controlling feature is the observance of another Sabbath than Sunday and not the observance of a mere statutory day. In other words, the purpose of the statute is to give to each sect its particular Sabbath or day of rest. Any other view of the statute would require the plaintiff not only to observe his own Sabbath for a period of 24 hours, but to observe a period of time not covered either by his Sabbath or the Christian Sabbath. We, therefore, conclude that both the police court and circuit court erred in holding that plaintiff was guilty under the statute, notwithstanding the fact that he regularly observed the Jewish Sabbath from sundown Friday evening to sundown Saturday evening.

WAGES — MINIMUM-WAGE LAW — CONSTITUTIONALITY — *State v. Crowe, Supreme Court of Arkansas (June 4, 1917), 197 Southwestern Reporter, page 4.*—The Legislature of Arkansas passed, in 1915, an act, No. 191, "to regulate the hours of labor, safeguard the health,

and establish a minimum wage for females in the State of Arkansas." In the present case the validity of that part of the statute relating to the minimum wage was in controversy, and the circuit court of Sebastian County had given judgment for the defendant Crowe, against whom proceedings had been instituted by the State, on the ground that the law had not been legally enacted. The supreme court, however, held the law constitutional, and reversed the judgment, remanding the case for further proceedings.

As to the contention that the act violates the fourteenth amendment, Judge Hart cited the Oregon decision in *Stettler v. O'Hara*, 69 Oreg. 519, 139 Pac. 743 (Bul. No. 169, p. 173), and referred to its affirmance by the United States Supreme Court without opinion, awaiting which decision the Arkansas court had deferred the announcement of its own. Decisions were cited and quoted affirming the validity of laws limiting the hours of labor of and otherwise affecting women, as were also decisions of the Supreme Court of the United States and of State courts upholding limitations to the right of free contract, enacted under the police power. The concluding portion of the opinion is for the most part as follows:

It is a matter of common knowledge of which we take judicial notice that conditions have arisen with reference to the employment of women which have made it necessary for many of the States to appoint commissions to make a detailed investigation of the subject of women's work and their wages. Many voluntary societies have made this question the subject of careful investigation. Medical societies and scientists have studied the subject, and have collected carefully prepared data upon which they have prepared written opinions. It has been the consensus of opinion of all these societies, medical and other scientific experts, that inadequate wages tend to impair the health of women in all cases and in some cases to injuriously affect their morals. Indeed, it is a matter of common knowledge that if women are paid inadequate wages so that they are not able to purchase sufficient food to properly nourish their bodies, this will as certainly impair their health as overwork. It is certain that if their wages are not sufficient to purchase proper nourishment for their bodies the deficiency must be supplied by some one else or by the public, if they are to keep their normal strength and health. The investigations above referred to show that it has become absolutely necessary for many women to work to sustain themselves, and that they have no one to assist them. The strength, intelligence, and virtue of each generation depends to a great extent upon the mothers. Therefore the health and morals of the women are a matter of grave concern to the public, and consequently to the State itself.

The members of the legislature come from every county in the State. The presumption is that it passed the statute to meet a condition which it found to exist and to remedy the evil caused thereby.

As said in *Stettler v. O'Hara*, *supra*, we believe that every argument put forward to sustain the maximum hours law or the restriction of places where women work applies equally in favor of the

minimum wage law as also being within the police power of the State and as a regulation tending to guard the public morals and the public health. Of course, the legislature could not fix an unreasonable or arbitrary minimum wage, but it must be fair and reasonable. It has been said that as to what is fair and reasonable there is no standard more appropriate than "the normal needs of the average employee, regarded as a human being living in a civilized community."

WAGES—MINIMUM-WAGE LAW—CONSTITUTIONALITY—*Williams v. Evans et al., Supreme Court of Minnesota (Dec. 21, 1917), 165 Northwestern Reporter, page 495.*—E. W. Williams instituted a suit to enjoin Eliza P. Evans and others, members of the minimum-wage commission of Minnesota, from enforcing orders fixing minimum wages. Another similar suit by the A. M. Ramer Co. was tried together with the Williams case. The act, passed in 1913, establishes a minimum-wage commission and provides for the determination by it of minimum wages for women and minors. Employers in any occupation are prohibited from employing any worker at less than a minimum wage determined and established by the commission. This determination is made after investigation and public hearings, is effective 30 days after issuance of an order, and may be applicable to the whole State or a portion thereof; but such order may be issued only if the commission finds that one-sixth or more of the women and minors employed in the occupation under consideration are receiving less than living wages. The members of the commission duly issued certain orders fixing wages, and the employers brought these actions to restrain their enforcement, on the ground that the statute is unconstitutional. The district court of Ramsey County held the law void and issued a temporary injunction. The supreme court took the opposite view, upheld the law and reversed the order for an injunction. Judge Hallam, speaking for the court, expressed the opinion that such limitations on legislative power as were contained in the State constitution are not more restrictive than those of the fourteenth amendment to the Federal Constitution, and therefore directed attention to the question whether the act violated the provisions of this amendment. Continuing, the opinion reads as follows:

The pertinent part of the fourteenth amendment reads:

"Nor shall any State deprive any person of * * * liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This guarantees to the citizen liberty of contract and liberty to conduct his business affairs in his own way. [Cases cited.] This right it is claimed has been infringed by this statute.

The liberty of contract guaranteed by this amendment is not absolute. It is subject to the power of the State to legislate for certain permissible purposes. [Examples given and cases cited.]

The extent of the police power, giving legislatures authority to restrict liberty of contract, and the principles governing its exercise are examined, and the opinion continues:

Bearing these principles in mind, we must determine whether this statute is within the proper field of legislation.

There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the workers and of future generations as well.

It is a strife for employer and employee to secure proper economic adjustment of their relations, so that each shall receive a just share of the profits of their joint effort. In this economic strife, women as a class are not on an equality with men. Investigating bodies, both of men and of women, taking all these facts into account, have urged legislation designed to assure to women an adequate working wage. The legislatures of 11 States have passed laws having the same purpose as the one here assailed.

It is not a question of what we may ourselves think of the policy or the justification of such legislation. The question is: Is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education, or good order of the people and are "greatly and immediately necessary to the public welfare"? If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem to be solved by the exercise of legislative judgment and discretion. (*Holden v. Hardy*, 169 U. S. 366, 398, 18 Sup. Ct. 383 [Bul. No. 17, p. 625].)

We think sufficient basis exists. It is not necessary that we should hold that statutes of this kind applicable to men would be valid. We think it clear there is such an inequality or difference between men and women in the matter of ability to secure a just wage and in the consequences of an inadequate wage that the legislature may by law compensate for the difference. That there is such difference has been recognized as an economic fact by the United States Supreme Court. (*Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 [Bul. No. 75, p. 631]; *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342 [Bul. No. 189, p. 133].) Two cases have arisen in other States involving the constitutionality of minimum-wage laws for women. In both the laws were sustained. *Stettler v. O'Hara*, 69 Oreg. 519, 139 Pac. 743 [Bul. No. 224, p. 220]; *State v. Crowe* (Ark.) 197 S. W. 4 [see p. 191].

We sustain the principle of minimum-wage legislation as applied to women. By like reasoning the principle may be sustained as applied to minors.

The objection that the law embodies an unlawful delegation of legislative power to the commission was taken up and the principles

governing the question examined by a reference to the decisions, concluding with an extract from the opinion in an Ohio case, quoted in *Field v. Clark*, 143 U. S. 649, 693, 694, 12 Sup. Ct. 495. This quotation and the court's further discussion are given herewith:

"'The true distinction' * * * is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of law. The first can not be done; to the latter no valid objection can be made."

Respondent contends that this act was not a complete law when it left the legislature and that there was no complete law until after the commission made an order and that the power to determine "when and where there shall be any law, and what it shall be, is to be exercised at the whim and caprice of the commission."

Let us address ourselves to this question. As above stated, section 20 defines a living wage. Section 12, in effect, enjoins every employer to pay a living wage "as defined in this act and determined in an order of the commission."

We think this must be construed as establishing a living wage as defined in the act as the lawful minimum wage, and as fixing a living wage as so defined as the standard by which the commission must be guided in determining a minimum wage for any occupation. The determination of a minimum wage by the commission is accordingly a determination of a fact "upon which the law makes * * * its own action depend."

We do not overlook the fact that the statute can not be effectively executed nor its penalties enforced until the commission establishes a minimum wage, nor the fact that the commission is given a discretion as to when to make the investigation into any particular occupation which may result in an order fixing a minimum wage in that occupation. These provisions vest "discretion as to its execution to be exercised under and in pursuance of the law," and they do not prevent the act from being a complete law nor render it invalid. There are abundant instances of the application of this principle. [Illustrations cited.]

The principles stated are now well recognized. The act contains no delegation of legislative power.

Minor objections also were overthrown, with the result, stated above, that the law was affirmed as valid.

WAGES—PAYMENT IN SCRIP—CONSTITUTIONALITY OF STATUTE—FREEDOM OF CONTRACT—NOTE GIVEN FOR ACCRUED WAGES—*Ex parte Ballestra*, *Supreme Court of California* (Nov. 16, 1916), 161 *Pacific Reporter*, page 120.—John Ballestra petitioned for a writ of habeas corpus for his release, he having been arrested upon the charge of violating the California statute forbidding payment of wages in scrip or any kind of order, etc., unless redeemable in full and immediately in lawful money. He questioned the constitutionality of this statute,

but it was upheld and the prisoner remanded to custody for trial. Judge Shaw, in delivering the opinion for the court, said:

The right to make contracts, like other personal and property rights, is subject to reasonable regulation designed and calculated to promote the general convenience, prosperity, and welfare. Laws having a reasonable tendency to accomplish these results, and not imposing unreasonable burdens upon individuals, are valid. The provisions of the statute in question do not transgress this rule. As applied to ordinary transactions between employers and employees, of the kind embraced within its terms, the statute is, in our opinion, valid and constitutional.

The affidavit on which Ballestra is held in custody charged, in the language of the statute, that on October 30, 1915, in Sonoma County, Cal., Ballestra "did willfully and unlawfully issue in payment of and as evidence of indebtedness for wages due an employee, to wit: Pasquale Barbaries," a certain note set forth in the affidavit, for the amount of wages due Barbaries, payable two years after date, and not on demand, no part of which has been paid. This clearly states an offense embraced in the description given in the statute.

WAGES—SECURITY FOR PAYMENT—CONTRACTORS' BONDS—*Northwestern National Bank of Bellingham v. Guardian Casualty & Guaranty Co., Supreme Court of Washington (Dec. 12, 1916), 161 Pacific Reporter, page 473.*—Brooks & Olsen contracted with the city of Bellingham for the construction of a water main and gave a bond, with the guaranty company named in the title of the case as surety, conditioned upon the payment of claims for labor and materials. The contractors made an arrangement with the bank named to make loans for the carrying on of the work, agreeing to give the bank as security assignments of all warrants issued by the city under the contract. Such assignments were given and filed with the city comptroller. Certain warrants were paid by the city to the bank, leaving a balance of \$2,300 and interest due on the notes given by the contractors to the bank. After a time the bank ceased to make advances to the contractors upon their notes, but cashed time checks and vouchers issued by the contractors for labor and materials, taking the checks and vouchers with a formal assignment upon them. The contract did not, as is often the case, contain a provision for the payment of a certain percentage of the estimated value of work done to the contractors and the withholding of the balance to meet unpaid claims for labor and materials, but did provide that the city might withhold any and all payments until satisfied that wages and claims for materials had been met. Action was brought by the bank to recover from the guaranty company the \$2,300 due on the notes and several thousand dollars, the amount of time and material checks cashed. The city showed that after making the payments to the

bank under the assignments of warrants and paying other claims for labor and materials it still had nearly \$3,400, which it paid into court for distribution. Besides claims for materials and those clearly for labor, properly speaking, the bank had purchased those of two subcontractors and of the bookkeeper and stenographer for the contractors. The bank contended for the payment of its \$2,300 out of the money paid into court, on the ground that the contractors had assigned to it all moneys to become due, as security for their notes given it. The guaranty company asserted that the bank's claim to the \$2,300 was inferior to that of the laborers and material men. The court held that, since the assignments taken from the contractors by the bank were filed with the city comptroller prior to any notice that labor and material claims had not been or would not be paid, and since the contract contained no provision for an absolute reserve of any portion as security for such claims, and since nothing had been withheld at that time for that purpose, the bank's claim was prior.

As to the claims of laborers and material men assigned to the bank, the guaranty company contended that the bank, having agreed with the contractors to advance them money, had a right to pay such claims under this agreement, but none to purchase them; but the court held that the bank had such a right like any one else.

The company next contended that the laborers and material men could assign rights of action against the contractors, but not their rights to proceed against the surety on the bond. The court held that the right under the bond attached to the other right and passed by the assignments. The claims of the subcontractor and the bookkeeper were held not lienable, and the bank, therefore, not entitled to recover for their amount. The net result was that the sum held by the court was applied, first, to the \$2,300 and interest, constituting the balance on the notes, and then to the claims for labor and materials held by the bank. The bank was then given judgment against the guaranty company for the balance of these claims, exclusive of those of the subcontractors and the bookkeeper.

WAGES—SEMIMONTHLY PAY DAY—CONSTITUTIONALITY OF STATUTE—*Arizona Power Co. v. State, Supreme Court of Arizona (June 23, 1917), 166 Pacific Reporter, page 275.*—The company named was convicted of the offense of refusing to pay one of its employees the wages due him at the time of his quitting its service, as provided in sections 705, 706, Penal Code, 1913. There was no dispute as to the facts, but the company questioned the validity of the law, first, because, as it claimed, while the penalty provided was a fine, imprisonment for debt might be a consequence of proceedings for its collec-

tion. The court, speaking through Judge Ross, held that the corporation could not sustain this objection, as is shown by the following extracts from the opinion:

It is not possible, in fact or in law, to imprison appellant, either on mesne or final process; it can not, as an individual, be arrested or committed to jail.

If the fine is ever collected, it will not be by jailing the corporation, but by execution against its property. The constitutional inhibition is against imprisonment for debt; it does not prohibit the use of other means to enforce the payment of a just debt. The stigma of imprisonment is forbidden, and while the debtor, honest and dishonest, is thus protected by the Constitution, the legislature is not denied the power to impose penalties or fines as a means of inducing an unwilling and litigious employer to make payment of wages promptly and at short intervals when the public welfare demands and requires it.

The appellant is not in a position to challenge the constitutionality of the law on the ground of its application to individuals; that question can only be raised by parties whose rights are involved or affected thereby.

Arguments that the contract contained in the charter of the corporation was impaired by the law, and that the classification, by which corporations and not other employers similarly situated were affected, was unreasonable and arbitrary, and therefore unconstitutional, were overruled by the court, which then said:

In the case of *State v. Missouri Pacific Railroad Co.*, 242 Mo. 339, 147 S. W. 118 [Bul. No. 112, p. 134], every conceivable objection was urged against the constitutionality of the law, which is practically the same as ours. All of these objections were taken up and fully discussed by the court and held to be without merit. We do not deem it necessary to set forth here the reasons given by the court in support of its decision, but suffice it to say that they seem to us to be in line with the general trend of the more recent development and expansion of the law under what is known as the police power of the State.

A further contention was that the act was void for uncertainty because in case the employee quits it is required that the employer shall make payment of wages due "at once." It was claimed that this must mean within a reasonable time, which would make its application uncertain. The question of the proper interpretation is discussed, and the opinion concludes as follows:

The statute does not, in terms, require the employee to demand of the employer to pay, or require a state of facts showing the futility of demand, yet without it no offense is made out, for it is possible that the employee may refuse payment, or can not be found, or is incapacitated. A demand and refusal to pay are essential elements of the crime. So, under our law, notice to the employer by the employee that he has quit, a demand for the payment of his wages, and a refusal to pay are essential elements of the offense defined. There

can not be a failure or refusal to pay until notice is given by the employee to the employer that he has quit and a demand made for his wages.

The admitted facts of the case are that one T. P. Caughlin, an employee of the appellant, quit work on the 23d day of September, 1915, at which time he notified the appellant that he had quit. The wages due him at that time was the sum of \$22.07, the payment of which was then demanded. The appellant failed and refused to pay the wages, and did not pay them until on or about October 5th, appellant's regular pay day. No excuse for failing to pay the wages due Caughlin was offered, other than that the law was invalid.

We think clearly the prosecution made out a case under the law, and that the judgment of conviction should be affirmed; and it is accordingly ordered.

WAGES—TEN-HOUR LAW—OVERTIME—EFFECT OF SETTLEMENT AND RELEASE—*Sumpter v. St. Helens Creosoting Co., Supreme Court of Oregon (May 1, 1917), 164 Pacific Reporter, page 708.*—James L. Sumpter brought action for pay for overtime services from July 1, 1913, to September 27, 1914, as an assistant engineer, his regular wages being \$2.50 per 10-hour day. The amount of overtime was 435 hours, and the amount claimed to be due was computed at 37½ cents per hour. The company's claim that the 10-hour law, on which the action was based, was unconstitutional was overthrown, that question having in the meantime been settled by the decision in the case of *State v. Bunting*, 139 Pac. 731 (Bul. No. 169, p. 120), affirmed by the Supreme Court of the United States in *Bunting v. Oregon*, 243 U. S. 426, 37 Sup. Ct. 435 (Bul. No. 224, p. 160). The company then presented in evidence the monthly pay checks, which were so arranged as to embody statements of the account and to make the indorsements a satisfaction of the accounts; also the time checks, which when signed constituted receipts in full for labor to date. The judgment in the circuit court of Columbia County had been for the employee, but this was reversed, the supreme court holding that it was competent for an employee, by settlement on the basis of the regular pay without objection, to bar his rights for pay for the overtime. Judge Benson delivered the opinion, in concluding which he said:

It appears to us that this state of the pleadings and the evidence establishes beyond any question that there was an account stated and a settlement which constitutes a bar to this action. Plaintiff argues that such a conclusion is calculated to render the statute ineffective, but we can not agree with this contention. The law provides for a remedy in the shape of a criminal prosecution, but it nowhere prohibits the laborer from waiving his civil remedy after the labor is performed. It must be conceded that there is no power to compel plaintiff to prosecute this action and neglect to do so would be a complete waiver. An accounting and settlement is another way of

reaching the same result. We conclude that the defendant was entitled to a directed verdict, and a judgment will accordingly be entered here in its favor.

WEEKLY DAY OF REST—"FACTORY"—MACHINE SHOP OF TRANSIT COMPANY—*People v. Transit Development Co., Supreme Court of New York, Appellate Division, Second Department (May 25, 1917), 165 New York Supplement, page 114.*—The court of special sessions of the city of New York found the company named guilty of the employment of one Machiels, a machinist, for seven days without a rest period of 24 consecutive hours, as required by statute. The company was fined \$20, and appealed. The decision turned upon the question whether the place of employment was a factory under section 2 of the labor law. Power houses, etc., other than construction or repair shops, owned and operated by public-service corporations, are exempted. The company involved was auxiliary to a street railway company. The judgment of conviction was affirmed, the establishment where the work was performed being held to be a construction or repair shop. Judge Stapleton concluded the opinion delivered by him as follows:

The appellant argues that the fair and reasonable meaning of the words "construction or repair shops" should be limited to those repair and construction shops where general construction and repair work is carried on, and should not be extended to include purely maintenance work in a generating plant. It further argues that the phrase "other than construction and repair shops" modifies "other structures" and does not refer back to power houses, generating plants, barns, storage houses, sheds." We are not convinced by either argument.

From the operation of the statute, the legislature, by definition, specifically exempted power houses and generating plants owned or operated by a public-service corporation; but then, with particularity, it excludes repair shops from the benefit of the exemption. No distinction is expressed between a shop in which emergency repairs are made and a shop in which general repairs are made. The workshop in which Machiels was employed is a repair shop. Had it been housed in a building separate and apart from the power house, there would not, we think, be any question that those employed in it are entitled to 24 consecutive hours of rest in every calendar week. Why should the circumstance that it is operated under the same roof make a difference? We can not reason why.

WORKMEN'S COMPENSATION—ACCIDENT—FIREMAN CONTRACTING PNEUMONIA FROM WETTING—*Landers v. City of Muskegon, Supreme Court of Michigan (June 1, 1917), 163 Northwestern Reporter, page 43.*—Mary B. Landers, widow of William Landers, instituted proceedings to secure compensation for the death of her husband, who

had been employed as a fireman by the city named. On the morning of December 30, 1915, he was engaged in assisting to put out a fire in the hold of a steamer wintering in the port. The boat stood out of the water 40 feet, and much water from the hose rebounded upon the firemen, so that Landers became very wet. Twelve hours were required to extinguish the fire. He was taken ill the next morning, quit work on January 2, and died of pneumonia January 13. The claimant was awarded the expense of medical and hospital treatment and medicines, and \$7.81 per week for 300 weeks. The award was reversed by the court on the ground that the occurrence was not an accident under the law, Judge Bird for the court saying in part:

Landers was employed as a fireman. It was a part of his regular duties to go to fires and help extinguish them. In doing so, it was not an unusual thing for him to get wet. Not only does the proof show, but we think it is a matter of common knowledge, that firemen are subjected to exposure and drenching while attempting to extinguish fires.

We must therefore conclude that pneumonia was brought on, not by an unexpected event, but by an event which was an incident to his regular employment.

At about 11 o'clock in the forenoon, there was a sudden rush of water from the upper deck, which fell onto and drenched the firemen as they were working around the boat. This is assigned as the unexpected event which constituted the accident. The uncontradicted proof is that they were wet through two or three hours before this took place. We think this incident should be classed among the ordinary ones attending the duties of a fireman, and not as an accident.

If it can be said in the present case that the diplococcus germ was dormant in the system of the deceased, and that it was aroused to activity by his exposure at the fire, the case must fail, because the thing which aroused the germ into activity was caused by events which were incident to his regular employment, and not by the unusual and unexpected event.

WORKMEN'S COMPENSATION—ACCIDENT—TYPHOID FEVER FROM DRINKING INFECTED WATER—*State ex rel. Faribault Woolen Mills Co. et al. v. District Court, Rice County, et al., Supreme Court of Minnesota (Oct. 26, 1917), 164 Northwestern Reporter, page 810.*—An employee of the company named was awarded compensation by the district court, the injury alleged being typhoid fever said to have been contracted from drinking infected water furnished in the factory for the use of the employees. It is stated that if this constituted an "accident" within the definition contained in the law, the evidence was probably sufficient to sustain the findings of the district court. The law provides that the word "accident" shall "be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at

the time injury to the physical structure of the body." After reciting this definition, the opinion, written by Judge Taylor and reversing the award, says:

The evidence shows that typhoid fever is a germ disease; that it is produced by taking typhoid bacilli into the alimentary canal; that no deleterious effects result until the bacilli taken into this canal have multiplied enormously; and that it requires more than a week after the infection for the disease to develop sufficiently for its symptoms to be discernible. The disease does not result from an event which happens "suddenly and violently," nor from an event which produces "injury to the physical structure of the body" at the time it happens.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—FREEZING—*State ex rel. Nelson v. District Court, Ramsey County, et al., Supreme Court of Minnesota (Nov. 2, 1917), 164 Northwestern Reporter, page 917.*—C. N. Nelson was a janitor employed by the Northwestern Telephone Exchange Co. On February 22, 1916, he shoveled snow for about 1½ hours during very cold weather, and froze his big toe; the ultimate result of this injury was the amputation of his leg. The district court denied the compensation claimed by Nelson, holding that the injury arose out of his employment but was not an accident. He then carried the matter to the supreme court by writ of certiorari, where the decision was reversed and he was held entitled to compensation. It was first pointed out that since the trial the court, following the great weight of authority in other States, had decided, in the case of the *State ex rel. Virginia & Rainy Lake Co. v. District Court*, 164 N. W. 585, that freezing was an accident. The inquiry was therefore narrowed to the question whether the accident arose out of the employment. The majority of the few cases found in other States led to the conclusion that such was the fact, and the previous decisions in the *Rau* case relating to sunstroke (see below), and in one where the injury was caused by lightning, pointed in the same direction.

WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF THE EMPLOYMENT—SUNSTROKE—*State ex rel. Rau v. District Court, Ramsey County, Supreme Court of Minnesota (Nov. 2, 1917), 164 Northwestern Reporter, page 916.*—George Rau died as a result of sunstroke incurred while working as a street laborer for the city of St. Paul, and the district court named denied compensation to his widow, Lena Rau. This decision was reversed, the supreme court holding her entitled to compensation on the facts found which, with the

court's conclusions, are sufficiently presented in the following quotations from the opinions delivered by Judge Quinn:

The conditions surrounding decedent at the time of his injury exposed him to an unusual danger, different from that to which the masses engaged in like employment were subjected. It had rained the night before; the sand was wet; the sun's rays direct, thereby enhancing liability to sunstroke. Decedent was exposed to the direct rays of the sun, in addition to the humid atmosphere emanating from the wet street.

That the injury was sustained in the course of the employment is not denied; that it was an "unexpected and unforeseen event" is not questioned; and we have no difficulty in arriving at the conclusion that it was an event "producing at the time injury to the physical structure of the body happening suddenly and violently." It is undisputed that the day was extremely hot. The men had rested for three-quarters of an hour in the shade and had returned to their labor. Decedent was at work near the middle of the street, when, all at once, he was seen to stagger. He had been overcome; had suffered a sunstroke. This was a violent injury produced by an external power, not natural.

Where the work and the conditions of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an accident arising out of the employment.

WORKMEN'S COMPENSATION—ADMIRALTY—FEDERAL AND STATE JURISDICTION—*Clyde Steamship Co. v. Walker, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 545.*—William Alfred Walker was injured on July 1, 1914, while at work as a longshoreman for the company named. An award to him was affirmed by the court of appeals (215 N. Y. 529, 109 N. E. 604; see Bul. No. 189, p. 249). This was reversed on the same principle as governed in *Southern Pacific Co. v. Jensen*, decided on the same date (see next case below).

WORKMEN'S COMPENSATION—ADMIRALTY—FEDERAL AND STATE JURISDICTION—*Southern Pacific Co. v. Jensen, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 525.*—Christen Jensen was killed on August 25, 1914, while employed as a longshoreman in unloading the steamship *El Oriente*, belonging to the company named and plying between the ports of New York and Galveston. His average weekly wages were found by the workmen's compensation commission to be \$19.60, and an award was made to his widow of \$5.87 weekly, and to each of his two young children of \$1.96 weekly; also \$100 for funeral expenses. The company objected to the award on the ground that the Workmen's Compensation Act did not apply, first, because the employment was in interstate com-

merce, and second, because such application would be in conflict with the constitutional jurisdiction of Congress as to matters of admiralty. The award was affirmed by the courts of New York State, the opinion of the court of appeals being reported in 215 N. Y. 514, 109 N. E. 600; see Bul. No. 189, p. 221. However, the Supreme Court held the ground of contention relating to admiralty to be a valid one, and reversed the judgment, by a divided court standing 5 to 4. Mr. Justice McReynolds delivered the majority opinion, and after stating the findings of the commission and reviewing the proceedings below he said in part:

In *New York C. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232], we held the [New York compensation] statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error, being an interstate common carrier by railroad, is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908, and no State statute can impose any other or different liability. Second. As here applied, the workmen's compensation act conflicts with the general maritime law, which constitutes an integral part of the Federal law under article 3, section 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Co., a Kentucky corporation, owns and operates a railroad as a common carrier; also the steamship *El Oriente*, plying between New York and Galveston, Tex. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that act is not applicable in the circumstances.

The fundamental purpose of the compensation law, as declared by the court of appeals, is "the creation of a State fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments," among them being "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same, on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in *New York C. R. Co. v. White*, *supra*, and need not be repeated. Under the construction adopted by the State courts no ship may load or discharge her cargo at a dock therein without incurring a penalty, unless her owners comply with the act, which, in order to secure payment of compensation for accidents, generally without regard to fault, and based upon annual wages, provides (sec. 50) that—"an employer shall secure compensation to his employees in one of the following ways:" [Act quoted as to methods of security required and penalties for failure to comply.]

Article 3, section 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction;" and article 1, section 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by

this Constitution in the Government of the United States, or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. [Cases cited.] And further that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. (*The Lottawanna* (Rodd v. Heartt), 21 Wall. 558 [other cases cited].)

By section 9, judiciary act of 1789, the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. (Judicial Code, secs. 24 and 256.)

The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. [Cases cited.]

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. [Cases cited.] And finally, this remedy is not consistent with the policy of Congress to encourage investments in ships, manifested in the acts of 1851 and 1884, which declare a limitation upon the liability of their owners.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes and Mr. Justice Pitney delivered dissenting opinions, the latter presenting considerations additional to those given in the former opinion, while Mr. Justice Brandeis and Mr. Justice Clarke based their dissent upon the grounds expressed by both the others. From Mr. Justice Holmes' opinion the following quotations are taken:

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the State courts, and leaves some power of legislation, at least, to the

States. For the latter I need do no more than refer to State pilotage statutes, and to liens created by State laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the State courts, although the death was due to a collision upon the high seas. [Cases cited.]

Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source—that is, from the United States. There is no such law. The maritime law is not a *corpus juris*; it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. (*The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483.) One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master and to apply the common-law principles of tort.

Now, however, common-law principles have been applied to sustain a libel by a stevedore in personam against the master for personal injuries suffered while unloading a ship. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733, and the *Osceola* recognizes that in some cases at least seamen may have similar relief.

Such cases as *American S. B. Co. v. Chase*, 16 Wall. 522; *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, and *Atlantic Transport Co. v. Imbrovek*, supra, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a State from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

Mr. Justice Pitney also confined his dissent to the matter of admiralty, and short extracts only are given from the somewhat lengthy opinion:

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York act but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in *New York C. R. Co. v. White*.

The argument is that, even in the absence of any act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the Federal courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by State courts of common law when passing upon any case that might have been brought in the admiralty; and that, just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so nonaction by Congress amounts to an imperative limitation upon the power of the States to interpose where maritime matters are involved.

This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that before the Constitution were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts.

Nor is the reservation of a common-law remedy limited to such causes of action as were known to the common law at the time of the passage of the judiciary act. It includes statutory changes.¹

WORKMEN'S COMPENSATION—BENEFICIARIES—WIFE LIVING APART FROM HUSBAND—LEGAL OBLIGATION TO SUPPORT—LUMP SUM—*H. G. Goelitz Co. v. Industrial Board, Supreme Court of Illinois (Apr. 19, 1917), 115 Northeastern Reporter, page 855.*—Henry Hunley was killed by an accident in the course of his employment with the company named. The industrial board found that he left surviving him his lawful wife, Florence Hunley, and made an award of \$5.20 a week for 416 weeks, which was afterward commuted to the lump sum of \$1,925.91. The employing company took the matter to the circuit court, which affirmed the award, but certified the case to the supreme court as one proper to be reviewed by it. It appeared that Hunley had married Florence Taylor in 1885, and a son and daughter were born; that the mother and son were living in Calgary, Canada, at the time of Hunley's death; that for a time between 1893 and 1896 he had lived with another woman. The company contended that Florence Hunley was not dependent upon Hunley and could not recover compensation. Paragraph (a) of section 7 provides that compensation shall be payable for death in a certain amount "if the employee leaves any widow, child, or children whom he was under legal obligation to support at the time of his injury." It was held that under the circumstances the wife was included as a beneficiary, the fact that the son contributed to her support, and that she was the owner of a home, not being material. Judge Carter for the court said in part:

There can be no question, from the evidence, but that the husband was under legal obligation to support his wife.

The evidence on the hearing before the industrial board shows, without contradiction, that the applicant, Florence Hunley, was legally married to the deceased and had never been divorced. Hunley's unfaithfulness to his wife would undoubtedly justify the wife in living separate and apart from him thereafter, unless she condoned

¹ As a consequence of the decision in this case, the sections of the judicial code referred to by Mr. Justice McReynolds were amended by Congress (Oct. 3, 1917), so as to save to claimants "the rights and remedies under the compensation law of any State" in cases of admiralty and maritime jurisdiction, thus adopting by legislative action the position taken by the courts of New York and the minority of the Supreme Court.

the offense. There was no evidence or attempt by counsel to prove that she did condone his unfaithfulness.

The duty to support his wife is imposed by law on the husband. This duty does not depend on the inadequacy of the wife's means, but on the marriage relation. 13 R. C. L. 1188. Some of the statutes as to workmen's compensation in other jurisdictions provide that the wife must be living with the husband at the time of the injury, but our act does not so provide.

The award of a lump sum, however, was overthrown, since the record did not disclose evidence that it was for the best interests of the parties, but contained simply a statement by the attorneys for Mrs. Hunley.

WORKMEN'S COMPENSATION—BENEFITS—LOSS OF EYE ALREADY DEFECTIVE—*Purchase v. Grand Rapids Refrigerator Co., Supreme Court of Michigan (Dec. 21, 1916), 160 Northwestern Reporter, page 391.*—Clarence C. Purchase became a claimant for compensation, and an award was made against his employer, the company named. On March 17, 1915, Purchase, then 29 years of age, got hot sand in his right eye, and after treatment it was deemed necessary, on April 1, to remove the eye. During his childhood the eye had been severely injured, with the result that thereafter it was only capable of distinguishing light and perceiving the fact that an object was approaching it. He was able to return to work and earn undiminished wages after a few weeks, and the company contended that an award of the schedule rate for the loss of an eye, i. e., 50 per cent of wages for 100 weeks, was not warranted by the circumstances. In an opinion delivered by Judge Ostrander the court held that the law did not warrant the making of any distinction because of the previous impairment of the eye where some degree of usefulness had existed. The concluding portion of the opinion is as follows:

The legislature has not attempted a definition, or made a declaration, applicable to the case at bar, except in terms of the loss of an eye. It has not specified a normal eye, although it may be concluded that the law refers to an eye which performs in some degree the functions of a normal eye. A mere sightless organ might perhaps be considered no eye at all. Claimant has lost an eye, although an infirm one. It was not wholly useless as an eye. On the contrary, the testimony is that he could with it distinguish light and see approaching objects. As a result of the injury, there was disability, and the disability is "deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified. * * *

The conclusion of the board will not be disturbed.

WORKMEN'S COMPENSATION — BENEFITS — PARTIAL DISABILITY — EMPLOYEE EARNING MORE THAN BEFORE INJURY —*Dennis v. Cafferty et al., Supreme Court of Kansas (Mar. 16, 1917), 163 Pacific Reporter, page 461.*—Thomas E. Dennis was injured while employed by W. H. Cafferty and another, doing business as the Kansas City Sand Co. His work was to load cars with sand, moving them with a pinch bar, and on November 28, 1914, while tightening a brake on top of a car, he received an injury to his hand. He wore splints on it for eight weeks, and afterwards a leather strap. The court found that his average earnings at the time of the injury were \$13.50 per week, and that his probable weekly earnings would be \$12 a week; also that his total disability lasted for 42 weeks and partial disability for 80 weeks. He was allowed \$6.75 per week, or one-half his earnings, for 42 weeks, and \$3 per week, the minimum compensation, for 80 weeks. It was contended that the finding that his probable earnings would be \$12 a week was contrary to the evidence. He went to work at first on a "boy's job" for \$10.50 per week for three months. Then he operated a power punch, work which favored the injured hand, for some time up to March 11, 1916, when he was given another job for the same company at \$16.50, which he held until about the end of the month, the work still not being of a heavy nature. He resigned to accept a position as an overseer, on the duties of which he entered April 3, 1916, at \$36 a week, and was holding this position at the time of the trial, May 23. He testified that this position was temporary, but that he expected to be transferred to another place at the same wages. There was evidence to the effect that the hand was not strong, and that he would not be able to do such work as he was doing when injured. The court said that it was impossible to justify the finding as to the amount of probable earnings, but took the view that the language of the statute provides a minimum for partial disability, and not for partial wage loss. The line of reasoning followed is apparent from the following quotation from the opinion delivered by Judge West:

In framing the present act the legislature was providing for payment on account of death or injury occurring in certain hazardous employments, with the general view of compensation at the ultimate expense of the public patronizing the industry in which the disaster occurred. Certain boundary lines must needs be fixed to make the act practicable. Instead of 50 per cent any other per cent could have been designated in case of total incapacity. A minimum of \$3 a week was prescribed, not because it would in each case be in accord with precise justice, but because as a general thing this was deemed a fair lower rung for the ladder of allowances. While aiming at a thing named compensation, no way was found to avoid in every instance certain inequities, or to provide in advance that judgments of courts might never turn out to be, in the light of subsequent develop-

ments, slightly excessive or slightly lacking in sufficiency. Although the method of settlement and adjustment should have been, and was doubtless intended usually to be, without resort to the courts, it seems to have been considered that in any case of partial incapacity the traffic, otherwise the public, could and should bear at least \$3 a week. While partially disabled, should a workman by some happy revolution of the wheel of fortune, by entering a profession, or by obtaining a light, but lucrative position, be placed beyond the need of the \$3 allowance, no means has been provided for its detachment from the aggregate of his income. But this occasional plethora must be of comparatively short duration, and no serious results can follow.

WORKMEN'S COMPENSATION—BENEFITS—PERMANENT IMPAIRMENT OF USE OF FOOT—*Underhill v. Central Hospital for the Insane, Appellate Court of Indiana, Division No. 2 (Dec. 4, 1917), 117 Northeastern Reporter, page 870.*—Eugene Kellum received an injury on May 16, 1916, while in the employ of the Central Hospital, and claimed compensation. His pay had been \$30 per month, plus room, board, and laundry estimated to be of the value of \$2.50 per week. The industrial board found that he had received a permanent impairment of the use of his left foot amounting to 75 per cent, and awarded him \$5.50 per week (55 per cent of earnings) for 93½ weeks (75 per cent of the schedule period for severance of foot at the ankle). As the hospital had furnished board, room, and laundry covering the larger part of this amount, the balance was directed to be paid in a lump sum. The employee claimed benefits under section 29, relating to total disability, and having a maximum limit of 500 weeks. The court held, however, that compensation should properly be awarded under the general provisions of section 31, which gives the board discretionary power to make awards for permanent partial disability for a period not exceeding 200 weeks; but, as the same section provides among its specific rates 125 weeks for the severance of a foot, and it is said in the opinion that "The facts of this case do not disclose a severance of appellant's foot or any part thereof," a limitation of the possible award in this instance to 125 weeks would seem to be implied. There was held to be nothing to show that the award of benefits for 93½ weeks was not a reasonable one, and it was affirmed.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—PLASTERING SINGLE ROOM, DURING THREE OR FOUR DAYS—*Aurora Brewing Co. v. Industrial Board of Illinois et al., Supreme Court of Illinois (Feb. 21, 1917), 115 Northeastern Reporter, page 207.*—Gottlieb Mack was killed June 10, 1914, while in the employ of the company named, and while engaged in plastering a room in a building being erected as an

addition to the company's bottle shop. His widow made claim for compensation, and it was granted by the industrial board. At the time of his fatal injury by the slipping of a ladder he had been at work on the job about three days, and had practically completed it. He was paid a wage of \$4 per day, and worked alone, except for a helper. He had done work for the company in previous years, once for a month, and at other times for shorter periods. The court reversed the award, holding that such employment was casual and that the claimant was therefore not entitled to compensation. The following extracts are taken from the opinion delivered by Judge Carter:

It would seem that the legislature intended the word "casual" to be used as meaning "occasional," "irregular," or "incidental," in contradistinction from stated or regular. Each case, however, must be decided quite largely upon its special facts.

In our judgment the legislature never intended an employee who was engaged for one job, lasting only three or four days, to be within the terms of the act, even though the same employee had been employed at irregular intervals during several previous years to perform similar jobs.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—USUAL COURSE OF BUSINESS—FARM LABOR—CARPENTER BUILDING HOUSE ON RANCH.—*Miller & Lux (Inc.) v. Industrial Accident Commission*, District Court of Appeals of California, First District (Dec. 5, 1916), 162 Pacific Reporter, page 651.—Sidney Eligh was injured while in the employ of the company named, and was awarded compensation by the industrial accident commission. The matter was taken to the court by a petition for a writ of review. At the time of the injury Eligh had been at work for 57 days as foreman of carpenters building a cottage on a ranch owned by the company and containing 100,000 acres. The company's charter allowed it to hold all kinds of property, to erect buildings, etc., and it was in fact engaged in carrying on ranches, as well as other kinds of business, and constantly employed carpenters in constructing and repairing buildings on its property. The court held that the occupation was neither casual nor out of the ordinary course of the employer's business. It also denied the defense set up by the company that it was, as to this work, a farmer, and included in the exemption of farm labor from the provisions of the act. The writ of review was dismissed, and the award allowed to stand.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—DUE PROCESS OF LAW—TRIAL BY JURY—POLICE POWER—*Anderson v. Hawaiian Dredging Co. (Ltd.)*, Supreme Court of Hawaii (Dec. 11,

1917), 24 *Hawaii Supreme Court Reports*, page 97.—One Anderson having claimed compensation from the company named, a circuit court of the Territory gave judgment for the company on demurrer, on the ground that the compensation statute was unconstitutional. The supreme court, however, upheld the law, and reversed the judgment. As to the matter of notice it was said, in the opinion delivered by Judge Robertson, that the lower court “fell into error in thinking that ‘there must be a positive provision for the giving of notice * * * in order to constitute due process of law.’” The constitutional provision that trial by jury in actions at common law should be preserved was not applicable to proceedings other than at common law, and in the case of compensation proceedings, where the benefits are fixed, there is no necessity for a jury to assess damages. The case of *New York Central R. R. Co. v. White* and the other decisions of the United States Supreme Court sustaining compensation laws are discussed, likewise some of the State decisions; and with regard to the *Ives* decision in New York it is said that, though decided as recently as 1911, it “has already become obsolete.”

The counsel for the defendant contended that where compulsory laws had been upheld it was because, as in New York, industries were classified and the law made applicable only to the more hazardous, or because, as in California, all employers contributed to a State fund from which benefits were paid. The opinion said as to this:

The acts in which classifications have been made have not been sustained because of them, but in spite of them. Nor does the legislative power depend on the inclusion of a provision for a governmental compensation fund to which all employers shall contribute. In our view the theory of the statute of this Territory that each employer should provide for the compensation of the employees injured in his own employ is every whit as reasonable as that of the California act. Its natural tendency would be to cause greater care and better management on the part of employers of labor.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ELECTION OF EMPLOYEE TO SUE OR RECOVER COMPENSATION FROM EMPLOYER NOT COMPLYING WITH LAW—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Fassig v. State*, *Supreme Court of Ohio* (Jan. 23, 1917), 116 *Northeastern Reporter*, page 104.—Frank Pond was injured while in the employ of Percy Fassig, in an establishment having five or more employees. The employer had not contributed to the State insurance fund, nor received permission to become a self-insurer. The employee made application to the industrial commission, under the provisions of section 27, to fix the amount of compensation, and it did so. It then gave the employer notice to pay the amount within 10 days, and when such payment was not made,

the State, through the attorney general, brought suit to recover the amount plus the statutory penalty of 50 per cent. The employer contested the validity of section 27, which applies to employers not complying with the provisions of the law, and gives to the employee the right to proceed for compensation, as was done in this instance, as an alternative to bringing a liability suit with the common-law defenses barred. The court of common pleas rendered judgment for the defendant, holding this section of the law unconstitutional, but the court of appeals reversed this, giving judgment for the State for the benefit of the employee; the supreme court also held the law valid and affirmed the latter judgment. Judge Johnson delivered the opinion, first quoting the constitutional amendment permitting the enactment of a compulsory compensation law, referring to the decision upholding the former elective law of the State and to the progressive sentiment leading to the passage of the compulsory law. Section 27 is quoted in full, its relations with preceding sections discussed, the option given to the employee to sue or to apply for a determination of the amount of compensation pointed out, and the procedure outlined. Judge Johnson then said:

The grant of power to the general assembly to pass a compulsory law carries with it, as incident thereto, the power to include all such reasonable provisions as are necessary to make the law effective. The procedure laid down is in full keeping with the provisions of section 35 of article 2 of the constitution, and is one to compel the employer to perform his part in the general scheme of industrial protection.

It is claimed first that the right of trial by jury is violated.

It is at once manifest that the provisions of the section whose validity is attacked are important and essential steps in the administration of the law itself and are vital to the accomplishment of its beneficent purpose. The suit for the liquidated or stipulated amount is not a suit as at common law by the employee for the damages sustained. The employee has waived the right to bring such a suit by claiming compensation. A suit for damages is one for the recovery of an unliquidated sum in an action at law. The suit by the State for the amount of the compensation under section 27 is not one for negligence of any kind. It has no regard for such a thing. It is simply based on the fact of injury in the course of employment. The recovery in the damage suit is presumed to wholly compensate the injured person, but when he elects to accept compensation it is fixed in accordance with the schedule. The action to recover it is a statutory action, and under the amendment the statute properly fixes the measure of recovery. The action against the employer to recover the amount so ascertained and fixed must be brought in a court of general jurisdiction, and the defendant employer is entitled to a trial by jury. He is entitled to make the defense that he is not an employer of five or more employees, etc.; that the injury to the beneficiary was not received in the course of employment, or that it was willfully self-inflicted; or he might show that he had paid his premium into the insurance fund. The defense that he would not be

entitled to make in the case simply goes to the amount of compensation, for that is fixed pursuant to the statute. If the issues stated are found against him, and he pays the amount fixed by the board, he has only paid what other employers pay who comply with the provisions of the law, together with the penalty which the law imposes on him for not obeying it. Inasmuch as the amount recovered is not determined by proof of the actual damages sustained, but is such an amount as is fixed by the statute when the administrative board has ascertained the facts to which the statute would apply, there is nothing for the jury to pass upon on that question. It is a sum that is liquidated or stipulated by the statute.

There is no denial of trial by jury as to any issue which the employer is entitled to raise.

It is also claimed that the section under examination infringes on the judicial power of the State in that it confers upon an administrative board judicial functions.

From what has been already shown it will be seen that the proceedings before the commission, and its order, are merely administrative, and simply lay the foundation for a suit in a court of competent jurisdiction in which the employer has due process and all rights reserved.

At this point authorities are cited bearing upon the point under discussion. The opinion goes on as follows:

Much that has been already said applies with equal force to the remaining claims of plaintiff in error that the section in question denies to the employer in question the due process of law and the equal protection of the law, in violation of the provisions of the State and Federal Constitutions referred to.

An additional objection is made against the validity of section 27. It is said that the provision with reference to an injury "in the course of employment" permits an award to one whose injury did not arise out of the employment. We do not think this contention is well taken. The language is found in the constitutional amendment as well as in the statute. It was plainly the intention of the framers of the amendment, and of the statute, to provide for compensation only to one whose injury was the result of or connected with the employment, and would not cover any case which had its cause outside of and disconnected with the employment, although the employee may at the time have been actually engaged in doing the work of his employer in the usual way.

Counsel for some employees of employers who have elected to make compensation under the statute have filed a brief in this case in which they assert that section 22 of the act under consideration, which authorizes employers under the conditions named therein to directly compensate their injured employees, is invalid because there is no provision in the act itself by which an employee of such an employer, who makes application to the board for compensation and is refused, may have any relief whatever.

The validity of section 22 has been considered in another case not yet reported [see *Turner case*, p. 284], and the court is unanimously of opinion that it is a valid provision.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—AGREEMENT TO ASSUME RISKS—*Chicago Rys. Co. v. Industrial Board of Illinois et al.*, *Supreme Court of Illinois* (Dec. 21, 1916), 114 *North-eastern Reporter*, page 534.—James Balla was killed on October 17, 1913, while employed by the company named as a motorman. He was in front of his car, attempting to adjust the trolley so as to move into the barn, when the car suddenly started and crushed him between it and the car ahead. The industrial board affirmed an award of an arbitration committee in favor of his estate and against the company, and it was again affirmed by the circuit court of Cook County, which, however, certified that the cause was one proper to be reviewed by the supreme court. The latter in the present decision again affirmed the award in an opinion delivered by Judge Farmer. On the questions of constitutionality, injury arising out of and in the course of employment, and agreement to assume risks, the language of the opinion is as follows:

It is first contended that the act of 1913 is unconstitutional, because it interferes with the freedom of contract, and because it is special and class legislation, granting special and exclusive privileges and immunities to certain individuals, which are denied to others. The plaintiff in error insists the act of 1913 is different from the act of 1911 (Laws 1911, p. 314), which was held constitutional in *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211 [Bul. No. 169, p. 216], and not in violation of the provisions of the Constitution it is claimed the act of 1913 violates. The differences between the two acts relied on are that the 1911 act applied only to employers engaged in especially hazardous or dangerous employments or occupations, while the 1913 act provides "that any employer in this State may elect to provide and pay compensation" under the act. Under the 1911 act every employer within the provisions of that act was presumed to have elected to provide and pay compensation according to the act, unless and until he filed a notice in writing to the contrary with the State bureau of labor statistics. Under the 1913 act the employer engaged in an extrahazardous occupation is likewise conclusively presumed to be under the act unless he filed a written election to the contrary, but employers in other than extrahazardous occupations are not under the provisions of the act unless they file an election to provide and pay compensation under the act. Plaintiff in error is engaged in an occupation which is brought under the provisions of the 1913 act, unless notice of an election to the contrary is filed in writing. In the *Deibeikis* case it was held such a provision in the act of 1911 did not violate the constitutional right of freedom to contract. There is no material distinction between the two acts with regard to employers engaged in hazardous occupations. We have held the former act was not subject to the objection here made, and it must follow, for the reasons given in the *Deibeikis* case, that the 1913 act is not subject to such objections. There is no merit in the contention of plaintiff in error that the act is invalid, because it is special and class legislation, and grants special and exclusive privi-

leges and immunities to some individuals, which are denied others, or that it is invalid because it deprives plaintiff in error of the right of trial by jury. The Deibeikis case substantially answers every constitutional objection raised in this case by plaintiff in error.

The facts appear to show that if deceased had observed the rules of plaintiff in error, with which he was familiar, the accident might not have occurred. If the deceased had obeyed the rules of the plaintiff in error company, he would have left his car in such condition that it would not have started when he adjusted the trolley, and plaintiff in error contends that the injury which caused his death was not an accidental one sustained by deceased, arising out of and in the course of his employment. What he was doing arose out of and was being done by him in the course of his employment. The fact that he acted negligently in doing it did not take him out of the employment of plaintiff in error, nor the act which resulted in the injury out of the course of his employment.

The deceased was employed August 25, 1913. In his application for employment he agreed to assume all risks of accidents resulting from his own negligence, and agreed, if he entered the employment of plaintiff in error, to assume all risks of accidents happening as the result of his own negligence while in such employment, and to acquit plaintiff in error of all liability for any personal injury suffered by him while in such employ. Plaintiff in error contends that this amounted to a contract between it and deceased that they were not to be subject to the Workmen's Compensation Act, and that no recovery can be had under that act. The Workmen's Compensation Act is the declared public policy of the State upon the subject embraced in the statute, and provides a method by which employers may exempt themselves from providing and paying compensation under the act to employees for accidental injuries sustained and arising out of and in the course of the employment. It is contrary to the policy of the act to allow an employer, while choosing to come under the provisions of the statute by not filing an election in writing to the contrary, to relieve itself from liability under the act by private agreement or contract with the employee.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—JUDICIAL POWERS—*Solvuca v. Ryan & Reilly Co., Court of Appeals of Maryland (June 28, 1917), 101 Atlantic Reporter, page 710.*—Antoni Solvuca brought suit against the company named for damages for injuries sustained as its employee. The company pleaded that it had conformed with the provisions of the workmen's compensation act, having secured permission to carry its risk as a self-insurer. The plaintiff demurred to this plea, claiming that it was insufficient because the compensation act was unconstitutional. The Baltimore Court of Common Pleas upheld the law as valid, and rendered judgment for the defendant company. The court of appeals affirmed this judgment, Judge Thomas delivering the opinion. He first examined the provisions of the act, and stated that the court had

often held that "the law of the land" in the State constitution, and "due process of law" in the Constitution of the United States, mean the same thing. The contention as to violation of that provision in the State constitution was therefore held to be settled by the recent decisions of the Supreme Court of the United States, and quotation was freely made from the opinion in *New York Central R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 (Bul. No. 224, p. 232). The case of *Am. Coal Co. v. Allegany Co.*, 128 Md. 564, 98 Atl. 143 (Bul. No. 224, p. 208), holding valid a law creating a miners' relief fund, was also quoted as sustaining the present law against many of the grounds urged against it. The constitutional provision for jury trials was held to be satisfied by the provision for such trial on appeal if requested by the parties.

The final objection answered was that the act violated the section of the State constitution which vested all judicial powers in certain courts named therein. Authorities were quoted as to what constitute judicial powers, and an excerpt made from the decision of the Wisconsin Supreme Court sustaining the act of that State against the same objection (*Borgnis v. Falk*, 147 Wis. 327, 133 N. W. 209 [Bul. No. 96, p. 799]). In concluding its discussion of this matter the court said:

The workmen's compensation law, which was passed in the exercise of the police power of this State, creates a commission known as the State industrial accident commission to administer the provisions of the act. In the discharge of its duties and the exertion of its powers it is required to exercise judgment and discretion, and to apply the law to the facts in each particular case, but it is clear that the legislature never intended to constitute the commission a court, or to confer upon it the judicial power of the State within the meaning of the constitutional provisions referred to.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—WILLFUL INJURY—DISFIGUREMENT IN ADDITION TO DISABILITY—*Adams v. Iten Biscuit Co.*, *Supreme Court of Oklahoma* (Jan. 9, 1917), 162 *Pacific Reporter*, page 938.—B. L. Adams brought action for damages for personal injuries against the company named, his employer, and the company demurred to the complaint on the ground that the injuries were covered by the workmen's compensation act. The demurrer being sustained, the employee carried the case to the supreme court, claiming that the compensation act was unconstitutional, and that even if constitutional it did not fully cover his injuries. The act was, however, declared valid, and the judgment sustaining the demurrer was affirmed. Judge Hardy delivered the opinion, first outlining the provisions of the act, which is compulsory. A somewhat novel contention raised was that the act

is so revolutionary in character as to amount to an amendment to the State constitution, which could not be put in force by mere legislative enactment. The court admitted the importance of the law, but after reviewing the history of such legislation in this and other countries and the findings of commissions as to the evils and inadequacy of the liability system, concludes that the law is within the police power of the State and the authority of the legislative body. With a thorough examination of the decisions, the other usual objections to constitutionality are disposed of, including failure of the title of the act to cover its subject matter and conflict with the provisions of the Federal and State constitutions in respect to trial by jury, due process, and equal protection of the law. As to deprivation of all remedy for willful injuries by the employer, Judge Hardy says in part:

The act does not undertake to regulate willful injuries of the character mentioned, but leaves the injured employee to his remedy as it existed when the act was passed.

Considering the various provisions of the act together, there does not seem to be any ambiguity as to its meaning. It embraces all kinds of accidental injuries not resulting in death, whether occurring from the negligence of the employer or not, arising out of and in the course of employment, but does not include willful or intentional injuries inflicted by the employer, nor injuries resulting from an intent upon the part of the employee to injure himself or another or for a willful failure to use a guard or other protection against accident required by statute or furnished pursuant to an order of the State labor commissioner. A willful or intentional injury, whether inflicted by the employer or employee, could not be considered as accidental, and therefore is not covered by the act. The compensation afforded by the act and the procedure by which the same is determined was intended to be exclusive as to all of the injuries therein embraced, and the right of action theretofore possessed by the injured employee was abolished, leaving to him such right of action in the courts for willful injuries as he may have had prior to its passage, and the act, as thus construed, does not deprive plaintiff of the equal protection of the laws.

The injury occurred through negligence of the company's foreman in causing an explosion of natural gas when Adams was at a table about 12 feet from and directly in front of the oven. His hands and arms were so badly burned as to totally and permanently disable him from work at his trade as a baker, and permanent scars were also left on his face, head, and entire body. It was urged that he should at least have an action for additional damages for the disfigurement, for which no compensation is allowed by the act. Taking up this question and concluding the opinion Judge Hardy said:

The legislative intent was evident to award compensation for all accidental injuries arising out of or in the course of employment,

and not to divide up such injuries and award compensation for a portion thereof and leave to the injured employee a remedy for the remainder. All of plaintiff's injuries were received in the course of his employment, were accidental, and were the result of the same negligent act of defendant. The compensation provided was intended to be exclusive, and a right of action in the courts therefor was abolished.

WORKMEN'S COMPENSATION—DEPENDENCE—FATHER AND MOTHER HAVING OTHER MEANS—*Fennimore et al. v. Pittsburg-Scammon Coal Co., Supreme Court of Kansas (Apr. 7, 1917), 164 Pacific Reporter, page 265.*—Rue Fennimore, 19 years of age, was killed while an employee of the company named, and his parents claimed compensation. The son's earnings were \$50 per month, of which he turned over perhaps \$35 per month to his mother, and the finding of the district court was that the father and mother were dependent upon such earnings to the extent of \$25 per month, or five-tenths of his earnings; it awarded \$900 as compensation. There was evidence that the father owned the dwelling house, which cost \$1,450, farm lands, from which he received a gross income of \$400 or \$500 in the year 1915, and one-fourth the stock of the coal company, which was capitalized at \$30,000; and that he worked for the company at \$125 per month. No household servants were kept, and the son had helped with the family washings and the like. The supreme court held that the finding of partial dependence was justified, noting that the language of the law is indefinite, and that it is very difficult to set up any rules or standards of dependency. Judge Burch said in concluding the opinion:

Accepting the statute just as it came from the legislature, the court is of the opinion that the question before the district court was not one of how the domestic economies of the Fennimore family might have been arranged, or ought to have been arranged, but how they were arranged; and if the father and mother did in fact depend in part on the son's earnings, so that they suffered injury by being deprived of what they had relied on, they were entitled to recover. This being true, the finding of partial dependency is abundantly sustained.

WORKMEN'S COMPENSATION—DEPENDENCE—FATHER PARTIALLY DEPENDENT, RECEIVING ALL OF SON'S EARNINGS—*In re Peters, Appellate Court of Indiana, Division No. 1 (June 28, 1917), 116 North-eastern Reporter, page 848.*—The father of a minor son accidentally killed in course of his employment having made claim for compensation, the industrial board of Indiana submitted to the court the questions, first, whether the father was a dependent, and second, whether he was entitled to full compensation, viz, 55 per cent of

\$12.75 (the son's wages) for 300 weeks. The son lived with the family, consisting of father, mother, and two younger brothers. The father received a weekly wage of \$15, and had no property or other income. The son's wages went into the family fund. The court held that the father was a partial dependent; and, holding that no deduction from the amount of the wages should be made for the son's support, it answered the second question also in the affirmative, as appears from the following extract from the opinion delivered by Judge Batman:

As the father was receiving all his deceased son's earnings at the time of his death, or 100 per cent thereof, it follows that he will be entitled to receive 100 per cent of what he would have received had he been wholly dependent. In other words, there is no difference in the amount a total dependent and a partial dependent is entitled to receive under such section, where such partial dependent receives all the earnings of such injured employee.

WORKMEN'S COMPENSATION—DEPENDENCE—MARRIAGE AFTER INJURY WHICH RESULTS IN DEATH—*Kuetbach v. Industrial Commission of Wisconsin et al.*, *Supreme Court of Wisconsin* (Dec. 4, 1917), *165 Northwestern Reporter*, page 302.—Ferdinand Kuetbach was injured December 18, 1915, under conditions which made his employer liable for compensation. At that time he was living with his father, who was dependent upon him. He died June 5, 1916, leaving a widow, Etta Kuetbach, whose marriage to him had taken place May 18, 1916. On June 21, 1916, a child was born to her, the result of illicit relations with Kuetbach occurring before the time of the accident. The widow and the child through his guardian made separate claims for compensation, each claiming that the other was not entitled thereto. The industrial commission made an award to the father of the deceased employee, but the district court of Kane County reversed this action and made an allowance to the widow, and her only. Under the provisions of the act a widow is conclusively presumed to be dependent upon a husband with whom she was living at the time of his death, and the same is provided with reference to a minor child, there being no surviving dependent parent; while in all other cases questions of dependency are to be determined as of the date of the injury. On appeal, the supreme court reversed the district court's judgment, deciding, as did the commission, that the father alone was entitled to benefits. In the opinion by Judge Rosenberry the ground is taken that whether a person is a dependent at all is determined by the status at the time of the accident, while the conclusive presumptions noted above relate only to the degree of dependency as total. The widow not having been a

lawful wife at the time of the injury, and the child not legitimate at that time en ventre sa mere, no dependence whatever could be presumed, and therefore they were held not to be rightful claimants.

WORKMEN'S COMPENSATION—DEPENDENCE—MARRIAGE AFTER INJURY WHICH RESULTS IN DEATH—SURVIVING WIFE—*Crockett v. International Ry. Co., Supreme Court of New York, Appellate Division, Third Department (Dec. 28, 1916), 162 New York Supplement, page 357.*—Davie Mayo Crockett was injured in the employ of the company named on November 17, 1914, and died as a result on December 17 of the same year. On November 23, 1914, he was married, and after his death his widow applied for compensation. The State industrial commission certified to the court the question whether she was entitled to an award as the surviving wife in accordance with the provisions of the law. The court drew a distinction between wives and dependents, founded upon the wording of the act, and decided that in such cases as the present one the "surviving wife" is entitled to the benefits of the act. Judge Cochrane delivered the opinion, which is in part as follows:

.. The argument against the question is based on the last sentence of section 16, which is: "All questions of dependency shall be determined as of the time of the accident."

Undoubtedly the term "dependents" is very frequently used in the statute as including wife and children. Instances to that effect are numerous. Death benefits payable to wife and children, however, in no respect rest upon the question of their dependency. That very clearly appears from said section 16. Death benefits under that section to all other persons rest on the dependency of such person or persons to the deceased employee. That is true of husband, parents, brothers, sisters, grandparents, or grandchildren of the deceased. But a surviving wife and children under 18 years of age are entitled to an award, although they may be wealthy. The distinction exists because of the legal and moral responsibility of a husband and father to support his wife and children, irrespective of their individual means of support. The phraseology of section 16 clearly indicates this distinction, and when, therefore, in the closing sentence of that section, it is stated, "All questions of dependency shall be determined as of the time of the accident," the term "dependency," as there used, should be restricted in its application to the same class of people to whom the term has previously been applied throughout the same section. It does not apply to surviving wife and children, because as to them the question of dependency is immaterial.

WORKMEN'S COMPENSATION—DEPENDENCE—REGULARITY OF CONTRIBUTIONS FOR SUPPORT—*Commonwealth Edison Co. v. Industrial Board of Illinois et al., Supreme Court of Illinois (Feb. 21, 1917),*

115 Northeastern Reporter, page 158.—Victor F. Nelson having been killed by electric shock while in the employ of the company named on June 23, 1914, the administrator of his estate made claim for compensation. Nelson was unmarried, and left a father, a stepmother, an adult brother, and a married sister. The industrial board confirmed an award of \$3,500 as compensation, made by the committee of arbitration. The company appealed, denying that the father was dependent. The Illinois law authorizes the payment of compensation where the deceased has contributed to the support of any lineal heir within four years previous to the time of his injury. It was in evidence that the deceased in this instance had contributed sums of from \$10 to \$20 to his father, whose wages were much smaller than his own, sometimes as often as every second month, and more frequently and in larger sums in case of sickness. On one occasion he had paid \$25 the first week of an illness, and \$35 the third week. The court affirmed the award, saying that regularity of contributions was not required to fulfill the conditions, and that "the statute does not require that the surviving parent or lineal heirs shall be dependent upon the deceased."

WORKMEN'S COMPENSATION—DEPENDENCE—SISTER AS MEMBER OF FAMILY—*In re Murphy, Supreme Judicial Court of Massachusetts (Nov. 27, 1917), 117 Northeastern Reporter, page 794.*—Jeremiah Maloney was killed while in the employ of a subscriber under the Massachusetts Workmen's Compensation Act. The proceedings for compensation instituted by his minor daughter and his sister, Mrs. Agnes M. Murphy, were opposed by the employer's insurer, but an award was made to the sister by the industrial accident board. It appeared that the sister was a widow having a son 15 years of age and attending a high school, and that she, her brother, and her son lived together in a house which had belonged to her mother, and for which she had paid no rent, though six brothers and sisters in all held undivided interests in it. The mother had lived with them until her death in 1912. Mrs. Murphy secured outside work at washing and the like, sufficient to earn some \$3 per week. Maloney contributed \$5 per week to the expenses, but during the previous winter had been out of work and had fallen behind, and after working two months was still two or three months in arrears at the time of his death. Mrs. Murphy testified that at the time of the hearing she was able to earn about \$2 per week, and could not get along on that amount; that she did not get along as well since her brother's death; and that "nothing was ever said about board," that is, as to the payments made by him being regarded as for board. Maloney had also worked about the place and cultivated a vegetable garden. The court held

that he was not the head of a family of which the sister and her son were members, and the award to her was reversed and a decree entered in favor of the insurer.

WORKMEN'S COMPENSATION—DEPENDENCE—WIFE IN FOREIGN COUNTRY—NOTICE AND CLAIM—*In re Gorski, Supreme Judicial Court of Massachusetts (June 28, 1917), 116 Northeastern Reporter, page 811.*—The administrator of the estate of John Gorski instituted proceedings to recover compensation for the death of the latter against his employer, the Howes Brick Co., and its insurer. The fatal injuries were received June 24, 1914. Gorski had come from Poland the previous November, leaving his wife and two daughters. A minor son roomed with him, but such financial assistance as passed between them was given by the son to the father. The administrator was appointed February 9, 1915, and on March 1 he mailed to the industrial board a form of notice to the employer and of claim for compensation; this, however, was not received by the board. It appeared that the wife lived in the part of Poland affected by the War; but since nearly six weeks intervened between the employee's death and the outbreak of war, and his son was with him, the court held that no sufficient reason under the statute was shown for failure to give notice and file claim within a reasonable time. It also held that a claim not actually received by the board could not be said to have been "filed" with it.

It was found that the wife remained on a farm and hired a man to operate it and that the husband intended to have her come over later on. The court held that she was neither a wife living with her husband nor living apart from him for justifiable cause or because he had deserted her. As the only money sent to her since the separation had been furnished by the son actual dependency was held not to be shown.

WORKMEN'S COMPENSATION—DEPENDENCE—WIFE IN FOREIGN COUNTRY BUT SUPPORTED BY HUSBAND—*Kalcic v. Newport Mining Co., Supreme Court of Michigan (July 26, 1917), 163 Northwestern Reporter, page 962.*—Antonija Kalcic, widow, living in Croatia, Austria, instituted a proceeding for compensation for the death of her husband, Ljudevit or Louis Kalcic. He was killed while employed in a mine of the company named, in May, 1914. Kalcic came to this country in 1907 and worked in the mines until his death, with the exception of a time during 1910, when he visited his old home in Croatia. Besides the widow a son born in 1911 survived him. He regularly sent money to his wife, amounting in the last year of

his life to \$80. Her affidavit stated that she had no other means of support except her earnings of 20 cents a day for two or three days each month and that it had been their intention that she should join her husband in America when sufficient funds had been accumulated. A board of arbitration awarded her \$1 a week for 300 weeks, but the industrial accident board modified this award to allow for the same period the full amount for complete dependency; that is, \$8.70 per week, a sum equal to one-half the earnings of the deceased. The court affirmed the latter award. It held that she was not entitled to the presumption that she was totally dependent as living with her husband at the time of his death, but that the facts were sufficient to support a finding of actual total dependency.

WORKMEN'S COMPENSATION — DURATION OF PAYMENTS — SUBSEQUENT INSANITY—*In re Walsh, Supreme Judicial Court of Massachusetts (June 4, 1917), 116 Northeastern Reporter, page 496.*—James Walsh was injured on July 1, 1913, while employed by the Wholey Boiler Works as a boiler maker, and as a result his right leg was shortened by 2½ inches. As the work at which he had been employed required him to climb about and work on stagings, a physician whose opinion was adopted by the board took the view that he was incapacitated for his trade, in which his wages were \$15 per week, but could do work as a laborer and earn \$7.50 per week. The insurance company having refused to pay compensation after his recovery from the original total disability, the board awarded him one-half of his loss of wages, or \$3.75 per week, for the balance of the period of 300 weeks. Subsequently the employee became insane from another cause than the injury, and was incapacitated from doing any work. The court held that this did not bar the continued payment of compensation, Judge Loring saying in part:

The insurance company has argued that the subsequent insanity of the employee stands on all fours with the subsequent death of a dependent. It was decided (In *Murphy's Case*, 224 Mass. 592, 113 N. E. 283 [Bul. No. 224, p. 259]) that the subsequent death of a dependent ends his right to compensation. But none of the considerations upon which that conclusion was reached exist in the case of a permanent partial incapacity to work caused by an injury within the act and a subsequent total disability coming from an outside cause.

WORKMEN'S COMPENSATION — ELECTION — INJURY OCCURRING WITHIN THIRTY DAYS FROM BEGINNING OF EMPLOYMENT—*Woodruff v. Producers' Oil Co., Supreme Court of Arizona (Nov. 26, 1917), 76 Southern Reporter, page 803.*—James Woodruff brought suit for

damages for injuries suffered by him while employed by the company, caused, as he alleged, by the use of a defective derrick and a worn and defective swivel, and the placing of an inexperienced man in charge of engine and machinery. The first action brought by the employee, based upon a liability statute alone, had been dismissed. The present suit proceeded under the same liability statute (Civil Code, art. 2315); the plaintiff also pleaded in the alternative that if the cause of action should be found to be under act 20 of 1914 (the compensation law, though usually referred to as the "Burke-Roberts Employers' Liability Act") that the latter statute was unconstitutional; and, finally, he asked for compensation if the ultimate decision should be that the compensation law was not only applicable but valid. The pleadings and proceedings were complicated, and the supreme court rendered two opinions, the final one, on rehearing, reversing the first, which had held the compensation act applicable, and ruling that the plaintiff, having no other right of recovery, was not in a position to attack the constitutionality of the compensation law because he had no interest in proving it invalid, and affirming the judgment of somewhat more than \$300 as compensation awarded by a district court.

The final decision derives its importance from its construction of two provisions relating to election. Paragraph 1 of section 3 provides that the act shall not apply to any employer or employee unless prior to the injury they shall have elected by agreement, either express or implied, to be so governed. Paragraph 3 of the same section provides that contracts of hiring made subsequent to the taking effect of the act shall be presumed to have been made subject to the provisions of the act, unless there be as a part of said contract an express statement in writing, not less than 30 days prior to the accident, that the provisions of the act are not intended to apply. The trial court held the two paragraphs inconsistent and gave effect to the latter as later in the order of adoption. Since the employee had not notified the company to the contrary 30 days before the accident, he was held to be under the act. The supreme court called attention to the duty of courts in construing statutes to give effect to all parts if possible and to harmonize them so as to give "a sensible and intelligent effect to each." It therefore held that contracts of employment which have not been running 30 days at the time of the accident are not affected by paragraph 3, but are under paragraph 1, and the compensation law does not govern. It stated that the district court had not adjudicated the rights of the plaintiff under the code section governing liability suits, and remanded the case to it for further action thereunder.

WORKMEN'S COMPENSATION—ELECTION—MINORS—CONSTITUTIONALITY OF PROVISION—*Young v. Sterling Leather Works, Court of Errors and Appeals of New Jersey (Nov. 19, 1917), 102 Atlantic Reporter, page 395.*—Edward Young brought suit through his next friend to recover damages for personal injuries received, as was alleged, through the negligence of the defendant named, which was a corporation and his employer. The defense set up was to the effect that the parties were governed by the New Jersey workmen's compensation act. This act provides that section 2, the compensation provisions of the act, shall be applicable unless there is a written statement to the contrary in the contract, or notice has been given in writing by one party to the other; in case of a minor employee the notice must be given by or to his parent or guardian. On behalf of the plaintiff it was argued that this provision sought to bind minors without their election, and is invalid as denying to them the equal protection of the laws and depriving them of property rights. Judgment in the supreme court had been for the company, and this was affirmed, Judge Kalisch in the opinion holding the provision valid and saying in part:

An infant has no vested right in the disability which the common law has erected as a barrier against his making binding contracts, during his infancy, to the extent that the legislature may not constitutionally remove such disability as to future contracts entered into by him.

At common law, an infant could only legally bind himself, by a contract which was for his benefit, and obligations imposed, by statute, upon an infant were binding. But even if this were otherwise, there is no constitutional provision in the way of the legislature to deal with the disabilities of infancy, as it, in its legislative wisdom or judgment, may see fit.

The provision of section 2, that in the case of a minor the notice shall be given by or to the parent or guardian of the minor if the provisions of that section are not intended to apply, is clearly for the benefit of the minor. The legislative intent is to safeguard the minor's interest and to protect him against his immature act or judgment. And this was clearly within legislative authority. It is, in fact, declaratory of the common-law doctrine relating to transactions with infants.

WORKMEN'S COMPENSATION—ELECTION—NOTICE TO FATHER OF MINOR BY PAY ENVELOPE—*Brost v. Whitall Tatum Co., Court of Errors and Appeals of New Jersey (Nov. 20, 1916), 99 Atlantic Reporter, page 315.*—Daniel C. H. Brost, a minor 19 years of age, brought action by his next friend against the company named for damages for personal injuries. The negligence charged was the maintenance, in an unsuitable condition in the company's glass-blowing factory, of a board upon which it was necessary for him to

walk in crossing a mold hole for the purpose of carrying materials. The board was loose and had a hole in it, which, it was claimed, caused the employee to slip and fall into the mold hole. The company defended, one ground set up being that the matter was governed by the compensation act. It appeared, however, that the company had printed on the boy's pay envelope a warning that the provisions of the compensation act were not intended by the company to apply to him. The act provides that in the case of a minor, notice of election to avoid the act must be given to the parent or guardian. In this case the envelope had been given by the boy to his father, and this was held to be sufficient notice to the latter. The supreme court had held the plaintiff's evidence insufficient and granted a nonsuit, but this judgment was reversed and the case sent back for a jury trial, it being held also that the evidence of the company's negligence was sufficient for the jury's consideration, and that the abrogation of the defense of assumption of risk by the act was valid. Judge Walker examined pertinent decisions as to the matter of notice, and stated the conclusion of the court with regard to it as follows:

In the case at bar the notice was actually conveyed to and received by the boy's father. We are of opinion that there was due service in this case of the notice that the Workmen's Compensation Act should not apply, and therefore the plaintiff's suit was properly brought at common law.

WORKMEN'S COMPENSATION—ELECTION—TOWNSHIPS—HAZARDOUS EMPLOYMENTS—CASUAL EMPLOYMENT—*McLaughlin, Commissioner of Highways, v. Industrial Board of Illinois et al., Supreme Court of Illinois (Dec. 5, 1917), 117 Northeastern Reporter, page 819.*—Abraham Hiler was killed October 15, 1913, while dynamiting stumps in clearing out for a new road in the town of Marrowbone, Moultrie County, Ill. Hiler was a common laborer, and not specially employed for the work of blasting. His administratrix was awarded compensation by the circuit court of the county, which certified the case as one proper to be reviewed by the supreme court. The latter court held that townships are, by the terms of the act, conclusively presumed to have elected to be governed by its provisions unless they have elected to the contrary, notwithstanding that no provisions are made as to what officers may make the election, nor as to the method of raising money to pay awards; also that the legislature had the power to make the act applicable to municipalities. It held that a dirt road is not a "structure" under the act, so as to make its building an extrahazardous occupation, but that the use of dynamite in dangerous quantities in blowing out stumps is extrahazardous. The judgment of the circuit court was

reversed, however, and compensation denied, because the court took the view that the work of dynamiting was casual, or incidental to the main purpose of road building. Judge Duncan in the opinion says as to this:

The work of dynamiting the stumps was a mere casual or incidental employment in connection with the matter of grading and repairing the road, and the evidence does not show that the road district had ever before used dynamite in connection with road grading at any time, and the evidence clearly shows that that work would only continue for a few hours at most. There was no expectancy, so far as the evidence shows, that dynamite would ever be again used by the district in its road work.

After a careful consideration of the question we have concluded that the employment of Hiler in this case in the extrahazardous employment was not a regular or stable employment within the meaning of the statute, but was merely a casual employment. Hiler was therefore not an employee within the meaning of the workmen's compensation act, and the industrial board had no jurisdiction of the case.

WORKMEN'S COMPENSATION—EMPLOYEE—PRESIDENT OF COMPANY PERFORMING MANUAL LABOR—*Bowne v. S. W. Bowne Co., Court of Appeals of New York (May 8, 1917), 116 Northeastern Reporter, page 364.*—S. W. Bowne, the president and principal stockholder of the company named, suffered an accident while at work assisting in handling lumber, which resulted in the loss of his left leg. His salary of \$70 per week was not affected by the accident, and he had received dividends on his stock, during the preceding year, amounting to \$20,000. The industrial commission, on his proceeding for compensation, awarded the maximum, \$20 per week, for 288 weeks. The company and the insurer contended that he was not an employee under the law, and this view was taken by the court, Judge Pound, in the opinion delivered by him, saying in part:

The question is plainly presented whether the principal executive officer of a corporation is an employee within the definition of the word contained in the workmen's compensation law.

The words of the statute, construed in the light of the legislative purpose, do not justify the conclusion that the distinction between the higher executive officers of the corporation and its workmen was obliterated. [Cases cited.] The short title of the act, the limitation thereof to employers employing workmen, the evil to be remedied, the method of remedying the evil, the obvious incongruity of applying the law to the principal executive officer of a corporation as an accident insurance at the maximum rate of not to exceed \$20 a week based on loss of earning power, all point conclusively to a distinction between such an officer and other employees which the court should not disregard.

WORKMEN'S COMPENSATION—EMPLOYEE—TEAMSTER ASSISTING IN EXTRICATING Mired TEAM—CASUAL EMPLOYMENT—*State ex rel. Nienaber v. District Court of Ramsey County et al., Supreme Court of Minnesota (Nov. 30, 1917), 165 Northwestern Reporter, page 268.*—George B. Nienaber was a coal dealer in St. Paul. On June 9, 1917, one of his delivery teams, in the suburbs of that city, became mired, and the driver requested the driver of a street sprinkler in the employ of the city, but using his own team, to assist him. The sprinkler teamster did so, hitching his team in front of that attached to the coal wagon, and in urging his horses forward his foot and ankle were stepped on and crushed. The teamster thereupon claimed compensation from Nienaber, and an award in the amount of \$9 per week during the period of disability, not exceeding 300 weeks, was made by the district court named, and appeal was taken. Judge Brown delivered the opinion, stating that the majority of the court considered that the injured man was at the time of the injury an employee of the coal merchant, and, though casually employed, was employed in the usual course of the business, so that compensation had properly been awarded.

WORKMEN'S COMPENSATION—EMPLOYEE—WIFE OF EMPLOYER—*In re Humphrey, Supreme Judicial Court of Massachusetts (May 26, 1917), 116 Northeastern Reporter, page 412.*—The claim of Eliza S. Humphrey for compensation for an accidental injury was opposed by the insurance carrier of her employer, a subscriber under the act, who was her husband. She was paid regular wages for her services as cashier and bookkeeper in a store, an arrangement to that effect having been entered into at a time when her husband and his brother carried on the business as partners. She was injured while on the lot occupied by the store when on the way to her home near by. The court, speaking through Judge Rugg, held that a wife can not be her husband's employee, and reversed a decree granting compensation, the opinion being, in part, as follows:

It is provided by St. 1911, c. 751, pt. 5, sec. 2, that "Employee" shall include every person in the service of another under any contract of hire, express or implied, oral or written," with exceptions not here material. Plainly a wife working for her husband is not within the scope of this definition. Obviously one can not be an employee without a contract. That is recognized by the words of the act. Employment presupposes a contractual relation. A married woman can not make a contract express or implied with her husband. [Statute and decisions cited.] A married woman can not make a valid contract with a partnership of which her husband is a member. [Cases cited.] Manifestly a wife can not be an employee of her husband outside the Workmen's Compensation Act. She can not be an employee of her husband under the terms of that act.

WORKMEN'S COMPENSATION—EMPLOYER AND EMPLOYEE—"ENGAGED IN BUSINESS"—REMODELING HOUSE—*Marsh v. Groner*, Supreme Court of Pennsylvania (June 30, 1917), 102 Atlantic Reporter, page 127.—Washington N. Marsh, who was injured while at work as a plasterer on the house of Ida Groner, proceeded under the workmen's compensation act against the latter. She was a married woman, living with her husband in the house owned by her, and for the greater part of the year had been remodeling the house. Marsh was employed to do several days' plastering, and sustained the injury complained of as the result of the collapse of a scaffolding. The act provides that the term "employee" shall include persons "who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer." The court of common pleas of Northampton County set aside an award made by the workmen's compensation board, and the supreme court affirmed this action, Judge Stewart saying, in part, in the opinion delivered by him:

We derive from this [the definition of the term "employee" quoted above] by necessary implication that only such employers are made liable under the act as are themselves engaged in regular business. This must be so if any effect whatever is to be given the exclusion clause. If the employer has no regular business, it follows that the employee was not injured within the condition prescribed. What gives rise to the question is the indefiniteness and want of precision of meaning of the word "business" as it occurs in the act.

Statutes are presumed to employ words in their popular sense, and when the words used are susceptible of more than one meaning, the popular meaning will prevail. It would be a very exceptional person who would not understand that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of.

Our conclusion is that the defendant was not engaged in any business within the proper meaning of that term as used in the act, and therefore the claimant when injured was not employed in the manner prescribed by the act. His employment, like that of his employer, was casual in character.

WORKMEN'S COMPENSATION—EMPLOYMENT IN CONNECTION WITH, OR IN PROXIMITY TO, MACHINERY—"MILL, SHOP, OR FACTORY"—*King v. Berlin Mills Co.*, Supreme Court of New Hampshire (Dec. 5, 1916), 99 Atlantic Reporter, page 289.—One King petitioned for compensation for injury received as an employee of the company named. He was struck in the back by a plank while engaged, with five or more other men, in erecting a carrier, to be used in conveying pulpwood from freight cars on the Grand Trunk Railroad to the

Dead River, to be from there floated down to the company's mill, 2 miles below on the Androscoggin River. The carrier was to consist, when completed, of a V-shaped trough, through which an endless chain running at its bottom would convey the pulpwood. The men were erecting a wooden horse, one of the supports for the trough. No part of the trough or chain, or of the machinery for propelling the chain, was in position at the time. The apparatus was entirely disconnected with any of the mills of the company, being about a mile from the nearest one. Under these circumstances it was held that the injury was not within the scope of the act, which by its terms applies to "work in any shop, mill, factory, or other place on, in connection with, or in proximity to, any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor."

Judge Plummer concluded the opinion, written by him, with the following statement:

The plaintiff's case is not within the purpose and spirit of the employer's liability and workmen's compensation statute. He was not employed at a place where there was any machinery, but was engaged in manual labor at a place wholly separate and distinct from the defendant's mills where machinery was in use, and at a distance from them, and his employment was not such as to entitle him to protection under the act.

WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—NATURE OF ACT—*North Alaska Salmon Co. v. Pillsbury et al.*, Supreme Court of California (Dec. 14, 1916), 162 Pacific Reporter, page 93.—Oscar Anderson was awarded compensation by the industrial accident commission of California for an injury suffered while at work in Alaska under a contract of employment made in California. On the first consideration of the company's appeal, which was based on the ground that the commission did not have jurisdiction to make an award for an accident happening outside the State, the Supreme Court held that it did have such jurisdiction, and affirmed the award. That decision was apparently not reported. The present decision was reached on a rehearing of the case, and reversed the former view, the result being an annulment of the award. Judge Sloss delivered the opinion, and said in part:

Our former decision, upholding the jurisdiction of the commission, was based on the theory that the workmen's compensation law entered into and became a part of the contract of employment, and that, where such contract was made in this State, the statute fixed the rights of the parties with respect to any injury arising out of the employment, wherever such injury might occur.

Upon further study we are satisfied that this view is not tenable. The liability of the employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, i. e., that of employer and employee, and affixes certain rights and obligations to that status. True, the relation of employer and employee has its inception in a contract, but, once the relation is created, its incidents depend, not upon the agreement of the parties, but upon the provisions of the law.

There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 and various statutes in other States, under which the compensation provisions are dependent upon the election or consent of the employer and employee. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract.

The question resolves itself, then, into one of the correct interpretations of our statute. Ordinarily, the statutes of a State have no force beyond its boundaries.

Unquestionably, the legislature of Alaska has full authority to determine the conditions upon which liability shall exist for an injury sustained within the boundaries of that territory, and this right could not be limited by the circumstances that the injured person might be a nonresident of Alaska, and in the employment of another nonresident under a contract of employment made elsewhere. It will not be supposed that the legislature of this State undertook to pass a law which would trench upon the sovereign powers of any other jurisdiction.

Citing decisions in other States where the laws have been held to have extraterritorial effect, the court differentiates the cases arising in Connecticut, New Jersey, and West Virginia, because in those States the laws are elective, and in the instance of West Virginia the language of the law appears to make it apply to all workmen, except those employed wholly without the State, which was not the fact with reference to the miner whose injury gave rise to the decision. As to New York, it is said that while the statute is compulsory, the fact that payments are made from a State fund, supported by premiums whose amount is calculated on the total pay roll, makes the decision there irrelevant under the circumstances existing in California.

WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT OF STATUTE—VESSEL IN PORT OF ANOTHER STATE—*Kruse et al v. Pillsbury et al.*, *Supreme Court of California* (Jan. 19, 1917), 162 *Pacific Reporter*, page 891.—Compensation having been ordered by the industrial accident commission to be paid to Emily Sandberg by Emil T. Kruse and others, employers, for the death of her husband, the employers applied for a writ of certiorari. The deceased, Louis Sandberg, was second officer of a vessel and was killed while the vessel was

in port at Hoquiam, Wash. It had already been settled by the decision in *North Alaska Salmon Co. v. Pillsbury* (see above) that the California compensation law does not have extraterritorial effect, but it was contended that the fiction of admiralty law causes a vessel owned in any jurisdiction to remain a part of the territory of its own State or country wherever it may be. The court held, after an examination of pertinent cases, that this does not hold as to a vessel in port. The award of the commission was therefore annulled. Judge Melvin in the opinion written by him used the following language:

There are many authorities in support of the rule that when a merchant vessel of one country enters the port of another for the purposes of commerce, it subjects itself to the laws of the sovereignty governing such port, unless some different rule has been established by treaty or otherwise.

All nations have equal authority upon the high seas, and therefore a ship upon the waters of the open ocean is subject to the laws of the home port, being for all purposes a part of the substance of the country from which she sails. But in the port of a foreign country the laws of that country are in full force, and must operate to the exclusion of the statutes of the sovereignty governing the ship's home port.

WORKMEN'S COMPENSATION—FARM LABOR—LABORER ON THRASHING MACHINE—*In re Boyer, Appellate Court of Indiana, Division No. 1 (Oct. 25, 1917), 117 Northeastern Reporter, page 507.*—William Boyer was a separator man on a thrashing machine operated by Edward A. Lane, who went about from farm to farm thrashing oats and wheat at a fixed price per bushel. The employer opposed an application for compensation on the ground that the employee was a farm laborer, and so belonged to a class excepted from the operation of the compensation law. The industrial board certified the disputed question of law to the court, which decided in favor of the employee. It was pointed out that the thrashing is seldom done by the farmer himself, and that the thrashing and milling of grain are equally pursuits distinct from farming, the fact that the thrashing machine travels about and operates upon the farms not making any difference in the classification.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—BRICK-LAYER POINTING WALL OF LITHOGRAPHIC ESTABLISHMENT—*Dose v. Moehle Lithographic Co., Court of Appeals of New York (Oct. 23, 1917), 117 Northeastern Reporter, page 616.*—Jacob Dose was employed by the company named, whose business, that of lithographing and printing, is classed as a hazardous one under the New York workmen's compensation act, to point up and repair the wall of its

building. He worked at day wages, and the company furnished all materials and apparatus. On June 22, 1916, while he was at work, a rope supporting a scaffold broke, and he was thrown 30 feet to the ground and suffered injuries for which he claimed compensation. The industrial commission made an award in the claimant's favor, but this was reversed by the supreme court, appellate division, on the authority of *Bargey v. Massaro Macaroni Co.*, 155 N. Y. Supp. 1076, affirmed 113 N. E. 407 (Bul. No. 224, p. 270). The court of appeals reversed the judgment of the supreme court, holding the employee entitled to compensation. Judge Hogan, who delivered the opinion, reviewed the *Bargey Case*, and called attention to the provision in chapter 622, Laws of 1916, amending the definition of the term "employee." The following is quoted from the opinion:

It is obvious from a comparison of the earlier law with the amended statute, that under the statute, before the amendment, an employee to be entitled to an award must have been engaged in a hazardous employment in the service of an employer conducting a hazardous employment. Such was the construction of the law in the *Bargey Case*. The amendment of 1916 was intended to, and does, embrace an additional class of employees, viz, those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment. The claimant, Dose, was clearly within the class embraced in the amended law.

The appellate division held that the injury to Dose did not arise out of, and in the course of, an employment "carried on by the employer for pecuniary gain," that Dose had no connection whatever with the hazardous employment conducted in the building, that his injury arose not out of and in the course of the work of lithographing and printing, but of bricklaying, and that the employment of bricklaying was not carried on by the employer for pecuniary gain. That conclusion would render meaningless the amendment of 1916. The company was an employer of workmen. It conducted a hazardous business for pecuniary gain, which term, as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain in order to come within the act. *Matter of Mulford*, 220 N. Y. 543, 116 N. E. 344 [see p. 236]. The injury received by Dose was accidental, and sustained by him as an employee in the service of the company which carried on a hazardous employment. The position that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not, in justice to itself, its business, or its employees, continue business in a plant which was actually unsafe or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company; and, under the law as amended, was clearly entitled to compensation.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—DRIVER FOR FLORIST, INJURED IN ARRANGING WINDOW BOX.—*Glatzl v. Stumpp*, Court of Appeals of New York (Jan. 30, 1917), 114 *Northeastern Reporter*, page 1063.—Franz Glatzl having suffered fatal injuries while in the employ of G. E. M. Stumpp, a florist, proceedings for compensation were brought by his widow, Eugenie Glatzl, and his minor children, and an award was made in their favor by the industrial commission. The employee was a driver engaged in making deliveries, and on November 8, 1915, he drove to a certain house, and the other man on the wagon delivered flowers there. They then attempted to arrange a window box, Glatzl climbing upon a ladder in front of the house. He lost his balance and fell upon the ground, and the window box, falling upon him, fractured and lacerated his thumb. Tetanus developed and caused his death on November 24. The court, reversing decisions of the board and of the appellate division of the supreme court, held that the injury was not in the course of a hazardous employment as driver, Judge Cuddeback delivering the opinion and saying in part:

It has been said that the employer of Franz Glatzl was engaged in carrying on the business of a florist, which is not a hazardous employment under the act, and that Glatzl, his employee, was not, therefore, protected in any degree by the statute. We do not accept that view. It is true that the business of florist is not mentioned in the act as a hazardous employment; but in this case, as incident to his business, the florist undertook to deliver to his customers the flowers which they purchased, and in carrying on that branch of the business he operated a wagon on the streets and highways of the city. That was within the words of the statute a hazardous employment, and Glatzl was hired to drive the wagon. If the injury which he received had arisen out of and in the course of that employment, it would seem plain that a case under the statute was made out. Then the widow and children would be entitled to the award; but Glatzl was not engaged in such service when he fell.

I can observe no connection between the driving of the delivery wagon by Glatzl and his fall from the ladder which resulted in his death. It was not because Glatzl was the driver of the delivery wagon that he fell from the ladder. Any other person adjusting the window box might have been injured in the same manner.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—OPERATING ENSILAGE CUTTER ON FARM.—*Raney v. State Industrial Commission*, Supreme Court of Oregon (July 17, 1917), 166 *Pacific Reporter*, page 523.—Wesley Raney was injured in the employ of D. R. Tinnerstet, while engaged in operating an ensilage cutter propelled by a gasoline engine. His hand was caught by the knives and torn off at the wrist. The employer's business was that of a farmer. The industrial accident commission refused compensation, but the circuit court of Tilla-

mook County reversed this and gave judgment in the employee's favor. This was affirmed by the supreme court, which held that the occupation was included within the compensation law, the cutter used being a "feed mill" under its provisions. The court said further that—

The fact that the operation of an ensilage cutter may have been merely incidental to farming, the business in which plaintiff's employer was generally engaged, did not make the management of the "feed mill" a less hazardous occupation.

The compensation law was amended by the legislature of 1917 so as to exempt farmers from liability for compensation for injuries received in the cutting of ensilage or other work done by power-driven machinery when incidental to farming operations. Since the injury in the present case occurred in 1916, compensation to the claimant is, of course, not affected by this subsequent enactment.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—SALESMAN FOR NONHAZARDOUS BUSINESS, RIDING MOTORCYCLE—*Mulford et al v. A. S. Pettit & Sons, Inc., Court of Appeals of New York (May 1, 1917), 116 Northeastern Reporter, page 344.*—Norma S. Mulford instituted proceedings under the compensation law for the death of her husband, Edward S. Mulford, which was opposed by the employer, the company named, and by the insurance carrier. The employer dealt in lumber, coal and feed, not a hazardous business under the compensation law. The claim was made, however, under group 41 of section 2, which covers the operation of vehicles by gasoline and other power. The appellate division affirmed an award made by the industrial commission in favor of the claimant, and this judgment was affirmed by the court of appeals, Judge Pound, in the opinion, comparing with this case similar cases decided in the State, and saying:

Of course, the employer in this case was not in the business of operating a motorcycle for gain. Its business was not the operation of motorcycles in any sense. I think, however, that "pecuniary gain," as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain in order to come within the act. If, in that connection, the purpose of using the motorcycle is profit, that is enough. *Herbert v. Shanley Co.*, 242 U. S. 591, 37 Sup. Ct. 232. The deceased in this case operated the motorcycle as an incident to his employer's business. In the *Bargey Case* [218 N. Y. 410, 113 N. E. 407; Bul. No. 224, p. 270] we held that deceased, a carpenter making repairs on a building used in the manufacture of macaroni, was not covered by the act, because the employer's occupation was the preparation of macaroni, and that the employee was not engaged therein. The question presented in this

case was not considered in the opinion, although it was said that the macaroni company was not engaged in the repair of buildings for pecuniary gain.¹

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STORAGE—RETAIL COAL DEALER—*In re Roberto, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 397.*—Berhardina Roberto applied for compensation for the death of an employee of John F. Schmadeke (Inc.), which conducted a large retail coal business. The capacity of its pockets was between 10,000 and 12,000 tons, and the daily sales amounted to not far from 1,000 tons. On December 15, 1916, the supply of coal was small, and it was necessary for the employee to "trim" the coal by moving coal out of the corners of the pocket, so that it would run by gravity down a chute into automobile trucks for delivery to customers. The employee was walking along a corridor around the pocket when he fell, sustaining fatal injuries. The court reversed an award to the applicant, and dismissed the claim. It held that the business of an employer does not come within the meaning of the term "storage" in the law, even though his business may be an extensive one, where goods are kept on hand with no other purpose than their delivery as fast as sales can be made.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STORAGE—RETAIL STORE—*Walsh v. F. W. Woolworth Co., Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 394.*—Emmet G. Walsh was awarded compensation by the industrial commission for an injury alleged to have been sustained on October 21, 1916, in the form of a strain of the employee's back. He was a boy of 16, and his duties were to take merchandise delivered on the sidewalk in front of the employer's 5 and 10 cent store and place it in the basement, and to take the goods to the salesroom above at the request of the salesman. He claimed that the injury happened while he was rolling a barrel of peanuts up an incline. The question of fact as to the injury having been settled by the decision of the commission, the only point at issue was whether it occurred in the hazardous employment of "storage." The employer was held not to be engaged in this business, and the award was reversed and the claim dismissed. The following is taken from the opinion delivered by Judge Woodward:

The most obvious thing about group 29, in connection with the scheme of the workmen's compensation law generally, is the fact that it deals with wholesale matters. When the statute refers to ware-

¹ For a repudiation of the doctrine in the Bargey Case see *Dose v. Moehle Lithographic Co.*, p. 233.

housing or "storage of all kinds and storage for hire," we are to understand, not purely incidental storage of the goods necessary to keep up a retail stock, but the wholesale storage of merchandise in large packages, involving special dangers in their handling and storage. Formerly an employee was defined to be "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same," but now it is "a person engaged in one of the occupations enumerated," or one "who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises," etc., and this clearly excludes the claimant in this case, for it can not be contended that the employer's "principal business" was that of a warehouseman or storage man, in the light of the record now before us.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—WEIGHING HIDES UNLOADED FROM VESSELS—INJURY—ANTHRAX CONTRACTED THROUGH ABRASION OF SKIN—*Hiers v. John A. Hall & Co., Supreme Court of New York, Appellate Division, Third Department (May 2, 1917), 164 New York Supplement, page 767.*—Eugene H. Hiers was awarded compensation by the State industrial commission against his employer, the company named, and its insurer. His occupation was weighing hides on the piers in Brooklyn, the hides constituting parts of the cargoes unloaded from vessels. Such unloading and handling is one of the occupations designated as hazardous under the compensation law. His gloves became permeated with moisture and salt from the hides and a swelling was caused on the back of one of his hands, resulting in an abrasion of the skin upon this swelling. On February 10, 1916, anthrax germs contained in the hides were communicated to his system through this fissure, and the award was made for the disease resulting. A compensable injury is defined by the act as including:

"Only accidental injuries arising out of and in the course of employment, and such disease or infection as may naturally and unavoidably result therefrom."

The award in favor of the employee was affirmed, Judge Cochrane saying:

There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation, or is a natural outcome thereof. It is expected, usual, and ordinary. This disease incurred by the claimant was unexpected, unusual, and extraordinary, as much so as if a serpent concealed in the hides had attacked him. There is no difference in principle because the attack, instead of being made unexpectedly by a concealed serpent, was made unexpectedly by a concealed disease germ. We think the circumstances constitute an accidental injury, within the meaning of the statute.

However, there is another theory on which this award may be upheld. The claimant, in the course of his employment and as a result

thereof, had received an abrasion on his hand or a fissure therein. This may properly be deemed an accidental injury arising out of and in the course of his employment, and the disease or infection caused by the anthrax germ may be deemed "such disease or infection as may naturally and unavoidably result" from such injury, within the meaning of the statute.

WORKMEN'S COMPENSATION—HORTICULTURAL LABOR—JANITOR PRUNING TREE—*Kramer v. Industrial Accident Commission of California, California District Court of Appeals (Oct. 12, 1916), 161 Pacific Reporter, page 278.*—The industrial accident commission awarded compensation to Oscar Ohlsson for injury received while in the employ of Henry J. Kramer. The former was janitor of a building used by his employer as a dancing academy and dwelling house. On the adjoining lot was a garage used by Kramer, and the serious disability of the employee resulted from the piercing of his ankle by a palm thorn while he was pruning a fig tree on this lot. Horticultural labor is excluded from compensation, and the court reversed the award on the ground that he was engaged in such labor. In the course of the opinion delivered by Judge Shaw, he said:

It appears that Ohlsson was employed in a dual capacity; that is, in the capacity of a janitor for a dancing hall and a house and garden laborer. In the light of the evidence we construe the finding that Ohlsson was employed as a house and garden laborer as referring to household domestic service mentioned in section 14, and the caring for the flowers, grass, trees, and shrubbery growing upon the two lots. In other words, the service performed by Ohlsson as a house laborer consisted of household domestic service, while that performed by him in the capacity of a garden laborer consisted in horticultural labor. Clearly the labor of caring for grass lawns, trees, shrubbery, and flowers is horticultural in character. The pruning of this fig tree without specific instructions so to do might well be regarded as within the scope of his employment as gardener, since the proper care thereof required such work to be done. It did not interfere with the use of the driveway, and the pruning thereof had no connection with the work of janitor which by any stretch of the imagination could render it incidental thereto. Therefore the conclusion of law as found by the commission that at the time of the injury "the applicant employee was not engaged in any of the occupations or employments excepted by section 14 of the workmen's compensation, insurance, and safety act from the provisions of said act" is without support in the facts found.

New York decisions are discussed and found to be in agreement with this view.

WORKMEN'S COMPENSATION—INJURY—ACTINOMYCOSIS FROM PULVERIZED GRAIN—*Hartford Accident & Indemnity Co. v. Industrial Commission et al., Supreme Court of California (Jan. 4, 1917), 163*

Pacific Reporter, page 225.—H. A. Burris, an employee of the Perkins Grain & Milling Co. during the months of October, November, and December, 1915, became afflicted with an affection of the nose and mouth which was diagnosed as actinomycosis. His work was filling sacks with ground barley and wheat, and the evidence, from physicians who testified and medical works to which they referred, was conflicting as to the causes of the disease and as to whether it could be contracted from grain. The commission's decision, awarding compensation to the employee, was upheld by the court, the opinion, delivered per curiam, concluding as follows:

The commission resolved this conflict in opinion and authority in favor of the applicant for compensation by its finding that "the applicant's employment in and about the handling of grain caused him to contract the disease known as actinomycosis." The evidence in support of this finding consists, not only in the opinion evidence of the physicians who treated the applicant and diagnosed his case, but also in the testimony of the applicant himself that he had not theretofore suffered from any such disorder, but that it had become acutely developed whilst he was engaged in the work of sacking and handling pulverized grain for his employer. We think this evidence was sufficient to warrant the commission in arriving at its aforesaid conclusion, and this being so, we have no power to interfere with its discretion in making said award.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ANSWERING TELEPHONE CALL—*Holland-St. Louis Sugar Co. v. Shraluka*, *Appellate Court of Indiana*, *Division No. 2* (May 28, 1917), *116 Northeastern Reporter*, page 330.—Compensation was awarded Barton Shraluka by the industrial board of Indiana, and the company named, his employer, appealed from the award. The employee worked in the sugar factory from 6 a. m. to 6 p. m., 7 days a week, without opportunity to go outside the factory or allowance of time for lunch. While at work on the third floor he was informed by the company's chemist that he was wanted on the telephone. He started to walk down stairs, but near the top slipped on some pieces of beet and fell to the floor below, sustaining several injuries. It proved that the telephone call was for another employee. The principal question was whether the injury was one arising out of the employment. The court decided that it was and affirmed the award. Judge Dausman delivered the opinion, stating the principles set up by the apposite cases, which are cited, and saying that even if the call had been one from his family or friends, it would have been presumable that it was under the circumstances an incident of his employment, especially as he had been summoned by a superior, and had a right to assume that the call pertained to his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ATTEMPT TO RAISE WINDOW INTENTIONALLY NAILED DOWN—*In re Borin, Supreme Judicial Court of Massachusetts (June 27, 1917), 116 Northeastern Reporter, page 817.*—John Borin was injured while in the employ of the William Ryde Co. Certain windows in the room had been nailed down, because to reach them for the purpose of opening and closing involved dangerous climbing over dye tubs filled with hot water and steam. The need of fresh air being great, the employee climbed over the tubs and attempted to detach with a hammer and chisel the slat with which one of the windows was fastened. A piece of the chisel flew and struck him in the eye, causing the injury for which he claimed compensation. In reversing an award made in his favor the court held that this injury did not arise out of the employment, Judge Braley concluding the opinion written by him as follows:

The claimant therefore must be held to have worked in the dye house as fitted for use by his employer, who had the absolute right to close the windows temporarily, or permanently, so that the premises should be used as if those windows formed no part of the construction or equipment; of which conditions he had implied or constructive notice. The fastened window spoke as plainly to him that it was to remain closed as if a printed notice had been posted, or an oral order had been given, the intentional violation of which ordinarily would have precluded compensation.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DOMESTIC SERVANT LIGHTING FIRE WITH ALCOHOL—*Kolasynski v. Klie, Supreme Court of New Jersey (Oct. 8, 1917), 102 Atlantic Reporter, page 5.*—Antoni Kolasynski claimed compensation for the death of a servant in the family of John H. Klie, this employee having been burned to death while lighting a fire. She had been warned not to use kerosene "or anything like that" for the purpose, but the accident occurred while she was using wood alcohol. The court, speaking through Judge Swayze, said that the only question was whether the accident was one arising out of and in the course of the employment, and affirmed a judgment for the petitioner, saying in part:

That it was by accident is not questioned. It was a fortuitous event, which might indeed be expected but might never happen. We must conclude that it arose out of and in the course of the employment unless the disobedience of orders prevents that conclusion. The disobedience of orders in this case was a disobedience of orders as to the way in which the work should be done. The work itself was the very work decedent was expected to do. It was done at the very place where it was meant to be done.

The measure of disobedience found was held not to bar the claim, and the judgment was affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EATING LUNCH—*Manor v. Pennington*, *Supreme Court of New York, Appellate Division, Third Department* (Nov. 14, 1917), *167 New York Supplement, page 424*.—Alfred Pennington was a contractor doing some construction work on the main and second floors of a garage in Plattsburg, N. Y., and had in his employ William Manor. The employer had no control over the basement of the garage. Manor and three other men went into the cellar at noon to eat their dinner, and just as they were about to go upstairs to resume work the boiler exploded, and Manor received burns from which he died the same day. John Manor made claim for compensation, and the industrial commission made an award in his favor. The court, however, held that the injury did not arise out of and in the course of the employment, Judge Woodward, for the court, saying in part:

Manor was not an employee because he was not engaged in performing any of the work for which he was employed (*Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, 413, 113 N. E. 407 [Bul. No. 224, p. 270]); his injuries did not arise out of his employment in any other sense than that he was, probably, in that locality because he was employed upon the first and second stories of the building, but he was not at the time doing anything for the employer, any more than he would have been if he had been waiting in the office of a local hotel for the expiring of the dinner hour.

The accident which happened was not due to any risk growing out of the performance of the employer's contract; it was such a risk as arose from the conduct of the garage by its owners, with which the employer had no relation, and the employee could have been performing no service for the master. He was performing no work whatever; he was awaiting the hour to return to his employment in a part of the premises which were in the possession and control of third persons; and the law does not extend its protection to one thus situated.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EMPLOYEE IN FACTORY ON BOTH SIDES OF STREET, SLIPPING ON ICE—*Redner v. H. C. Faber & Son*, *Supreme Court of New York, Appellate Division, Third Department* (Nov. 14, 1917), *167 New York Supplement, page 242*.—Charles W. Redner was employed as a general utility man by the H. C. Faber & Son Co., manufacturer of trunks. Across the street is a second trunk factory, operated by the A. W. Winship Co., a corporation having the same stockholders as the Faber company and carried on as a single executive organization with it. It was Redner's duty to perform services for both concerns, including the lettering of trunks. On January 20, 1916, he went, at the direction of the superintendent of the Faber company, to letter a trunk in the building of the Winship

company. On attempting to return he slipped upon the snow and ice in the street, and from the effects of the fall received he died six months later. The question upon which the decision turned was whether the injury was one arising out of the employment, it being contended on the part of the employer and insurer, who appealed from an award of compensation to the widow, that it was the result of a street accident, to which all persons using the highway were equally liable. The court, speaking through Judge Woodward, affirmed the award, saying that some English decisions would seem to sustain the contention mentioned, and that some of our own have refused to sustain awards in cases where injuries occurred in highways after the termination of the hours of employment, but had not gone to the extent to which the court was asked to go in the present case. Continuing, the opinion says in part:

The evidence indicates that, while the location of the accident was technically a public highway, it was in fact practically a part of the premises of these two corporations; it was not generally used for street purposes. The determining factor is, not whether the accident occurred in a public highway, but whether the employee was there in the performance of his duties. If he was there in the discharge of the obligations of his employment, the accident would arise out of such employment as certainly as though he had reached a point within the factory and had there slipped and sustained his injuries. This highway was a part of the place provided for him to work in. Under the circumstances here disclosed, it was a matter of absolute indifference who owned or controlled the highway. It was as necessary for the decedent to cross this highway in doing the work appointed as it was for him to cross the room in which he was employed in the factory, and the liability would clearly extend to him if injured in either case while actually employed.

On appeal the judgment in this case was affirmed by the State court of appeals (May 14, 1918, 119 N. E. 842).

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE—BURDEN OF PROOF—*Bloomington, D. & C. R. Co. v. Industrial Board, Supreme Court of Illinois (Feb. 7, 1917), 114 Northeastern Reporter, page 939.*—Compensation was awarded by the industrial board to the administratrix of Henry Yanda for his death in the employ of the company named on July 9, 1914. The deceased, a carpenter, and one Albeitz were working at that time on the top of a car. There were iron frames about ventilators on the top, and Yanda was near the end of an uninsulated live cable. The other workman was looking down at his work and had his cap over his eyes. His first knowledge of any accident came when he saw Yanda falling over. He caught Yanda, and the latter was taken down from the car dead. The testimony as to whether or not there were

burns upon the body was conflicting, as was that as to whether death from electric shock could occur without the presence of such burns. The court held that although the burden of proving that death was the result of an injury occurring in the course of employment rested upon the administratrix, there was sufficient evidence to sustain the view taken by the board that such was the fact. The concluding portion of the opinion, which was delivered by Judge Cartwright, is in part as follows:

The burden of proof that Yanda's death was an accident arising out of his employment rested upon the administratrix, and such proof must amount to something more than mere guess and conjecture. The evidence was that Yanda was, and for 21 years had been, in perfect physical condition, and the reasonable presumption is that he was killed by some external, efficient agency. The agency was present if it became operative through contact with the iron plate and exposed end of the cable. The rational explanation is that the death was caused by an electric shock.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FALL FROM SCAFFOLD DUE TO EPILEPSY—*Van Gorder v. Packard Motor Car Co., Supreme Court of Michigan (Mar. 30, 1917), 162 Northwestern Reporter, page 107.*—Mildred Van Gorder instituted proceedings to obtain compensation for the death of Frank Van Gorder, and an award was made to her by the industrial accident board. Van Gorder was a steam fitter employed by the company named, and when standing upon a scaffold 6 feet in height he fell from it to the floor, fracturing his skull, and died from the effects of the fall within 24 hours. The board found upon evidence which the court deemed sufficient that the fall was the result of epilepsy, and also found that the injury was one arising out of and in course of the employment. The company contended that it was not one arising out of the employment, and the supreme court on appeal adopted this view, reversing the award on the ground that the fall was caused only by the fit, and that this was the sole cause of the injury.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FALL FROM STAIRS WHILE LEAVING PREMISES.—*In re O'Brien, Supreme Judicial Court of Massachusetts (Nov. 2, 1917), 117 Northeastern Reporter, page 619.*—John O'Brien, an employee of the Standard Comb Co., received injuries while leaving the premises in which he worked. O'Brien was 64 years of age, and practically blind in his right eye, but his vision was sufficient to enable him to do his work properly, and to descend the outside stairs which

led to the place of his employment. On September 12, 1916, while he was going down the stairs after completing his day's work, and while other employees were rushing down the stairs, he took his hand momentarily from the railing along them. He reached again for the railing, but made a misstep or lost his balance while on the ninth step from the bottom, and as a result fell over the railing to the ground. The superior court of Worcester County affirmed an award of compensation made by the industrial accident board, and from this court's decree the insurer appealed. The supreme judicial court affirmed the decree, resolving in favor of the claimant the disputed point as to whether the injury arose out of the employment. Judge Pierce said as to this, in the concluding portion of the opinion delivered by him:

We are of opinion that there is a reasonable probability that some employee in the course of his employment will fall and receive an injury while descending a stairway of an employer, constructed and used as the stairway was in the case at bar. It follows that the likelihood of such a fall is a risk and hazard of that business.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY ACQUIESCED IN BY EMPLOYER—*In re Loper, Appellate Court of Indiana, Division No. 2 (June 1, 1917), 116 Northeastern Reporter, page 324.*—The industrial board, in the case of one Loper, certified to the court the question of law as to whether his injury and death arose out of his employment within the meaning of the compensation act. Loper was at work as a drill-press operator. The assistant superintendent, as a matter of sport, attempted to apply to Loper's person the nozzle of a compressed-air hose, when the employee, in jerking away his body, ruptured an abscess in the region of the gall bladder, causing acute general peritonitis, and death two days after the injury. The employees, as was found by the board, were accustomed to use the hose to clean their clothes, and to turn the air from it upon one another. The employee injured had participated in this at other times, but on this occasion was attending to his work. The assistant superintendent had also participated before, and neither he nor any other representative of the employer had objected to the practice. The court held that under the circumstances the injury arose out of the employment. It calls attention to the cases of other kinds of "horseplay," in the majority of which compensation has been denied.

We are not dealing here with a sporadic, occasional, or unanticipated use of the air hose in play. It had become a habit here for the employees to turn the hose against one another. That the habit was a perilous one, see the following, where similar accidents occurred: [Cases cited].

The employer, with knowledge of the facts, permitted such practice to continue. It was within his power to have prohibited it. By failing to do so, it became an element of the conditions under which the employee was required to work.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—MINER SHOT AFTER GOING BACK TO ATTEND TO UNEXPLODED CHARGES—*Atolia Mining Co. et al. v. Industrial Accident Commission et al., Supreme Court of California (Aug. 10, 1917), 167 Pacific Reporter, page 148.*—J. D. Mason was a shot firer for the company named. It was the custom in small mines, such as this was, for some one of each shift of shot firers, after it appeared that some shots had not exploded, to return and make the place safe for the next shift. This could not well be done immediately on account of smoke and gas left by the explosion. The shift which included Mason finished work at 2 a. m. He and his two fellows had drilled 14 holes and loaded them. They lighted the fuses and went up the shaft about 100 feet, where they listened and counted 12 explosions. The other men lived some distance from the mine and went home. Mason went to his tent, about 200 yards away, washed his face and hair, and returned to the mine about 20 minutes after leaving it. He found that all the shots had been fired, the deficiency in the number of reports doubtless resulting from simultaneous explosions, this being a not uncommon occurrence. As he once more went to his tent with his miner's light one of the guards stationed to prevent theft of ores, without inquiry or warning, shot him in the back, inflicting an injury for which he claimed compensation. An award was made by the Industrial Accident Commission, and the employer and the insurance company, praying for a writ of error, contended that he was not an employee at the time of the injury, but a volunteer, his hours of service having expired; also that the shooting was a premeditated and unjustifiable assault. Overturning these contentions and affirming the award, the court, through Judge Henshaw, said:

Upon neither of these grounds can this award be annulled. The recognized custom of miners, carried out with the knowledge and approval of the mine owners (a custom which manifestly makes for the protection of the mine owners themselves, in lessening the liability of injury from unexploded blasts by the oncoming new shift, ignorant of the conditions), becomes in all essentials for this award a part of the duty of the miner in the performance of his work, and his injuries thus resulting grew out of and occurred in the course of his employment.

Upon the second proposition, while unquestionably it was a heedless and reckless thing for the guards thus to have shot a man without more investigation as to his character and intentions than was here shown to have taken place, yet every legal presumption favoring

innocance, the argument will not be sustained that these guards deliberately perpetrated an assault to commit murder. To the contrary, it will be held that the man who fired the shot, himself the chief guard, believed that the circumstances justified him in so doing, and that thus he was acting within the line of his own employment, and under this view Mason, having been injured by the negligent performance of an act within the general scope of the duties of the employee inflicting the injury, is entitled to his recovery.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—MOVING BEAMS TO REACH STEAM GAUGES—ACCIDENT—OBJECTIVE SYMPTOMS OF INJURY—*Manning v. Pomerene, Supreme Court of Nebraska (Apr. 14, 1917), 162 Northwestern Reporter, page 492.*—Chapin E. Manning brought an action for compensation against Louis W. Pomerene for injury suffered while engaged in attending to a boiler for the latter. It was necessary, in order to read the steam gauges, to go into a narrow passageway. Manning found this obstructed by some steel I-beams about 3 feet above the floor and pushed against them in an effort to move them out of the way. He felt faint and sick and had pain in his stomach and nausea, was obliged to sit down, and was unable to work the remainder of the day. He acted as overseer of other men on the next day, which was Saturday, but on Monday and afterwards he was unable to work, vomiting blood and having a slight paralytic shock. He was 63 years old, and there was a contention that the sickness was due to arteriosclerosis. Other contentions on the part of the defense were that the removal of the beams was not within the scope of the employment and that the occurrence was not "an unexpected or unforeseen event, happening suddenly and violently," and "producing at the time objective symptoms of an injury." These questions were resolved in favor of the employee, Judge Letton delivering the opinion, from which extracts are quoted as follows:

It seems there was a narrow passageway in which he was required to walk in order to reach the gauges showing the steam pressure in the boiler. The end of these beams projected over and obstructed the passageway, and while there were steam fitters near whom he might have called from their work to move the beams far enough to allow him to pass, it was perfectly natural and to be expected that in order to perform his duties he should move or attempt to move them himself. They were lying upon a projecting part of the boiler, and the testimony is that beams resting upon iron, as these were, usually slide easily when pushed. In our view he was acting within the scope of his employment.

It is insisted that no "unexpected or unforeseen event, happening suddenly and violently" occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back

and forwards could not reasonably be said to be "an unforeseen event"; and that it did not happen suddenly and violently except as it was produced by the plaintiff himself. It is said that this language "was clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding of employee's person by some breaking or falling or exploding of apparatus, machinery, or tools." To hold this would unduly limit the meaning of this clause. The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforeseen event happening suddenly. It is also said that no "objective symptoms" of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce "at the time objective symptoms of an injury," but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PRESUMPTION—EVIDENCE—*Chludzinski et al. v. Standard Oil Co., Supreme Court of New York, Appellate Division, Third Department (Dec. 28, 1916), 162 New York Supplement, page 225.*—This decision arose out of a claim for compensation by Catherine Chludzinski and others for the death of her husband, an employee of the company named. Death was caused by fire catching his flannel shirt, which, as in the case of all the workmen, was saturated with oil and was very inflammable. During working hours he went into a locker room adjoining the workroom, in which there was a lighted Bunsen burner protected by a hood. A few minutes later he came out with his clothes aflame, and died the same day from the effect of burns. The company argued that there was proof that the injury was not one arising out of and in the course of the employment. The court held to the contrary, and affirmed an award in favor of the widow and children, Judge Kellogg saying in the opinion delivered by him:

In the absence of a rule prohibiting the men from going to the locker room during working hours, it can not be said that the decedent had no right to enter that room, or that he ceased to have all the benefits of an employee while there. Many reasons might have made it proper, and in the due course of his employment, for him to enter the room at the time. We can not, under the law, indulge in any presumption against him.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PRESUMPTION—EVIDENCE—*Ohio Building Safety Vault Co. v. Industrial Board et al., Supreme Court of Illinois (Feb. 21, 1917), 115 Northeastern Reporter, page 149.*—The company named was directed to pay compensation to the widow of Jens Christensen, at the rate of \$31 per month for 96 months, on account of the death of her husband on December 23, 1914. He was a night watchman in the employ of the company, and on the night of December 19 received injuries which resulted in his death. There was evidence tending to show that he was assaulted with an iron pipe by some unknown person. The coroner's verdict was to that effect, and it was admitted as evidence before the board, and on appeal was held to have been competent evidence. The court also held that the circumstantial evidence was sufficient to sustain the findings of fact on which the board based its award, and affirmed the same. It appeared that the employee was of a peaceable disposition and had no personal enemies, but it was contended by the employer that the injury did not arise out of the employment. This contention was rejected by the court in its opinion delivered by Judge Carter, who, in the course of his quite thorough discussion of this point, said:

The deceased, because of his employment, was required to guard the building from trespassers or other intruders, and on this account he necessarily might have to deal with persons more or less regardless of the rights of others. Those required to deal with such persons run a risk of encountering violence. Under the evidence in this case, the injury is fairly traced to the employment of the deceased as the proximate cause—an injury which came from a hazard to which Christensen would not have been equally exposed apart from his employment. The danger of this injury was peculiar to his line of work and not common with all other kinds of employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—RETURNING FROM WORK—*Swanson v. Latham & Crane et al., Supreme Court of Errors and Appeals of Connecticut (July 6, 1917), 101 Atlantic Reporter, page 492.*—Alice May Swanson was a claimant to compensation against the firm of employers named, and the company carrying their insurance. The employers were building contractors engaged upon a house in Stafford Springs, and employed six men, one of them Andrew S. Swanson, the husband of the claimant. The men were paid their regular wages and in addition transportation charges, amounting to 90 cents per day, from Willimantic to Stafford Springs and return. They were at liberty to use this money for board and remain at Stafford Springs, or to expend it for transportation to Willimantic

and back. It was arranged that one of the employees, Osterhout by name, should carry the men back and forth in his automobile and be paid the transportation money directly by the contractors. On December 7, 1916, as the men were returning from Stafford Springs to their homes in Willimantic, the automobile collided with a railroad train at a crossing, and all of the six men were killed. The court affirmed an award of a compensation commissioner holding that the injury arose out of and in the course of the employment. From the opinion delivered by Judge Wheeler the following is quoted:

Transportation to and from his work was incidental to his employment; hence the employment continued during the transportation in the same way as during the work. The injury occurring during the transportation occurred within the period of his employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment, because contemplated by it. The case falls clearly within the construction we have heretofore placed upon the terms of the statute "arising in the course of the employment." *Larke v. Hancock Mutual Life Insurance Co.*, 90 Conn. 303, 308, 97 Atl. 320 [Bul. No. 224, p. 302]. An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—TRAVELING AGENT SLIPPING ON ICE—*In re Harraden, Appellate Court of Indiana (Dec. 20, 1917), 118 North-eastern Reporter, page 142.*—Charles H. Harraden was an employee of the Columbia Insurance Co., as a fire insurance agent. On March 20, 1917, he was sent from Detroit to Boyne City, Mich., on business and arrived there after dark. While going from the railway station to a hotel he slipped upon the icy sidewalk and fractured his femur. The industrial board found that he had been totally disabled from work up to the time of the hearing before it and might be permanently partially incapacitated. The board certified to the court the question whether the injury was one arising out of the employment. The court replied in the affirmative, after examining pertinent cases. The following is quoted from the opinion delivered by Judge Felt:

The facts show that Harraden's employment exposed him to increased hazards generally, among which was the one which caused his injury. The admitted facts compel the inference that the injury of Harraden resulted from conditions produced by the weather, and likewise because he was in the particular locality at the time in question. The latter fact is due to his employment. The facts admit of no other inference but that for his employment he would

not have been in that locality at the time of his injury. His employment was therefore a contributing proximate cause of his injury. By reason of it he was exposed to a hazard which in all reasonable probability he would not otherwise have encountered. The work he was employed to do required travel and made him particularly subject to hazards to an extent far greater than like hazards encountered by the general public.

Such being the case, the facts not only warrant the conclusion that the injury of Harraden was received in the course of his employment, but they likewise compel the inference that his injury arose out of his employment within the spirit, purpose and meaning of the workmen's compensation act.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—TRAVELING SALESMAN SLIPPING ON ICE—*Donahue v. Maryland Casualty Co., Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 226.*—Patrick M. Donahue was a traveling salesman for Thomas J. Flynn & Co., engaged in the sale of church goods. On February 21, 1916, he went from the employer's place of business in Boston to Lowell, and from there by electric car to the village of Collinsville, and to the house of a clergyman, distant about 10 minutes' walk. After completing the business he started to walk back to the car line, and slipped on the ice and fell, breaking his ankle. This occurred at a point where he was obliged to walk in the middle of the street, the sidewalk being impassable on account of the ice. He intended to take a car to a place where he could visit another prospective customer. The insurer appealed from an award of compensation made by the industrial accident board, and on which the superior court of Suffolk County had rendered judgment. The supreme judicial court reversed this judgment on the ground that the injury was due to a risk common to the public, the employment not being a contributing, proximate cause.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VOLUNTEER—*Eugene Dietzen Co. v. Industrial Board of Illinois, Supreme Court of Illinois (June 21, 1917), 116 Northeastern Reporter, page 684.*—Giuseppe Cappuccio was injured while in the employ of the company named on July 15, 1914, and an award was entered in his favor by the committee of arbitration and sustained by the industrial board, granting him \$5 a week for 112 weeks. The circuit court of Cook County affirmed the award, certifying, however, that it was a case proper to be reviewed by the supreme court. The employee's work was the polishing of small metal handles for tapelines by holding them against a buffing wheel. He had to take these from one box and, after polishing,

place them into another. The dust from the operation fell into a boxlike receptacle, connecting with a pipe to an exhaust fan. The employee dropped one of the handles into the receptacle, and, going a few feet away from his working place, removed a cover near the fan, and reached in for the purpose of getting the article. In doing this his hand was caught by the fan and severely injured. It was proven that another man was responsible for the exhaust system, and that the injured employee had nothing to do with it, and should have called for assistance in case of need. There was a conflict of evidence as to whether he had received specific warning on another occasion when he had taken the cover off the hole. The court held that, the scope of his employment having nothing to do with the exhaust system, the injury did not arise out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WILLFUL MISCONDUCT—*Inland Steel Co. v. Lambert, Appellate Court of Indiana, Division No. 2 (Dec. 19, 1917), 118 Northeastern Reporter, page 162.*—Harold B. Lambert proceeded against the company named for compensation for an injury sustained while employed by the company. From the findings of fact of the board it appeared that he was a switchman, that his duties were in connection with the operation of a switch engine about the yards, and that his hours were from 6 p. m. to 6 a. m. After quitting work he changed his working clothes for street clothes, and then had to go a distance equal to five city blocks to the entrance of the plant to deposit a card in the time clock. On the morning of March 7, 1916, when the injury occurred, the path along which he usually went was impassable for more than 70 feet, because of an excavation 10 feet deep. Before he reached this excavation the engine came along, in charge of the day crew, running in the direction in which he was going, and to avoid the excavation and save time he attempted to board it, and received the injury, which resulted in the loss of a foot above the ankle joint. He had been at work as a switchman for two months, and the company had in force during that time a rule that no one not at the time connected with its operation should board a switch engine. He had been given a book of rules on entering the employment, but it was in a foreign language which he could not read, and on his returning it he was told that there were none on hand in English, but that one would be furnished to him later. He was in the office several times, but was not given a book, nor did he ask for one. He had not previously ridden on the engine going out in the morning, but had done so on several occasions at night. The board found that he received his injuries by an accident arising out of and in the course of the employment, and that it was not due

to his own willful misconduct; and it awarded him compensation for 125 weeks at \$11.06 per week. The court reversed the award and ordered a rehearing. Judge Caldwell delivered the opinion, and first pointed out that, while it was proper for the board to state its conclusions as to whether the injury was an accident, whether it arose out of and in the course of the employment, and whether it was the result of willful misconduct, these were matters involving conclusions of law and were reviewable by the court, and such findings should not be upheld unless supported by the findings of ultimate fact. It was agreed that the injury was the result of an accident in the course of the employment, but the court held that under the facts as found it did not arise out of the employment, Judge Caldwell saying on this point:

In the case at bar we are impressed that the accident arose from a peril added by the conduct of the appellee; that the act of attempting to get on the engine in motion while proceeding to the time clock was not reasonably incidental to his employment, but rather was an act done purely for his own convenience. In our judgment the facts do not present a situation wherein the employee negligently performed a duty, or was guilty of negligence in the performance of a duty, but rather a case wherein he attempted unnecessarily to do a perilous act, not reasonably incident to his employment. We therefore conclude, under the finding, that the accident did not arise out of the employment.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—DEDUCTION OF AMOUNTS PAID BY ASSAILANTS UNDER ORDER IN CRIMINAL PROCEEDINGS—*Dietz v. Solomonwitz et al.*, *Supreme Court of New York, Appellate Division, Third Department (Sept. 13, 1917)*, 166 *New York Supplement*, page 849.—Charles B. Dietz was a paper hanger employed by Harry Solomonwitz. While thus at work in April, 1916, he was told by two members of a rival labor union that there was a strike upon the work and was asked to quit. When he refused to do so, the men assaulted him, inflicting injuries from which he had not sufficiently recovered to be able to work up to August 14, 1916. On that date an award was made to him by the industrial commission, he having in his proceeding for compensation expressed his election to take compensation rather than any damages obtainable from any person, and assigned his right to any such damages to the person or institution who should be liable for compensation. The criminal court which tried the assailants sentenced them to terms of imprisonment, but suspended the sentences and paroled them on condition not only of good behavior, but of payment by them to Dietz of \$100 immediately and \$15 per week during his disability. This weekly payment was the same as the amount of weekly compensation awarded to Dietz to run from May 8 to August

14, 1916, and for such further period as might be determined on a later hearing. The industrial commission decided that the employer and insurance carrier were entitled to no credit for the amounts paid by the parties responsible for the injury; but the court held that these amounts should be deducted from the compensation. In concluding the opinion written by him Judge Lyon, for the court, said:

The provision of section 29 requiring the employer to contribute only the deficiency should the employee elect to proceed against the wrongdoer impliedly requires the application in reduction of the employer's liability of any amounts received from the third party. The effect of the acceptance of these payments by the claimant was to correspondingly reduce the liability of the employer to the claimant. Hence the award should have been only for the balance which existed up to the time the award was made.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—ELECTION OF REMEDY—AGREEMENT BETWEEN WIDOW, EMPLOYER, AND INSURER AS TO SUIT—*Detloff v. Hammond, Standish & Co., Supreme Court of Michigan (Mar. 29, 1917), 161 Northwestern Reporter, page 949.*—Joseph Detloff was killed July 7, 1914, while driving a milk wagon as an employee of the Detroit Creamery Co., by a collision with a motor truck of Hammond, Standish & Co., claimed to be due to the negligence of the truck driver. His widow, as administrator, sued the latter company and recovered judgment in the amount of \$10,000. The defendant appealed and set up a contract, evidence as to which had been rejected at the trial. The widow, the creamery company, and its insurer were the parties to this contract, and under it the widow was to sue the third party, and if she recovered \$3,000 or more was to receive no compensation, while otherwise the deficit between the amount recovered and \$3,000 was to be made up to her. This agreement was not filed with the industrial accident commission nor approved by it. The defendant in the suit claimed that the agreement constituted an election of the compensation remedy. The court, however, held that the contract was void, and the bringing of the suit was the only effective election which had been made, and affirmed the judgment of the court below. Judge Stone delivered the opinion and in the concluding portion said:

A contract is void if it contemplates acts that are illegal or contrary to public policy. A contract which in its execution contravenes the policy and spirit of a statute is equally void as if made against its positive provisions. [Cases cited.]

We are impressed with the claim that the agreement in question was void ab initio, because opposed to public policy and express statute. If not void in the beginning, it became so when this suit was instituted, and therefore was immaterial and irrelevant to the issue upon the trial.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—LIMITATION OF RECOVERY—CONSTITUTIONALITY OF STATUTE—HAZARDOUS EMPLOYMENT—STORAGE—*Friebel v. Chicago City Ry. Co. et al.*, Supreme Court of Illinois (Oct. 23, 1917), 117 Northeastern Reporter, page 467.—Karl Friebel was injured, as was claimed, by the negligence of the company named and other street railway companies operating a line, one of the cars on which injured him while he was driving a truck for his employer, the Hartman Furniture & Carpet Co. He sued the railway companies, which defended in part on the ground that the suit was barred by section 29 of the workmen's compensation law. This section provides for the recovery of compensation from the employer even when the injury is caused by the negligence of third parties, provided all three parties are under the compensation act—the employer being subrogated to the rights of the employee to the extent of recovery from the third party of the amount paid as compensation. Judgment was for the defendants in the circuit court of Cook County, and this was affirmed by the supreme court. It was first held that the furniture company, which maintained a warehouse for the storage of its furniture, was engaged in the operating of a warehouse, listed as one of the hazardous occupations to which the law applies, and that the employee, who assisted in loading the truck at the warehouse and unloading it at the houses of its customers, was engaged in a part of this enterprise. The injury was held to have arisen out of and in the course of the employment, although it happened on the return from the last delivery of goods for the day. Interpreting section 29, the court held that the employee could receive, in cases like the present, where employer, employee, and third party were all under the act, only the amount provided by the compensation act for the injury received; that the employer is the one directly liable for compensation and that the employee can not maintain an action against the third party. As thus construed, the section was held to be valid, as against a contention that the employers have not given up anything in return for the benefits they receive under the section, nor do the employees receive any benefit under it to compensate for the limitation of the amount recoverable. It is pointed out that the employer may be liable to pay compensation for injury caused by a third person in the course of the employment, when nothing can be recovered by any one from the third person, and that the employee is not required in such cases to depend wholly on the solvency of his employer, nor, on the other hand, on a possibility of recovery from the third party, uncertain because it may not be possible to prove negligence. The opinion is expressed that if, after compensation has been awarded, the employer should prove to be insolvent and should refuse to bring suit for the benefit of the employee, the latter might do so in his

employer's name. In conclusion the statement is made that the section is valid, and a final objection relating to the insufficiency of the recovery is removed, by Judge Duncan as spokesman for the court, in the following words:

We do not think there is any single objection raised to the constitutionality or validity of this section of the statute that can be sustained. It may be true, as appellant insists, that under the compensation act he will not receive sufficient compensation to adequately compensate him for his real damages. We think it is certainly true in this case. The answer to that is, that he had the option, before he was injured, to have elected not to be bound by the compensation act. The fact that it has happened that he has chosen the course that realizes him the least money must be charged to his unfortunate judgment or choice. It is no ground for invalidating the statute. In case he should finally fail to recover in his common-law action against the party causing his injury—i. e., in case his employer should be unable to prove that appellant has any right of action against appellees—his action that brought him under the compensation act will result in a pure benefit to the amount of compensation he will receive from his employer.

We are clearly of the opinion that section 29 is legal and valid, and that the court was right in holding, under the facts in this case, that appellant has no right of action against appellees.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—SUBROGATION OF EMPLOYER TO RIGHTS—AMOUNT OF RECOVERY—*Otis Elevator Co. v. Miller & Paine, United States Circuit Court of Appeals, Eighth Circuit (Feb. 28, 1917), 240 Federal Reporter, page 376.*—Harry D. Pettengill, who was an employee of Miller & Paine, a corporation, and was engaged in their service in the construction of a building in the State of Nebraska, was killed on September 14, 1915. He having left a dependent wife and child, his administrator proceeded for the purpose of securing compensation under the State law, and an award was made. The employing company then brought action against the Otis Elevator Co., to whose negligence the injury was claimed to have been due, and judgment was recovered for \$10,000, a sum larger than the total amount of compensation to be paid by the employer, the excess, under the law, to go to the dependents of the deceased employee. The elevator company contended that it should have been permitted to show that the negligence of the employer concurred with its own in causing the injury, in which case, it claimed, there could be no recovery by the employer from the elevator company. This point of view was held not to be tenable, and other issues were decided in favor of the employer. Judgment in favor of the employer was therefore sustained. Extracts from the opinion delivered by Justice Carland are as follows:

The liability of Miller & Paine was positively fixed by law, regardless of the question of negligence on its part. The law then provided that Miller & Paine should be subrogated to the rights of the dependents of Pettengill against the elevator company, providing it was the negligence of the elevator company that caused his death. To construe section 109 as not permitting Miller & Paine to prosecute an action for the benefit of itself and the dependents of Pettengill, if the negligence of Miller & Paine concurred with that of the elevator company in causing his death, would destroy the section. The object of the section, as clearly appears from its language, was to permit the employer to reimburse himself by an action against the party whose negligence caused the death and also to allow the dependents of the deceased employee to recover a sum over and above the amount for which the employer was absolutely liable regardless of negligence, if the evidence should permit such recovery.

The action brought by Miller & Paine against the elevator company under its right of subrogation must be treated, so far as the right to recover is concerned, just as if the action had been brought by the administrator of the estate of Pettengill. To decide that the concurring negligence of Miller & Paine could defeat such an action would not only permit one wrongdoer to plead the fault of a joint wrongdoer in defense, but would, as heretofore said, destroy the right of subrogation granted by the statute. The liability to compensate an employee, imposed by law upon the employer regardless of negligence, is in lieu of his liability for all other reasons. The trial court did not err in its rulings in reference to this proposition.

The second proposition advanced by counsel for the elevator company is based on the fact that the elevator company at the trial below offered to show that the liability of Miller & Paine under the compensation act had been insured by an insurance company licensed to do such business in the State of Nebraska, and that therefore, as Miller & Paine would suffer no damage, it could not recover any damages against the elevator company. But this argument involves a misconception of the action brought by Miller & Paine. That action was to be tried just the same as if it had been brought by the administrator of the estate of Pettengill. If nothing had been paid by Miller & Paine, or other person for them, the whole recovery would go to the dependents of Pettengill. Just how the amount recovered in this action shall be divided as between the dependents, Miller & Paine, or the insurance company, is no concern of the elevator company.

Some suggestion has been made in reference to the excess of the recovery in this action over and above the compensation fixed by the statute being considered as an advance payment upon the amount due as compensation from Miller & Paine to the dependents of Pettengill. The compensation in this case might be \$10 per week for 350 weeks, or a period of about 7 years. Under the statute Miller & Paine are entitled to deduct from the amount of the recovery in this action the expense of recovering the same and the amount already paid for compensation and the expense of last sickness and burial, the balance to be paid forthwith to the dependents. The law says this balance shall be treated as an advance payment by Miller & Paine on account of any future installments of compensation. We

think a fair construction of the law is that this excess, in so far as the unpaid installments are concerned, shall be considered as an advance payment; but where, as in this case, the recovery exceeds the whole compensation to be paid, the law by its language did not intend to limit the recovery allowed by the first clause of section 109, which specifically provides that the amount of recovery shall not be limited to the amount payable as compensation.

WORKMEN'S COMPENSATION—INJURY BY NEGLIGENCE OF THIRD PARTY—SUITS—PARTIES—*Book v. City of Henderson, Court of Appeals of Kentucky (Oct. 2, 1917), 197 Southwestern Reporter, page 449.*—H. H. Book, a lineman for the Henderson Telephone & Telegraph Co., sued the city of Henderson for damages for its alleged negligence in failing to properly insulate an electric light wire. While he was engaged in work on the telephone wires one of them came in contact with the electric light wire, and the resulting shock threw him 20 feet from the pole upon which he was working, and severe and permanent injuries were inflicted. He had, before bringing this suit, recovered compensation from the company, and he made the company a party to the present suit. The statute provides for subrogation of the employer to the employee's rights to the extent of the amount of compensation, if that much is recovered. In the present decision it is held that the employee is not limited in his recovery to the amount paid him as compensation, but may recover actual damages as in other liability suits, the amount of the compensation paid to be, of course, for the benefit of the employer. It was said that the employer was properly made a party to the suit, but that in order to secure his recovery from the third party he must interplead and set up his cause of action. If this is done, it is the duty of the court to apportion the amount awarded between the employer and employee according to their rights therein; and if the employer should not seek to recover, the defendant would still be entitled to credit upon the judgment for the amount paid as compensation. A circuit court had dismissed the petition in the present case, but the court of appeals remanded the case for further proceedings in accordance with the opinion.

WORKMEN'S COMPENSATION—INJURY "ON, IN, OR ABOUT" A FACTORY, ETC.—TRUCK USED FOR DELIVERY—*Hicks v. Swift & Co., Supreme Court of Kansas (Nov. 10, 1917), 168 Pacific Reporter, page 906.*—Oliver E. Hicks was awarded compensation by the district court of Wyandotte county for an injury received in the employ of the company named, and the company appealed from the judgment. Hicks was driver of a truck used in delivering meat, and was injured by a box of meat falling upon him while he was attempting

to make a delivery in Kansas City, Mo., at a place about 12 miles from the packing house. The company contested the judgment on the ground that the injury was not received in Kansas, where the packing house is located, and under whose compensation act and in whose courts he proceeded; and, secondly, that the accident did not occur "on, in, or about" a factory or one of the other establishments mentioned in the act. The court held that it was not necessary to discuss the first point, as the second was well taken, and the judgment was reversed. Judge Mason in the opinion said:

No recovery can be had by the plaintiff in this proceeding unless he was injured "on, in, or about" the factory or packing house of the defendant. That the word "about" is one of locality and not of mere association or connection has been determined in a recent case.

An effort is made to bring the case within the statute, as it has already been construed, by the argument that the truck which the plaintiff was driving, being a portion of the equipment used in conducting the defendant's business, was itself a part of the factory. To support this view expressions are quoted tending to show that the truck was a part of the plant. The term "plant," however, is quite different from "factory." It may well apply to appliances used in carrying on the business, wherever situated. "Factory" by the statute is restricted to the premises where (mechanical) power is used in manufacturing or preparing articles for sale. The truck was an instrument for the distribution of the finished product, rather than of its manufacture or preparation. While in charge of the truck, after leaving the premises where the meat had been prepared, the plaintiff was not "within the danger zone necessarily created by those peculiar hazards to workmen which inhere in the business of operating" the packing house.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—ELECTION OF REMEDIES—*Jackson v. Industrial Board of Illinois et al.*, *Supreme Court of Illinois* (Dec. 5, 1917), 117 *Northeastern Reporter*, page 705.—William J. Jackson, receiver of a railroad company, in the employment of whom Nathaniel Raney was killed, sought by writ of error to overthrow an award made by arbitrators to the administratrix of Raney and affirmed by the industrial board and by the circuit court of Vermillion County. Raney's work was the painting of railway bridges, towers, and other structures. At the time he was injured he was on his way with a "speeder" or motor car to a work train to get a supply of paint to use in painting an interlocking tower. He attempted to remove the speeder from the track to allow an interstate train to pass and was killed by the train. The administratrix first gave notice of a claim under the workmen's compensation act, and then sued under the Federal Employers' Liability Act. In that suit the receiver demurred to the complaint on the ground that the employee was not engaged in interstate com-

merce, and the demurrer was sustained. The administratrix then prosecuted her claim under the compensation provisions, and an award was made in the sum of \$573.20.

The receiver contended that the administratrix was estopped from claiming compensation by her election to sue under the liability act, but this was overruled by the court, Judge Duncan, who delivered the opinion, saying on this point:

The doctrine does not apply to concurrent remedies that are not inconsistent with each other and has no application to an election between suits based upon different statutes. Where one has a right of action at common law and also under the statute for the same injury the bringing of either of said suits is not a bar to the other, and particularly where no recovery has been had under the one or the other.

The court held, on the other hand, that the employer was now estopped from defending on the ground that the employment was in interstate commerce, saying:

The court by its judgment in that case determined one question of fact that necessarily defeated the administratrix in that suit—i. e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability Act. That judgment completely estops plaintiff in error, as well as the administratrix, from contending in any other suit between the same parties that the deceased was injured while employed by the plaintiff in error in interstate commerce.

Finally the court held that it is the employment and not the act of the employee at the time of the injury which determines whether or not an injury is within the purview of the liability act, and that the fact that the employee was removing an obstruction to interstate commerce at the moment did not prevent the application of compensation provisions. The award was therefore affirmed.

WORKMEN'S COMPENSATION — INTERSTATE COMMERCE — INJURY WITHOUT NEGLIGENCE OF EMPLOYER — FEDERAL AND STATE STATUTES — *New York Central R. Co. v. Winfield, Supreme Court of the United States (May 21, 1917), 37 Supreme Court Reporter, page 546.* — James Winfield was tamping ties upon the track of the company named, when a stone flew up and destroyed the sight of one of his eyes, for which injury he claimed compensation under the New York law. There was no dispute that the employment was in interstate commerce, so that if the employer had been negligent the employee would have been not only entitled to seek a remedy under the Federal Employers' Liability Act, but confined to such remedy. The majority of the New York Supreme Court, Appellate Division, held that, no negligence being alleged, the award of compensation made

to him by the State commission should stand. Its decision was reported in 153 N. Y. Supp. 499, and noted in Bul. No. 189, p. 256. This judgment was affirmed by the court of appeals of the State, and an appeal was taken to the United States Supreme Court, which, two judges dissenting, reversed the judgment, holding that the Employers' Liability Act is exclusive in the entire field of injuries to railroad employees engaged in interstate commerce. Mr. Justice Van Devanter delivered the majority opinion, which, after stating the facts, proceeds as follows:

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all State laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. The State decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield v. Erie R. Co.*, 88 N. J. L. 619, 96 Atl. 394 [Bul. No. 224, p. 330], hold that the act relates only to injuries resulting from negligence, while the California court in *Smith v. Industrial Accident Commission*, 26 Cal. App. 560, 147 Pac. 600 [Bul. No. 189, p. 98], and the Illinois court in *Staley v. Illinois C. R. Co.*, 268 Ill. 356, 109 N. E. 342 [Bul. No. 189, p. 253], hold that it has a broader scope and makes negligence a test—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every State line. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 379, 13 Sup. Ct. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. *Second Employers' Liability Cases* (*Mondow v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 51, 32 Sup. Ct. 169 [Bul. No. 98, p. 470]. It was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. (Cong. Rec., 60th Cong., 1st sess., 1347.) And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying State laws, and to apply to them a national law having a uniform operation throughout all the States. (House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st sess.)

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the States free to require compensation where the act withholds it.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress.

It follows that, in the present case, the award under the State law can not be sustained.

Mr. Justice Brandeis wrote the dissenting opinion, in which Mr. Justice Clarke concurred. The first part of this opinion is as follows:

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908, Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad companies engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of State action. In other words, the majority of the court declares that Congress, by passing the Employers' Liability Act, prohibited States from including within the protection of their general workmen's compensation laws employees who, without fault on the railroad's part, are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress could have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The workmen's compensation law of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." (*New York C. R. Co. v. White*, 243 U. S. 188, 207, 37 Sup. Ct. 247 [Bul. No. 224, p. 232].) And this court has definitely formulated the rules which should govern in determining when a Federal statute regulating commerce will be held to supersede State legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though

the legislation might indirectly affect the commerce of the country." (*Sherlock v. Alling*, 93 U. S. 99, 103.)

2. "If the purpose of the act can not otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to regulation of Congress within the sphere of its delegated power. * * *

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State." (*Savage v. Jones*, 225 U. S. 501, 533, 32 Sup. Ct. 715.)

3. "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts can not be reconciled or stand together." (*Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623, 18 Sup. Ct. 488.)

Guided by these rules and the cases in which they have been applied, we endeavor to determine whether Congress, in enacting the Employers' Liability Act, intended to prevent States from entering the specific field of compensation for injuries to employees arising without fault on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope, and purpose; and, on the other, at the nature, methods, and means of State workmen's compensation laws. If the will is not clearly expressed in words, we must consider all these in order to determine what Congress intended.

First. As to words used: The act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of that act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An act relative to the liability of common carriers by railroad in certain cases."

Second. As to specific action taken: The power exercised by Congress is not such that, when exercised, it necessarily excludes the State action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be

sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the workmen's compensation laws of the States. Between the Federal and the State law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third. As to origin, purpose, and scope of the Employers' Liability Act and the nature, methods, and means of State workmen's compensation laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

Mr. Justice Brandeis then discusses under separate heads the origin, scope, and purpose of the Federal Employers' Liability Act, and the nature, method, and means of the workmen's compensation laws. The question of whether or not the Federal and State legislation conflict is then taken up, as follows:

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a State compensation law, affords, of course, no reason for imputing to Congress the will to deny to the States power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce. Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the States (which alone can deal comprehensively with it) the whole subject of indemnity and compensation for injuries to employees, whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the States this power. The subject of compensation for accidents in industry is one peculiarly appropriate for State legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. In a large majority of instances they reside in the State in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, preempted the whole field

has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to State action was far less clear than under the circumstances here considered. Tested by those decisions and by rules which this court has framed for its guidance. I am of opinion, as was said in *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 294, 34 Sup. Ct. 829 [Bul. No. 169, p. 182], that "the intent to supersede the exercise of the State police power with respect to this subject can not be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation and otherwise unprovided for, the protection afforded by beneficent statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for State action.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—INJURY WITHOUT NEGLIGENCE OF EMPLOYER—FEDERAL AND STATE STATUTES—*Erie R. Co. v. Winfield*, *Supreme Court of the United States* (May 21, 1917), 37 *Supreme Court Reporter*, page 556.—Amy Winfield proceeded for compensation under the law of New Jersey for the death of her husband, employed as engineer of a switch engine. The cars handled contained freight, some of them interstate, some intrastate, and some both, but the accident occurred while he was leaving the yard after completing his day's work. It was assumed by both parties that there was no negligence of the company causing the injury. The court of common pleas of Hudson County, New Jersey, rendered judgment in her favor, and the supreme court and the court of appeals of the State entered successive reversals, the final result being that the award stood. (See Bul. No. 224, p. 330.) This case contains a point additional to the one settled in the New York case above—*New York Central Railway Co. v. Winfield*—involving the scope of Federal and State laws as to injuries on railroads. The same two justices dissented as in that case. Mr. Justice Van Devanter delivered the opinion, holding that compensation could not be granted under the circumstances of the case, and spoke as follows:

The questions presented for decision are these: First, whether the Federal act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is causal negligence for which the carrier is responsible. Second, whether the facts proved sustain the conclusion that the deceased was employed in interstate commerce at the time of the injury. Third, whether, by reason of the State statute, the carrier became bound contractually to make compensation in this instance, even though it came within the Federal act.

The first question is fully considered in *New York C. R. Co. v. Winfield*, the opinion in which has been just announced, 244 U. S. 147, 37 Sup. Ct. 546 [see p. 260], and it suffices here to say that, for the reasons there given, we are of opinion that the Federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation, and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.

The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. (See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260, 34 Sup. Ct. 305 [Bul. No. 169, p. 83].) Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance.

The third question requires some notice of the New Jersey statute. It consists of two parts. One conforms to the principle which regards negligence as the basis of liability, and excludes liability in the absence of negligence. In its details, however, that part differs materially from the Federal act. The other conforms to a different principle which rejects negligence as a basis of liability and requires compensation to be made by the employer whenever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective," and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender "their rights to any other method, form, or amount of compensation or determination thereof." Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute, and, unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed" that the parties "have agreed to be bound" by this part of the statute. There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption can not be indulged here, and this for the reason that by the Federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of State laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a State statute, or by imputing

such an election to them by means of a statutory presumption. The third question, therefore, must be answered in the negative.

It follows that the court of errors and appeals erred in failing to give controlling effect to the Federal act.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—INJURY WITHOUT NEGLIGENCE OF EMPLOYER—FEDERAL AND STATE STATUTES—*Rounsaville v. Central R. R. of New Jersey, Court of Errors and Appeals of New Jersey (June 18, 1917), 101 Atlantic Reporter, page 182.*—George A. Rounsaville brought proceedings to obtain compensation for injuries suffered by him as an employee of the company named. The court of common pleas of Warren County held that the remedy was not under the compensation law, but under the Federal Employers' Liability Act of 1908, 1910. Its judgment was reversed by the New Jersey Supreme Court (87 N. J. Law 371, 94 Atl. 392; Bul. No. 189, p. 258), which held that, there being no negligence alleged, proved, or admitted on the part of the railroad company, the State courts had jurisdiction under the compensation law. In the meantime the case of *Winfield v. Erie R. R. Co.*, arising in the same State and identical in principle with the *Rounsaville* case, had been decided by the Supreme Court of the United States (see p. 265); and in the present decision the court of errors and appeals, since the State courts are bound by the decisions of the Supreme Court in matters involving the Federal Constitution and statutes, reversed the judgment of the State supreme court and affirmed that of the court of common pleas, the claimant thus failing to secure any compensation for his injuries.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—MOWING WEEDS ON RAILROAD RIGHT OF WAY—*Plass v. Central New England Ry. Co., Court of Appeals of New York (Nov. 13, 1917), 117 North-eastern Reporter, page 952.*—Jane Plass was a claimant for compensation for the death of her husband, a section laborer for the railway company named. He contracted ivy poisoning through cutting grass and weeds along the right of way—which work was a part of his duty—and this was followed by blood poisoning, bronchitis, congestion of the lungs, and death. The decision of the supreme court, which held that such poisoning was an accident, and affirmed an award to the widow, is reported in 155 N. Y. Supp. 854, and noted in Bul. No. 189, p. 203. On further appeal the court of appeals reversed the decree and ordered a new hearing, to give an opportunity for a determination by the industrial commission as to whether the employee was engaged in interstate commerce at the time of his

injury, holding that such a determination was necessary. Judge Collin, for the court, said:

If there was any evidence that the work contributed to the safety and integrity of the railroad, the work was connected with and a part of interstate commerce by the railroad [quoting from the Pedersen Case].

If the deceased was engaged in services pertaining to and a part of interstate commerce, the claimant was not entitled to an award. *N. Y. Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546 [see p. 260].

A witness on behalf of the employer testified that the object of the work was the safety of the bridges of the railroad and of the adjoining property, and to keep fires from spreading; if the grass and weeds caught fire it might destroy parts of the railroad, and the weeds and grass, not cut and removed, would to a certain extent destroy the track; would come upon the track and cause the engines to slip. This testimony could not be wholly disregarded by the commission. It constituted some evidence, demanding a determination, that the work of the deceased was or was not within interstate commerce. The employer, by the evidence, objections, request to find, and argument, directed the attention of the commission to its claim that an award could not be made because the deceased was engaged in interstate commerce. It was necessary to a lawful hearing and award that the commission should pass, under the evidence, upon the nature of the employment in which the deceased received his injuries.

WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—PLUMBER IN MAINTENANCE OF WAY DEPARTMENT—*Vollmers v. New York Central R. Co.*, *Supreme Court of New York, Appellate Division, Third Department* (Nov. 14, 1917), 167 *New York Supplement*, page 426.—Conrad H. Vollmers having been killed in the employ of the railroad company named, Ethel H. Vollmers applied for compensation for herself and children. Vollmers was a plumber employed in the maintenance of way department of the railroad, and, while repairing pipes beneath the station at Hillside, he had occasion to cross the tracks in front of the station, and was struck by an engine and killed. The industrial commission having made an award to the widow, the court reversed it and dismissed the claim on the ground that the employee was engaged in interstate commerce. Judge Woodward, in the course of the opinion delivered by him, said:

The fact is found that his crossing of the tracks was in connection with his employment. It seems clear, under the rule prevailing in the Supreme Court of the United States, that Vollmers was engaged in the maintenance of an instrumentality of interstate commerce; he was doing the work necessarily involved in the maintenance of ways department. The stations actually in use in the carrying on of interstate commerce are clearly instrumentalities of such commerce, and it is necessary to their proper maintenance that the plumbing should be kept in repair. The position of Vollmers was not merely

of a plumber called in to do an incidental job; he was in the employ of a department of the corporation devoted, not to the construction, but to the maintenance of ways, and this required him to be in and about the railroad properties generally, doing such repairs as were needed, whether in the station houses or outside of them. To say that such a man, identified with a department for the particular purpose, is not engaged in interstate commerce is to ignore the facts and the rulings of law made by the courts of last resort, and may not be sustained.

WORKMEN'S COMPENSATION—INTOXICATION AS CAUSE OF INJURY—*Collins v. Cole, Supreme Court of Rhode Island (Feb. 20, 1917), 99 Atlantic Reporter, page 830.*—Nora Collins began proceedings for compensation for the death of her husband, James Collins, while in the employ of C. M. Cole. The superior court of Newport County denied compensation on the ground that the fatal injury was due to the intoxication of the employee. He was watchman on a dredge, and went on duty at 6 p. m. On July 7, 1914, the dredge was not at work on account of rough weather. During the afternoon Collins drank heavily, and came on duty in such a condition that he had some one else attend the fires. He rowed back and forth to the shore two or three times, with some assistance in maintaining the proper direction, to carry members of the crew, as was his duty. On the last trip back they brought a quart bottle of whisky, from which he had two very large drinks. A little later the cook came from the shore to the dredge, and he and Collins were heard talking about going to the shore for more whisky. Soon the deck hands heard shouting, and found the cook struggling in the water and Collins standing in a very small and unstable skiff, which belonged to a yacht. This almost immediately tipped over, and in spite of efforts to save them both men were drowned. The decree denying compensation was affirmed in an opinion by Judge Vincent, who said after stating the facts:

The petitioner argues that, in order to defeat the petition, the respondent must prove that the death resulted solely and exclusively from intoxication while on duty. If the petitioner means by that that the respondent must exclude every possibility that death might have resulted otherwise than from intoxication, we can not agree with her. If Collins was in an intoxicated condition, that is, a condition in which he would be unable to look out for his own safety with that degree of care which a person would otherwise naturally exercise, and that, while so influenced, he did something which a person in a normal condition would not be likely to attempt and which brought about the accident, the trial court would be warranted in finding that the accident resulted from the condition into which he had voluntarily brought himself. We do not think that the statute requires that every possibility should be excluded before the evidence becomes sufficient to support the finding that the result was due to intoxication.

WORKMEN'S COMPENSATION—INTRASTATE OR INTERSTATE COMMERCE—MOVING CARS TO STORAGE TRACKS TO BE ICED—*Chicago Junction R. Co. v. Industrial Board of Illinois et al.*, Supreme Court of Illinois (Apr. 6, 1917), 115 Northeastern Reporter, page 647.—William S. Peterson, a switchman employed by the company named, was killed in the course of his employment October 9, 1913. He was assisting in the movement of cars onto a storage track, where they were to be iced for the shipment of meats. The later history of the cars showed that the greater part of them eventually were loaded for interstate shipment, after four had been in a collision and become disabled for use. It was agreed that if the employee was not engaged in interstate commerce he was entitled to the compensation which the industrial board had awarded him, while if he was in interstate commerce the Federal Employers' Liability Act would govern. The award of compensation was affirmed, Judge Cooke for the court saying in part:

It was not until these cars were again moved to the loading platform, and it was known what material was ready to be loaded, that it was determined that 10 of them should be loaded for destinations outside the State and 1 to carry a shipment to a point within the State. The movement of the string of cars by the switching crew of which the deceased was a member was a local movement, and, as none of these cars had at that time been selected to participate in an interstate shipment, the deceased was not engaged in interstate commerce, and the circuit court properly approved and confirmed the award and decision of the industrial board. The icing of the cars does not change the situation. The same procedure in icing was required in all the shipments made by Armour & Co., whether interstate or intrastate, and was, in effect, a part of the equipment of the cars themselves.

WORKMEN'S COMPENSATION—INTRASTATE OR INTERSTATE COMMERCE—REPAIRING PRIVATE SPUR TRACK—*In re Liberti*, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 New York Supplement, page 478.—Carmella Liberti instituted proceedings for compensation for the death of Rosario Liberti, and an award was made by the industrial commission. The deceased was an employee of the railway company named, and suffered a fatal injury when he fell from a hand car, which he and a number of other laborers were running upon a spur track to the grounds of the Mission of the Immaculate Virgin. The track was owned by the mission, and maintained by the company at the expense of the mission. The railway is entirely within the State, but carries interstate freight, and goods from without the State were taken to the mission over this track about once a week, while cars with intrastate freight went in daily. The court held that the employment at

the time of the injury was not in interstate commerce, so that the industrial commission had jurisdiction to award compensation; and the award was affirmed, Judge Kellogg, in the opinion saying:

The mission's track was solely for its use and for the carrying of freight from the station to the mission, as a convenience to the company and the mission. The property of the mission, its spur track, and those who are working upon it, are subject to the State law and are not governed by the Federal Employers' Liability Act. If the company was drawing interstate freight over the spur for delivery at the mission, and the accident had occurred to an employee engaged therein, a different question might arise; but this case seems to be entirely outside of the question of interstate commerce, and is purely a matter of domestic concern and arrangement.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—COMPUTATION OF "THIRTY DAYS AFTER INJURY"—*In re McCaskey, Appellate Court of Indiana, Division No. 1 (Oct. 10, 1917), 117 Northeastern Reporter, page 268.*—Lewis Grabhorn was employed by the Cotton-Wiebké Co., when on February 17, 1916, he was accidentally struck in the forehead by a sledge hammer in the hands of a fellow employee. The accident was witnessed by the president and manager of the corporation, which did away with the necessity for notice. At the time an abrasion of the skin of the forehead was produced, but no wound requiring medical or surgical treatment. In the evening of March 18 he was taken with a violent pain in his forehead, and on the next day consulted one McCaskey, a practicing physician, who on the 20th diagnosed the trouble as an abscess, requiring an operation and draining for a number of days. Dr. McCaskey rendered the necessary services, and presented a claim for \$50, which was admitted to be a fair compensation. The company, however, refused to pay this bill because, as it contended, the services were not rendered within 30 days after the injury. The industrial board certified this question to the court, and the latter decided that the claim was a valid one, the injury not being in such a case contemporaneous with the accident, but occurring at the time results developed which amounted to disability.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—EMPLOYER'S LIABILITY FOR OPERATION BECOMING NECESSARY, BEFORE EXPIRATION OF THIRTY DAYS, BUT POSTPONED—*In re Henderson, Appellate Court of Indiana (June 1, 1917), 116 Northeastern Reporter, page 315.*—The employee Henderson was injured on October 16, 1916, and a part of his left foot was amputated. The foot did not heal properly, gangrene set in, and on the 28th day it was evident that within four or five days another amputation would be necessary to save his life. On

that day the employer and insurance carrier notified the hospital that they would not be responsible for treatment after the 30 days. On the 29th day the employee filed an application asking the Industrial Board to make an order requiring the employer to continue the surgical and hospital services beyond the first 30 days. The board certified to the court the question whether it had, under section 25 of the act, authority to require such continuation. The court answered the question in the affirmative, showing that the language of the section was somewhat ambiguous, but placing an interpretation upon it, and saying in the concluding part of the opinion delivered by Judge Hottel:

We deem it proper to say that, if an emergency arose for either of the services provided for in said act at a time when the same was required to be rendered under said act, the employer by mere delay in rendering the service could not escape liability for any service which should have been and could have been rendered within the period during which the act makes it his duty to perform the service.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—LIABILITY OF INSURER FOR SERVICES FURNISHED BY EMPLOYER AFTER THIRTY DAYS—*In re Kelley, Appellate Court of Indiana, Division No. 1 (June 1, 1917), 116 Northeastern Reporter, page 306.*—John Kelley was injured under circumstances which made compensation payable under the Indiana law, and the industrial board found that the physician furnished by the employer rendered a bill for \$90 for services during the first 30 days after the injury; that at the expiration of 30 days the employee was in such serious condition that further medical services were necessary in order to save his life; that the employer directed the physician to continue his services, and his bill for the further services was \$90; and that the charges were reasonable. The contest was as to the liability of the insurer for the additional medical services, and the board certified to the court the question whether the physician was entitled to have the last-mentioned claim approved as against the insurer. This was answered in the affirmative, the court calling attention to the provisions of the act giving the employer the option of furnishing additional medical attendance where necessary, and to the provisions requiring that policies shall cover all benefits conferred by the act; also to the fact that the additional medical treatment in suitable cases would be to the advantage of the employer and the insurance carrier as well as of the injured employee.

WORKMEN'S COMPENSATION—MODIFICATION OF AWARDS—INCAPACITY—*Safety Insulated Wire & Cable Co. v. Court of Common Pleas in and for Hudson County et al., Supreme Court of New Jersey (Apr.*

7, 1917), 100 *Atlantic Reporter*, page 846.—Philip Kress received injuries to both hands about April 1, 1912, while in the employ of the company named. He was awarded as compensation \$6.21 per week, or one-half his earnings at the time of the injury, for 400 weeks, it appearing at the time of the hearing, nearly a year after the injury, that he was not able to do any work. Early in 1916 the company applied for modification of the award, which was refused by the court of common pleas on the ground that the original award of the full 400 weeks must have been made on the basis of a finding of total and permanent disability, and that action on the application would involve a review of that award. On the rendering of this decision the case was taken to the supreme court. It appeared that after being incapacitated from work for about a year and a half, the injured man began to do light work at \$9 a week, and later became watchman in a factory at \$12 per week, and at the time of the hearing was getting \$14, or more than his wages when injured. The supreme court thereupon decided that a modification of the award might be had on the showing of change in conditions, the statute providing for such adjustment after a year from the date of the original award. Judge Kalisch in the concluding portion of the opinion said as to the interpretation of the term "incapacity":

It is to be observed that the term "incapacity of the injured employee" is used. The legislature has thereby established the test of "incapacity" as the determining factor whether an award shall be diminished or increased, as the case may be. The incapacity which the legislature had in mind was the incapacity to perform labor. This, of course, is not applicable to the class of cases which the legislature has expressly declared to be that of total disability, such as the loss of both legs, etc., and for which there is a fixed period of compensation.

It must be borne in mind that the basic principle of the compensation act is indemnity. Therefore when it appears in a case where an award had been made that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court upon a proper application to interfere and grant relief.

WORKMEN'S COMPENSATION—NOTICE—*In re Dorb*, Supreme Court of New York, Appellate Division, Third Department (Nov. 14, 1917), 167 *New York Supplement*, page 415.—Leo Dorb was an employee of Frederick Stearns & Co., manufacturing pharmacists. On June 23, 1916, while lifting heavy boxes containing the manufactured products, he sustained a hernia, but continued at work until July 3. He consulted a physician and was told the nature of the injury and telephoned to the department where he worked that he was sick, but did not inform them that there had been an accident, nor what the nature

of the illness was. Three or four days later he went to his assistant foreman and told him the nature of his injury, without giving information as to the time, place, and circumstances, or stating that he would make a claim for compensation. It was the duty of the assistant foreman to report accidents to the employer, but he did not do so in this case, nor did the employee give any other notice. The law provides that failure to give notice may be excused by the commission because it could not have been given, or if the employer or insurer has not been prejudiced by the failure. The court reversed the award of the commission in favor of the claimant, saying that to justify failure to give notice whenever oral notice had been given to an agent of a corporation would completely nullify the provision of the law for written notice, and its object, to afford the employer opportunity to investigate the circumstances of the alleged accident.

WORKMEN'S COMPENSATION—NOTICE AND CLAIM—"REASONABLE CAUSE"—IGNORANCE—*In re Fells, Supreme Judicial Court of Massachusetts (Mar. 15, 1917), 115 Northeastern Reporter, page 430.*—The employee Fells was injured, and his claim for compensation was opposed by the insurer, on the ground that the claim was not made until nine months after the injury, while the law provides that it must be made within six months, unless failure to do so is occasioned by mistake or other reasonable cause. It was shown that in this case the employee was illiterate and ignorant of the requirements of the compensation law, and supposed that his foreman or the attending physician was safeguarding his interests, though he did not ask either to do so and was not assured that it would be done. An award in his favor was affirmed by the superior court of Suffolk County, but this was reversed by the supreme judicial court, Judge Carroll delivering the opinion, and saying in part:

If the legislature thought it wise when it amended the act, it could have provided that a failure to file a claim within six months would not bar proceedings under the act if occasioned by ignorance, mistake or other reasonable cause. But it apparently did not consider ignorance a sufficient excuse for this delay.

A mere anticipation that some one will fulfill the law on behalf of the employee, especially where there is no promise or assurance that this will be done, is not a mistake or other reasonable cause within the meaning of these words as used in this section.

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE AS "PERSONAL INJURY"—NEUROSIS FROM STOOPING POSITION—*In re Maggelet, Supreme Judicial Court of Massachusetts (July 25, 1917), 116 Northeastern Reporter, page 972.*—Frank Maggelet proceeded under the

workmen's compensation act to recover compensation for injuries. He had worked for 25 years for his employers, who were subscribers under the compensation act, as a cigarmaker. In March, 1916, he stopped work, and according to the finding of the industrial accident board was totally incapacitated for work by reason of a condition of occupational neurosis which arose out of and in the course of employment. There was medical testimony that the disease probably was caused by the stooping position of the employee at his work, which produced pressure upon the brachial plexus. The court held that this disease did not constitute a "personal injury" within the meaning of the act and reversed the decree in favor of the claimant entered by the superior court of Suffolk County upon the decision of the commission. The following is a part of the opinion delivered by Judge Rugg:

The act does not mention disease or occupational disease. It awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need not be a single definite act but may extend over a continuous period of time. Poisoning, blindness, pneumonia, or the giving way of heart muscle, all induced by the necessary exposure or exertion of the employment, fall well within recognized classes of personal injuries. On the other hand the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act. A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition can not fairly be described as a personal injury. The disease must be, or be traceable directly to, a personal injury peculiar to the employment. A nervous condition dependent upon poor posture of the body in our opinion does not constitute a commonly known and well recognized personal injury consequent upon employment.

There is not enough in this record to show that the condition of the employee is a necessary result of his work. It arose on all the evidence from a bad posture of the body while at work. This record is bare of any evidence to show that it is a reasonably necessary result of the employment that those following it should have neurosis or that the inducing proximate cause of that condition is the employment.

WORKMEN'S COMPENSATION—PERMANENT TOTAL DISABILITY—
PARALYSIS OF LEGS—CONDUCTING BUSINESS—*McDonald et al. v. Industrial Commission of Wisconsin et al.*, Supreme Court of Wisconsin (Apr. 4, 1917), 162 Northwestern Reporter, page 345.—Fred Edwards proceeded for compensation against C. S. McDonald, as employer, and the insurance company which carried the latter's risk. An order was entered by the industrial commission, making an award

to Edwards. The award was of a lump sum, equal to six times the amount of annual earnings, this being the amount provided for total permanent disability. The injury, caused by a fall from a pile driver, resulted in fracture of a vertebra and deformity of the spinal column, which produced pressure upon the spinal cord, and paralysis, though not total, of the lower limbs and lower part of the back. There was medical testimony that he could do no work requiring walking or stooping. He had not been fitted for any work except as a carpenter or laborer. Attention is called to the amendment of the language of the statute in 1915, by which, as a requisite for a finding of total disability, there must be inability to engage in "other suitable employment" as well as "in the employment that he was working at at the time of the accident." However, it was held that the finding was justified, Judge Eschweiler, for the court, saying on this point:

We can not say that there is no support for the determination arrived at by the commission and confirmed by the circuit court. The testimony warrants the conclusion that this man is permanently and totally disabled from performing labor at his trade as a carpenter or such labor as he was employed in at the time of the accident as well as being permanently and totally disabled from performing manual or other labor in any other suitable employment.

As to the effect of an intention to engage in a small business the judge said:

It is urged that because the record discloses that the respondent desired to have the award in a lump sum so that he might undertake some small business to be conducted by him and his wife, that therefore, by his own admission, he could not be considered as permanently and totally disabled. We do not think this distinction can be properly taken. There is a substantial difference between a man's wage-earning capacity, the foundation of the workmen's compensation act, and his capacity to make money in a business conducted under his supervision or direction and with the use or investment of other capital than that which arises from his own labor. Success in such an undertaking is so evidently dependent upon manifold conditions other than the capacity to work that it can not, as the law is now written, be considered to be a condition that must militate against his right to compensation for permanent total disability to carry on the work which he was employed in at the time of the accident or other suitable employment. Such distinction is pointed out in the case of *Moore v. Peet Bros. Mfg. Co. (Kans.)*, 162 Pac. 295. [See p. 291.]

It was also held that the fact that the lump-sum award was made before the expiration of six months from the date of the injury was not material, no objection having been made at the time of the award to such procedure, and the award was affirmed.

WORKMEN'S COMPENSATION—PERSONAL INJURY BY ACCIDENT—
NEPHRITIS FOLLOWING EXPOSURE—*United Paper Board Co. v. Lewis*,
Appellate Court of Indiana, Division No. 1 (Oct. 11, 1917), 117
Northeastern Reporter, page 276.—Amberson Lewis, while in the
employ of the company named, was required to flush out with hot
water running from a hose a large quantity of hot pulp which had
escaped from a broken pipe into the basement of the factory. In
doing this work, which took several hours, he became excessively
heated and damp, and in going home to dinner he became chilled.
The chills lasted several days and developed into nephritis, causing
a disability of eight weeks. It was held that this constituted a
personal injury by accident under the act, Judge Batman, who
delivered the opinion, saying:

In the instant case it is clearly apparent that appellee contracted
the disease which caused the disability for which he seeks compensa-
tion, as the direct result of an unusual circumstance connected with
his employment. His duties required him to keep the basement
room clean, but this did not ordinarily require him to flush hot
steaming pulp into the sewer with hot water from the exhaust of the
engine. It is evident that this was only required when the iron
pipe through which such pulp was conducted broke and allowed it
to escape to the floor. Hence the industrial board may have very
properly found that the breaking of the pipe created an unusual
condition under which appellee was required to work at the time
in question, resulting in enforced exposure. In such event, any
disease, of which such exposure is shown to have been the cause, may
properly be said, under the rule stated, to constitute a personal
injury by accident, and to come within the provisions of the work-
men's compensation act of this State.

The court further held that the possible negligence of the employee
in exposing himself to chill on leaving the factory could not be a
determining factor; also that the injury was one arising out of and
in the course of the employment.

WORKMEN'S COMPENSATION—PERSONAL INJURY BY ACCIDENT—
PNEUMONIA RESULTING FROM EXHAUSTION AND EXPOSURE—*Linnane*
v. Aetna Brewing Co., *Supreme Court of Errors and Appeals of*
Connecticut (Dec. 19, 1916), 99 *Atlantic Reporter*, page 507.—The
dependent claimed compensation in this case and was given an
award by the compensation commissioner, which was affirmed by
the superior court of Hartford County. The deceased was a fire-
man for the company named. His regular shift was from 7 a. m.
to 3 p. m. One of the other firemen being unable to reach his work
because of a storm, Linnane was called upon at 2 a. m. on December
14, 1915, to go to work, and without any breakfast he made his way for

three-fourths mile through deep snow to the brewery. He arrived out of breath and exhausted and wet nearly to his waist. He then worked for 12 hours in his wet clothing, his work being heavy and requiring him at times to be before the open mouth of the furnace and at other times to wheel ashes and clinkers out into the yard. He returned home exhausted and without appetite. Though ill he worked a few days, but pneumonia developed and he died on December 22. The judgment in the claimant's favor was reversed because the court held that the death was not the result of accidental "personal injury" as required by the act in order that compensation may be granted. Reference is made to the decision of the court in the case *Miller v. American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345 (see Bul. No. 224, p. 306); and the case is said to be controlled by the principles laid down therein, for, while the unusual weather conditions might be classed as accidental, at least as concurring with the untimely and prolonged hours of labor, the resultant exhaustion, though accidentally incurred, could not be said to be "in and of itself a bodily injury" within the meaning of the act.

WORKMEN'S COMPENSATION—PROCEDURE—APPEAL—*Union Sanitary Mfg. Co. v. Davis*, Appellate Court of Indiana (Jan. 23, 1917), 114 *Northeastern Reporter*, page 872.—Frank L. Davis was awarded compensation by the industrial board of Indiana under the provisions of the workmen's compensation act of that State, and the employer, the company named, appealed. Davis filed a motion to dismiss the appeal, claiming that it was not properly taken, as no motion for a new trial had been made, as is necessary in ordinary civil suits as a preliminary to appeal. Judge Felt delivered the opinion of the court, and overruled the motion to dismiss the appeal. It was held that a motion for a new trial was not necessary, at least where, as in the present instance, there had been a review of the award by the full board; also that there was no necessity for a motion to set aside the award of the full board, the attitude of the court being expressed by the following, quoted from Judge Felt's opinion:

An examination of the whole act shows clearly that the intention of the legislature was to provide compensation and the proper award with a minimum of legal procedure. The provisions for a review afford opportunity of presenting to the full board all questions relied upon by the aggrieved party, and in the main serve the same purpose that a motion for a new trial serves in a civil action.

WORKMEN'S COMPENSATION—PUBLIC EMPLOYMENT—CONSTITUTIONALITY OF PROVISION—*State ex rel. Fletcher et al. v. Carroll*, Supreme Court of Washington (Feb. 2, 1917), 162 *Pacific Reporter*, page 593.—Stephen Fletcher and Josiah E. Rhoads were employees in the light-

ing department of the city of Seattle and were severely injured by burning by electric current. They made claim for large common-law damages, and the sum of \$3,500 was recommended by the city's finance committee to be paid to them in full settlement, which they signified a willingness to accept. Ordinances were passed over the mayor's veto directing the city comptroller to draw warrants for such payments. Acting upon legal advice, the comptroller refused to issue the warrants, and the employees began proceedings in mandamus to compel him to issue them. In defense it was contended that the provisions of the workmen's compensation act afforded the sole remedy against the city. The superior court, which was the first to consider the action for mandamus, held that an injured person had a right of election between common-law damages and acceptance of the provision of the city charter, which allows, in cases of permanent disability, a pension to be fixed by the city council, but not to exceed 20 per cent of the wages received at the time of injury. The compensation act provides that it shall not apply to public employees where State law or city charter or ordinance makes other provision. The supreme court held that the lower court had erroneously interpreted this provision, and that it simply removed such employees from the operation of the provisions for payment from the State fund, without reviving common-law liability as to them. Reviewing the purpose of the act and the reasons for its enactment, Judge Fullerton, who delivered the opinion, said in conclusion on this point:

Having in view the declarations concerning the purposes of the act and the evils it was sought thereby to remedy, we can not conclude that the legislature meant to subject municipalities, merely because they had themselves made provision for the care of their employees injured while in the course of their employment, to the burdens and hazards of a common-law action in damages. We think it was meant rather to substitute the remedy afforded by the city for the remedy afforded by the act, and to leave the provisions which take away the common-law action in force.

It was claimed that this interpretation would deny equal protection of the laws, since the State and various municipalities made unequal provisions for their employees. This contention was not sustained, the opinion saying:

But the law itself makes no discrimination in the respect mentioned. On the contrary, it operates alike upon all municipalities throughout the State. It simply provides that, where a municipality has itself made provision for a person injured in a hazardous occupation, the injured person must take under the municipal provision rather than under the provision made by the law itself. It is true that the result may be different recoveries in different municipalities for similar injuries, but that is not to deny to the individual the equal protection of the laws.

It was said that if the provision made by the city was merely nominal, it was possible that the employee would be allowed to take under the compensation act; but where the provision was in fact a substantial one, it must govern.

WORKMEN'S COMPENSATION — PUBLIC EMPLOYMENT — COUNTY BUILDING ROAD—*Gray v. Board of County Commissioners of Sedgwick County, Supreme Court of Kansas (June 9, 1917), 165 Pacific Reporter, page 867.*—G. S. Gray brought suit under the workmen's compensation act against the board mentioned in the title because of an injury suffered by him while employed by the commissioners to haul gravel for use on a county road, which was being graded and surfaced. The court assumed, without deciding, that the employment was within the act as being "on, in, or about a mine or quarry," but held that the act applies, in relation to county or municipal work as well as that of private employers, to employment in the employer's trade or business, in the hazardous occupations mentioned therein, only when "conducted for the purpose of business, trade, or gain." As a county, in its opinion, can not be said to build roads for such a purpose, it held that the county was not liable to the injured employee for compensation.

WORKMEN'S COMPENSATION — PUBLIC EMPLOYMENT — LABORERS, WORKMEN, AND MECHANICS—JANITOR UNDER CIVIL SERVICE—*White v. City of Boston, Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 481.*—Compensation was awarded to Agnes White, whose husband, a schoolhouse janitor, fell while washing a window and was killed. On appeal it was contended that White, being an appointee under the civil-service act, was in the "official service," and was therefore not within the class of "laborers, workmen, and mechanics" to whom the compensation law applies. The court through Judge Loring said that the matter of civil-service appointment was not decisive, but rather the nature of the work; that a head janitor of a city hall or large office building, whose duties were those of superintendence and who did not personally work with his hands, might not be a laborer or mechanic, but that this instance presented a different aspect. The decree awarding compensation was affirmed, Judge Loring saying further:

But the janitor here in question was not that kind of a janitor. In the case at bar the fact was or at least evidence warranted a finding that the fact was that the deceased with his own hands did all the work of cleaning, heating, washing windows, care of yards, sidewalks and lawns in case of the two schoolhouses in question, and that

work included everything from keeping the water-closets clean to running the steam boiler in the school building of the Abby W. May School (for which he had to have a fireman's license) and the furnace in the other school building.

Not only was it the duty of the deceased to do all the work, but the evidence warrants a finding that he did it and all of it with his own hands.

WORKMEN'S COMPENSATION—PUBLIC EMPLOYMENT—LABORERS, WORKMEN, AND MECHANICS—TEACHER OF AUTOMOBILE REPAIRING IN VOCATIONAL SCHOOL—*Lesuer v. City of Lowell, Supreme Judicial Court of Massachusetts (May 25, 1917), 116 Northeastern Reporter, page 483.*—Clarence C. Lesuer was accidentally killed while in the employ of the city of Lowell. He was a teacher, among other subjects, of automobile repairing, in the industrial and vocational school conducted by the city, his duty being to show the boys how to do repair work and on occasion to demonstrate methods, his death being caused by some unknown act or omission on the part of one of the boys whom he was instructing. His father and administratrix made claim for compensation, which was denied by the industrial accident board; and the decree entered on that decision was affirmed, on the ground that the employee was not a laborer, workman, or mechanic within the meaning of the law.

WORKMEN'S COMPENSATION—PUBLIC EMPLOYMENT—POLICE OFFICERS—*Griswold et al. v. City of Wichita, Supreme Court of Kansas (Jan. 6, 1917), 162 Pacific Reporter, page 276.*—Frank Griswold, a police captain of the city named, was killed by a pistol shot from some person who had broken into a store in the nighttime, and whom he was attempting to arrest. Suit was brought under the compensation law for the benefit of his family, and in the district court judgment was for the defendant city, on the ground that a police officer is not a workman and that the compensation provisions do not apply to him. This judgment was affirmed by the supreme court, Judge Porter delivering the opinion, from which the following is quoted:

Many good reasons might be suggested for including within the scope of the act workmen employed in hazardous enterprises by cities engaged in conducting a business for profit, as electric light or water-works plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden by adding to the cost of the service. But where a city is engaged merely in the exercise of its governmental functions, we think it clear that the workman, no matter how hazardous his employment, would not come within the spirit and purpose of the compensation act.

WORKMEN'S COMPENSATION—RELEASE—MISTAKE AS TO EXTENT OF INJURY—*Weathers v. Kansas City Bridge Co., Supreme Court of Kansas (Jan. 18, 1917), 162 Pacific Reporter, page 357.*—Judgment was rendered in favor of W. P. Weathers in the district court of Wyandotte County, Kans., in his proceeding under the workmen's compensation act. Two weeks after an injury to this employee he went to the office of the general manager of the bridge company, his employer. They talked over the matter of the amount of compensation and agreed that the employee would probably be able to go to work in two weeks longer, and he was given a check for \$24, being \$6 per week for four weeks, or 50 per cent of his wages for that time, and signed a release. It appears that a bone in his foot was broken, which fact was not known to either party at the time, and it was actually several months before disability ceased. The judgment for plaintiff was set aside and a new trial ordered because there had been no allegation that the mistake of fact was mutual, and the instruction to the jury had been to the effect that a release could be set aside because of inadequacy of the consideration and a mistake on the part of the signer. The court held, however, that where inadequacy of consideration and mutual mistake of fact concur, a release is not binding. The employee should, therefore, it was said, have an opportunity in another trial to prove these facts, if they existed. The following is quoted from the opinion of Judge Marshall:

That part of the instruction which says, in substance, that the plaintiff can recover if he signed the release under a mistaken belief as to the extent of his injuries is not correct. He can recover when he proves that the agreement and release were executed under a mistake of both the plaintiff and the defendant as to the extent of the plaintiff's injuries, if he also proves that the amount already paid him is not adequate compensation under the law.

WORKMEN'S COMPENSATION—REVIEW AFTER LUMP-SUM SETTLEMENT—*In re McCarthy, Supreme Judicial Court of Massachusetts (April 7, 1917), 115 Northeastern Reporter, page 764.*—Patrick McCarthy was injured on December 22, 1913. On April 1, 1915, an agreement, entered into for the settlement of the remaining liability of the insurer by the payment of \$500, was affirmed by the industrial accident board. Later, application was made for the loss of sight, which, at the time of making the settlement, was not anticipated. This was denied by the board, and its decision affirmed by the superior court of Suffolk County. The supreme judicial court also affirmed the decree, Judge Carroll, discussing for the court the effect of lump-sum payments in part, as follows:

The workmen's compensation act was intended to compensate employees during the period of incapacity for labor; and, in case of

death, to help their dependents by the payment of a weekly sum during a stated period. Its purpose was not to compensate by the payment of a lump sum unless the case presented features which made it unusual; and this fact was to be found by the industrial accident board. Weekly payments must have continued for six months and the agreement of settlement must be found to be for the best interests of the employee or his dependents. When these findings are once made, the payment is in full settlement for all compensation, general and specific, under the act. Both parties are bound by it. The insurer can not complain if the amount is thought to be too large, nor the employee, if too small.

Even if blindness developed after the six months' period, and it was caused by the injury and was unknown at the time of the settlement, the employee is nevertheless bound by the terms of his agreement, which state:

"Said payments are received in redemption of the liability for all weekly payments now or in the future due me * * * for all injuries received by me on or about the 22d day of December, 1913."

WORKMEN'S COMPENSATION—REVIEW BY COURT—EFFECT OF RELEASE—*Odrowski v. Swift & Co., Supreme Court of Kansas (Nov. 11, 1916), 162 Pacific Reporter, page 268.*—Stanley Odrowski was awarded compensation by the district court of Wyandotte County for injury suffered while in the employ of Swift & Co. The company appealed, claiming that a release which had been signed by the employee about four months after his injury and which the district court had set aside was binding. This release was given in consideration of \$45 paid him at the time and \$103.50 which he had previously received. These sums made a total which, according to the findings of the jury, exactly equalled the amount then due him. It was claimed on his behalf that the release was secured through false statements made by a physician in the employ of the company as to the extent of the injuries. The court said, however, that the employee's own testimony not only did not bear out the view that he executed the release in reliance on such statements, but, on the other hand, negatived it, since he testified that he signed the paper without reading it or knowing that it was a release. It was pointed out that in the absence of any proof of fraud the mere fact that a person, having every opportunity to do so, does not read a paper which he signs, does not give the court power to permit him to avoid its effect. The specific provision for the setting aside of "agreements for compensation" and "awards" is held not to apply, because by the terms of the act an agreement can only be set aside for fraud or undue influence and because the word "award" is used throughout in the sense of an arbitration. Finally, it is held that the judgment must be reversed and remanded with directions to enter a judgment for the company rather than for a new trial.

WORKMEN'S COMPENSATION—REVISION OF AWARDS—MARRIAGE OF DEPENDENT SISTER—*Adleman v. Ocean Accident & Guarantee Corp. (Ltd.) et al., Court of Appeals of Maryland (June 26, 1917), 101 Atlantic Reporter, page 529.*—Morris Brenner, an employee of the Reliable Junk Co., of Hagerstown, Md., died December 5, 1914. as the result of an accidental injury. Compensation was awarded in the sum of \$12.50 per week for 4 years and 32 weeks from the date of death, and this sum was apportioned equally between his mother and a sister, Mary Brenner, each receiving \$6.25 per week. In June, 1916, the insurer, the company named in the title of the case, filed a petition praying that compensation to the sister be abated as of the date of June 19, 1915, on which date she had married one Adleman, but, as it was alleged, had concealed this fact, so that the company was not aware of it until June 1, 1916. The commission dismissed this petition, but on appeal by the company the circuit court for Washington County ordered the compensation abated. The claimant in turn appealed, and under the present decision she was successful in having the compensation ordered continued according to the original award. The compensation act provides that compensation shall cease on the marriage of a widow, and section 54 provides for modification of awards by the commission in the way of a reapportionment among the beneficiaries. It was argued by the insurance company that this gave the commission power to deprive one beneficiary of compensation altogether, but the court held that the section conferred no power upon the commission to annul the compensation to a beneficiary who was a dependent at the time of the employee's death.

WORKMEN'S COMPENSATION — SELF-INSURANCE — CONSTITUTIONALITY OF STATUTE—*State ex rel. Turner v. United States Fidelity & Guaranty Co. of Baltimore, Md., Supreme Court of Ohio (Apr. 17, 1917), 117 Northeastern Reporter, page 232.*—This was a proceeding in quo warranto to oust certain insurance companies from exercising the franchise of writing in Ohio insurance to indemnify employers who, under section 22 of the workmen's compensation act, take upon themselves direct liability to pay compensation to workmen. With the exception of employers who become self-insurers under this section, all employers coming under the act are required to contribute to the State fund by paying premiums for insurance of their compensation liability therein. Certain employers, having satisfied the industrial commission of their financial ability to carry their own risks, secured permission to do so, and then obtained contracts from

the private insurance companies indemnifying them against possible losses. The attack against this method of avoiding the monopoly which the State fund otherwise would exercise was based on the ground that section 22 was unconstitutional; the court, however, held that it was valid, and that the employers given that privilege by the commission might become self-insurers, with an indemnification from other sources if desired. It may be noted that the legislature in 1917 has limited the privilege of becoming self-insurers to those who desire to be such without any provision for indemnification.

The first reason assigned for the alleged invalidity of the section was that it was violative of the section of the constitution of the State authorizing the passage of a compulsory workmen's compensation act. The court remarked that the provision was permissive and not mandatory, and that the details of the law and the method of its administration were largely left to the good sense of the general assembly. Judge Nichols delivered the opinion, and said further on this point:

The law could have been framed, no doubt, so that all employers would have been compelled to participate in the one fund to be administered wholly by the State board; but the law's departure from that exclusive method is not of such palpable nature as to suggest to this court that it should destroy such portion of the law..

Further objections to the section were of the nature of complaint that there was a denial of the equal protection of the laws. The opinion shows that there is no real discrimination between the employers, since all have an equal opportunity to become self-insurers if they can qualify. As to the equality among employees, Judge Nichols concludes as follows:

So far as we can see, the only difference is in the person of the paymaster—in the one case the State, and in the other the employer. The law expressly provides that the compensation, when paid direct, shall in no event be less than that paid out of the State insurance fund. As heretofore stated, the board of award must be satisfied of the financial ability of the noncontributing employer, and is further authorized to require such security or bond from such employers as it may deem proper, adequate, and sufficient to secure to injured employees the payment of compensation. In other words, the State board of awards is clothed with full authority to make certain the payment of compensation, just as certain in fact as if the State fund itself was to be drawn upon. If, then, the compensation in the one case is to be as great as in the other, and if the prompt payment is as certain in the one case as in the other, the claim of inequality before the law is dissipated to the very vanishing point.

The wisdom or unwisdom of permitting indemnity insurance contracts is declared not to be connected with the question presented to the court.

WORKMEN'S COMPENSATION—SERIOUS AND WILLFUL MISCONDUCT OF EMPLOYER—MAINTAINING ELEVATOR IN UNSAFE CONDITION—DOUBLE COMPENSATION—*Riley v. Standard Accident Ins. Co. et al., Supreme Judicial Court of Massachusetts (May 25, 1917), 116 North-eastern Reporter, page 259.*—William Riley was injured in the employ of the Home Soap Co., and the employer and insurer appealed from an award of compensation made to him. The amount awarded was doubled on the ground that the employer was guilty of serious and willful misconduct in maintaining an elevator which was badly out of repair, and whose condition resulted in the injury. The court held that this did not constitute willful misconduct under the act, and modified the award by eliminating the doubling of the amount, affirming it as so modified. Judge Braley in delivering the opinion said in part:

The negligence of the subscriber in furnishing for the use of its employees an elevator so thoroughly out of repair as to be unsafe, and in permitting the use of the elevator which the board could find the superintendent considered was in a "dangerous condition," while abundantly shown by the evidence, does not rise to the degree of serious and willful misconduct of a subscriber or of any person regularly intrusted with and exercising the powers of superintendence, for which under section 3 as amended, the injured employee shall be awarded double compensation. As said by Sheldon, J.:

"Serious and willful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequence." (*Burns's Case*, 218 Mass. 8, 10, 105 N. E. 601, 602 [Bul. No. 169, p. 212].)

WORKMEN'S COMPENSATION—SUITS—FAILURE OF EMPLOYERS TO OBSERVE LAWFUL REQUIREMENTS—*American Woodenware Mfg. Co. v. Schorling, Supreme Court of Ohio (May 22, 1917), 117 North-eastern Reporter, page 366.*—Fred W. Schorling brought action for damages against the company named, and secured a judgment in his favor in the court of common pleas, which was affirmed by the court of appeals of Lucas County. The company contended that, as it employed more than five persons and had complied with the requirements of the workmen's compensation act, any remedy which the employee had was given by that statute. The amendment to the constitution, section 35 of Article II, which empowered the legislature to enact the compulsory compensation law, provides that—

No right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees.

The suit was based upon alleged negligence of the company in permitting conditions of employment which resulted in the falling of a load of lumber upon him. A failure to provide a safe method of transporting the lumber was alleged, as was a negligent manner of piling the lumber too high upon a small car and the maintenance of the track in a defective state of repair. The supreme court reversed the judgments of the courts below, holding that the suit could not be maintained in the present case. Referring to the portion of the constitutional amendment quoted above, with particular reference to the phrase "lawful requirement," Judge Johnson, who delivered the opinion, said, in part:

At the time this amendment was adopted by the convention in May, 1912, the act of May 31, 1911 (102 Ohio Laws, p. 524, which was the original workmen's compensation law), was in force. It was provided by section 21-2 of that act that where a personal injury was suffered by an employee, or when death resulted to an employee from personal injuries while in the employ of an employer in the course of employment, and such employer had paid into the State insurance fund the premium provided in the act, and in case such injury had arisen from the willful act of such employer, or any of the employer's officers or agents, or from the failure of such employer or his agents to comply with any municipal ordinance or lawful order of any duly authorized officer, or any statute for the protection of the life or safety of employees, then in such event nothing in the act contained should affect the civil liability of such employer. It will be observed that in the original act the elements which should constitute lawful requirements for the protection of the life or safety of employees were specifically enumerated. If the failure to comply "with a lawful requirement" includes an act which was actionable negligence simply because of the rules of common law, then the portion of the section which authorizes the taking away of any or all rights of action or defenses of employees and employers would be practically meaningless and inoperative. We should be holding that embodied in the same section was power to take away all rights of actions or defenses of employees and employers, and also a practical denial of power to take away any right of action.

Reference was then made to the enactment of the new law in 1913 (103 Ohio Laws, 72), in pursuance of the authority given by the amendment to the constitution to provide for a compulsory system. Section 29 of this act contains practically the same provisions as section 21-2 of the earlier act, but was amended in 1915 so as to define the term "willful act" as meaning an "act done knowingly and purposely with the direct object of injuring another." Continuing the court said:

Here again we meet a distinct conflict between different provisions in the same section, if the construction above referred to be correct. We have a provision preserving to the employee the right to sue his

employer for an injury which has arisen from the willful act of the employer, provided the willful act was "done knowingly and purposely with the direct object of injuring him," while in the same sentence we have a provision that the employee may sue his employer for simple negligence in failing to provide for his safety, as such negligence might be ascertained and fixed by the rules of the common law, and without reference to whether it was willful or unintentional—such as the falling of the lumber alleged to be negligently piled in this case. We think it clear that no such result was intended in the adoption of the amendment to the constitution referred to.

A particular contention of the employee was that the "lawful requirements" of the constitutional amendment, and the "legal requirements" of section 21-2 of the compensation act, would include all those specified in sections 15 and 16 of the Industrial Commission Act as being duties of the employer. The court's view was that only the failure to comply with specified orders of the commission would be so classified. The portion of the opinion relating to this point reads, in part, as follows:

When the provisions of sections 13, 15, 16, 18, 21, 22, and 25 are considered together, in the light of the declared purpose of the enactment creating the industrial commission, we think it clear that the purpose and the effect of sections 15 and 16 was to bring all employers within the scope of the jurisdiction and authority of the commission, and to impose upon them the obligation to comply with the orders and requirements of the commission when duly made.

The commission might through its authorized officials visit an industrial plant and after thorough inspection and investigation make an order requiring certain specific precautions to be taken and safeguards to be provided, all of which it is expressly empowered and directed to do by the terms of the act here involved; yet if an injury was sustained by an employee, after the employer had fully complied with the order, and had incurred expenses, arranged his plant, and conducted his business with reference thereto, the injured employee could assert in an action against him that the precaution ordered by the commission was not reasonable and safe and did not meet the requirements of sections 15 and 16; that in fact this action had no relation to any order of the commission, because his right of action rested upon the general terms of those sections to be determined as at common law. The employer would, in such case, be put upon his defense exactly as if the old common-law rule and the antiquated and unsatisfactory methods of dealing with accidents in industrial pursuits still prevailed, and as if no law had been passed and no effort made by the State to respond to the sentiment of the people, created by long and harsh experiences, that a more humane and satisfactory system should be erected. On the other hand, if the construction we have indicated be correct, then, when an order of the commission has been made and complied with, the injured workman will receive at once the compensation provided by the law out of the insurance fund. This could result only in doing justice between the parties, because if the employer has complied with the orders of an impartial official commission, after having posted notice to the em-

ployee that he was proceeding under the law and subject to the commission's order, he has done all that in justice should be required. But if he has failed to obey the order or requirement of the commission, made under these general provisions, or has failed to comply with the requirements of any statute or ordinance defining safety devices or safeguards required to be used, he is by that act guilty of negligence per se and liable to the injured workman as provided in the act.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY—AWARD FOR CONSECUTIVE PERIODS—*Marhoffer v. Marhoffer*, *Court of Appeals of New York* (May 1, 1917), 116 *Northeastern Reporter*, page 379.—August Marhoffer, employee, proceeded against Alexander Marhoffer, employer, and his insurance carrier, for compensation for an injury suffered by the former. The second finger of his right hand was cut off, and the thumb and index finger lacerated. The State industrial accident commission found that he was totally disabled for 10 weeks from the date of the injury, and awarded him medical treatment for 2 weeks, 66 $\frac{2}{3}$ per cent of his wages for the succeeding 8 weeks for the total disability, and compensation at the same rate for 30 weeks additional for the partial disability caused by the loss of the second finger. The propriety under the law of thus awarding compensation for both total and partial disability for the same injury was questioned, and the court held that such award was not in accordance with the law; it therefore set aside the award for the eight-week period. Judge Pound delivered the opinion and said in part:

Concurrent awards and consecutive awards, based on separate items of physical impairment, disconnected from earning power, alike ignore the fundamental principle that the basis of compensation is a sum payable weekly for a fixed time during which the employee is actually or presumptively totally or partially disabled and nonproductive.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY—"IN LIEU OF ALL OTHER COMPENSATION"—*In re Denton*, *Appellate Court of Indiana, Division No. 2* (Oct. 30, 1917), 117 *Northeastern Reporter*, page 520.—Two cases were considered together, involving the construction of the workmen's compensation law of Indiana. The claimant Denton suffered an accident which resulted in the amputation of his left arm above the elbow, and a fracture of the sacrum which, it appeared at the time of a hearing before the board, would disable him totally for 100 weeks, and partially for 50 weeks longer. Good, the claimant in the other case, also suffered a single accident, which caused a permanent loss

of use of the right arm amounting to 75 per cent, and a fracture of the femur, which resulted in total disability for 22 weeks. The circumstances in both cases were such as to entitle the employees to benefits under the compensation act. The board certified to the court the question whether the claimants were entitled to benefits for the specific periods given in the schedule of section 31 for the permanent partial disabilities, and in addition for the periods of total disability due to the other injuries. This question was answered in the affirmative by the court, which held that the words "in lieu of all other compensation" in section 31 refer only to all compensation for permanent partial disabilities, so that additional compensation might be claimed for a period of total disability due to another injury, even though incurred at the same time, the awards to run, not concurrently, but consecutively.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—INABILITY TO GET WORK—*In re Lacione, Supreme Judicial Court of Massachusetts (May 26, 1917), 116 Northeastern Reporter, page 485.*—Agdio Lacione, 16 years of age, was employed as a water boy by the Hanscom Construction Co. On September 24, 1915, his right hand was caught in the gears of a stone crusher. Compensation was paid him up to October 28; he then returned to work at his regular wages of \$9 per week until December 27, shortly before the work closed. The middle finger of the right hand had been amputated, and the index and ring fingers were stiffened. The boy was unable to understand orders given in English, and the industrial accident board found that, the right hand being permanently disabled, he was totally incapacitated for work from December 27, 1915, and awarded compensation accordingly. He did no work from that date until the hearing the following May, but it did not appear that he had attempted to secure work. The decree granting compensation for total disability was reversed, with instructions that the board should make such award as the evidence already taken would warrant. Judge De Courcey, in the opinion, said in part:

As the evidence does not show a total inability to perform work or to secure work to do, the finding of a total loss of wage-earning ability by the employee at the time of the hearing, and for the four months preceding was not warranted by the evidence.

It well may be that on the evidence the employee is entitled to compensation for partial incapacity, and to some additional specific compensation under part 2, section 11, of the act [providing fixed awards for specific injuries]. He should be given an opportunity to move for a further hearing before the board, on the testimony already heard, and to apply for such compensation as he is legally entitled to.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—INCOME FROM CONDUCT OF BUSINESS—*Moore v. Peet Bros. Mfg. Co., Supreme Court of Kansas (Jan. 6, 1917), 162 Pacific Reporter, page 295.*—Warren L. Moore was awarded a lump sum of \$2,710 as compensation for the full term of 8 years for an injury suffered in the employ of the company named, which injury was found to have resulted in permanent total incapacity. The company moved that the enforcement of this judgment be enjoined, and the judgment modified, on the ground that his total incapacity had ceased, since he was conducting a cleaning, pressing, and tailoring business in the basement of his home, from which he was making \$12 to \$15 per week. The court, Judge Mason delivering the opinion, held that the profits of the business did not constitute earnings under the law, and affirmed the decision of the district court overruling the motion. The following is quoted from the opinion:

The question is presented whether the fact that an injured workman is able to, and does, conduct a business of his own, which returns him an income, is inconsistent with a finding that his injury resulted in his permanent "total incapacity for work" within the meaning of the compensation act.

The phrase quoted does not imply an absolute disability to perform any kind of labor. It requires a practical and reasonable interpretation, as is illustrated by the familiar rule that inability to obtain work, caused by an injury, is classed as total incapacity. One who is disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as totally incapacitated. The Scotch Court of Session has held that the profits of a business owned by the injured workman are not to be classed as earnings.

We find no American cases in which the question has been referred to. If it had been shown in this instance that the plaintiff personally performed a part of the work of cleaning, pressing, and tailoring, a very different question would be presented. Possibly any portion of his income that could be traceable to such work on his part should be given the same effect as though he received it as wages. But the showing made is merely that he is "making" a certain sum weekly out of the business which he is "conducting" as owner, and this might be the case, although he were a complete physical wreck. A judgment based on a finding that a workman's injury has resulted in his total disability to work can not be said to be inequitable or against conscience because he has the thrift and intelligence to provide for his support by investing such means as he has in a business carried on by the labor of others under his direction.

WORKMEN'S COMPENSATION—WAGE LOSS—EARNING POWER—WAGE ADVANCE DUE TO EDUCATIONAL TRAINING—*Epsten v. Hancock-Epsten Co., Supreme Court of Nebraska (July 3, 1917), 163 North-*

western Reporter, page 767.—Edward J. Epstein, a minor, had the great toe of his left foot crushed under the plunger of a press in the establishment of the company named, on April 29, 1915. Medical attention was furnished by the company, and he returned to work May 18; but about a week later blood poisoning developed, he went to a hospital, and the injured toe was amputated. That fall he attended a business college, and the next May returned to work for the company in a different capacity at \$10 per week, his previous wages having been \$7. At the time of the hearing he was earning \$15 per week. The district court awarded him \$5 per week until May 20, 1916, when he returned to work, and in addition \$1 per week for 245 weeks, as 50 per cent of wage loss, payable as a lump sum; the Nebraska statute does not have a specific award for loss of fingers or toes, unless there is a permanent loss of use of the hand or foot. The claimant applied also for additional cost of medical treatment, but the court held this limited to the three weeks already adjusted. The award was sustained except that the award for permanent partial disability was made payable in weekly payments instead of as a lump sum. As to the matter of loss of earning power Judge Rose for the court said:

If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury. A general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. In the present case it is a reasonable inference from the evidence that plaintiff received higher wages because he had by education and training fitted himself for more remunerative employment. There is evidence tending to show that he is unable to perform the duties of his former employment. The evidence justifies a finding that his earning capacity has been impaired.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—OPERATION OF ELEVATOR IN VIOLATION OF RULES—*Pacific Coast Casualty Co. v. Pillsbury et al.*, District Court of Appeal, First District, California (Nov. 16, 1916), 162 *Pacific Reporter*, page 1040.—Simon Cassell, a messenger boy in the employ of the Simon Millinery Co., of San Francisco, was killed by accident, and his dependent was awarded compensation by the industrial accident commission. The casualty company, insurer of the millinery company, petitioned for a writ of review, and the award was annulled in the court of appeal because it was held that the fatal injury was caused by the willful misconduct of the boy. He had been out of the building to secure some piping,

and on return operated a freight elevator in order to ascend to the upper floors, and was crushed by it. It appeared that he had been warned when he entered the employment not to ride in or operate the freight elevators under penalty of immediate discharge, but it was claimed that the rules with regard to elevators were not strictly enforced. The following is quoted from the opinion, delivered per curiam:

We are of the opinion that the undisputed evidence in the case showed that the deceased had been expressly warned not to ride in, or attempt to operate, the freight elevators in the building in which he met his death, under penalty of discharge and that notices were posted at, or near, the entrance of such elevators of similar import, and that the disregard of such warning by the employee must, in the absence of evidence mitigating such disobedience, be held to constitute such willful misconduct as would prevent a recovery before the commission, where, as in the instant case, there is no evidence tending to show that the disregard of its warnings, orders, and notices was condoned by the employer.

WORKMEN'S COMPENSATION INSURANCE—MEDICAL, ETC., EXPENSES—INDEMNITY—*State ex rel. Turner v. Employers' Liability Assurance Corporation (Ltd.)*, *Supreme Court of Ohio* (Jan. 31, 1917), 116 *Northeastern Reporter*, page 513.—The State of Ohio, through its attorney general, brought this action of quo warranto against the insurance company named to enforce an act of 1913, page 91 of the laws of that year, which provided that contracts indemnifying an employer for loss on account of injury to employees must specifically cover medical expenses, and in case of death funeral expenses and compensation to dependents. It was held that this law was not in conflict with and did not repeal section 9510 of the General Code, defining the powers of insurance companies but simply limited the kind of contract that might be written in certain cases. A similar holding was made with regard to the provision that no contract should be made to indemnify an employer for loss or damages resulting from his negligence or that of his agents or servants, unless the employer is a contributor to the State fund or has legally exercised the option of carrying his own insurance, under section 22 of the compensation act. Judgment of ouster was rendered as to the exercise of the franchise of the company, as to writing indemnity insurance policies other than those permitted by the opinion of the court. The operation of ouster was suspended for 100 days in order to permit the company to conform to the court's holdings.



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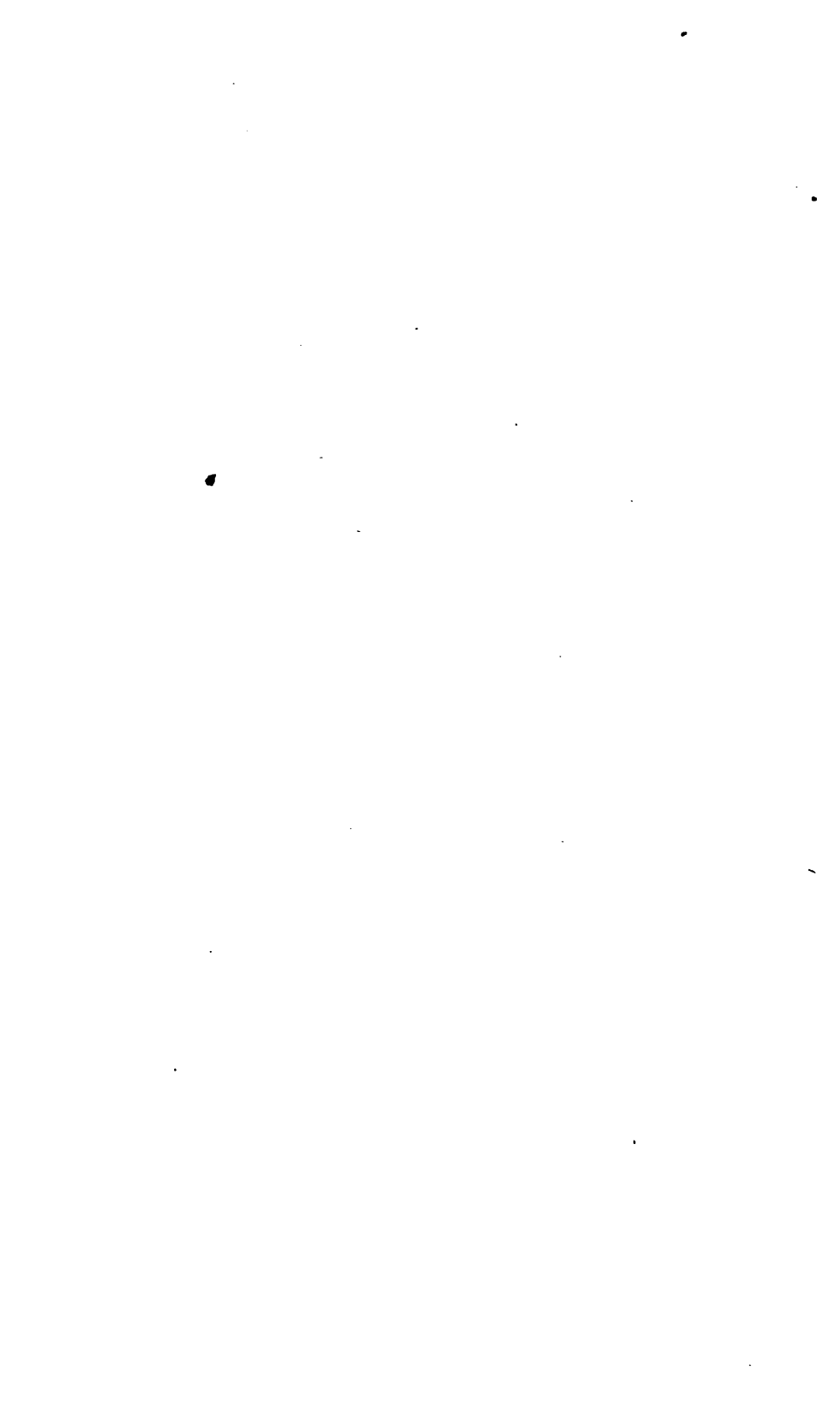
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BUREAU OF LABOR STATISTICS

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No. 258

LABOR CASES OF THE UNITED STATES COURTS

DECISIONS OF COURTS AND
OPINIONS AFFECTING LABOR
1916

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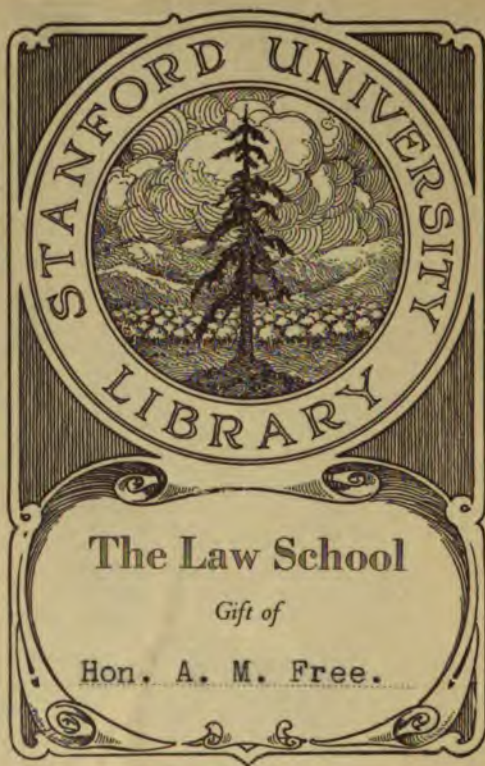
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1918**

**LINDLEY D. CLARK
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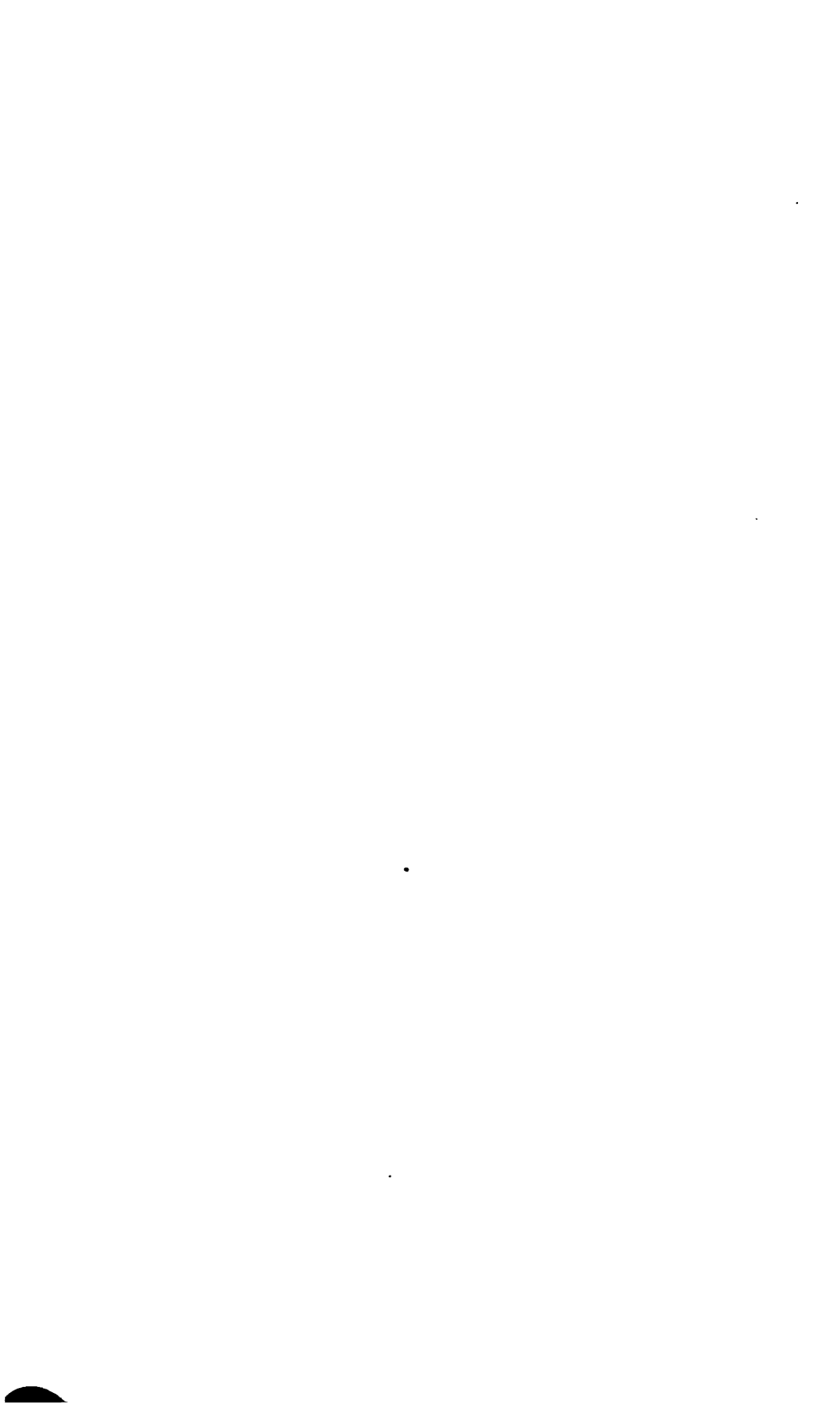
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REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1918.

INTRODUCTION.

This bulletin is the seventh in the series devoted exclusively to the presentation of court decisions, the preceding numbers being 112, 152, 169, 189, 224, and 246. The first bulletin noted bears date of 1912, prior to which time decisions of this nature appeared in practically every issue of the bimonthly bulletins, ending with No. 100. Brief statements of the most important cases are given in the MONTHLY LABOR REVIEW of the Bureau as soon as they come to the knowledge of the office, but these cases are also included in the annual summary. No attempt is made to cover the entire list of decisions handed down by the State and Federal courts, representative types being usually sought for. In a few classes of cases, however, such as those construing workmen's compensation laws, those relating to labor organizations, and those involving important questions in interstate commerce, a more general inclusiveness is practiced. The decisions used are mainly those handed down by Federal courts and the State courts of last resort, though in some cases opinions of subordinate courts of appellate jurisdiction are used, notably of the Supreme Court of New York. Opinions of the Attorney General of the United States construing Federal labor legislation are also reproduced.

The opinions and decisions are presented in abridged form, the facts being stated in most cases in the language of the editors, with quotations from the language of the court, though occasionally the conclusion reached is indicated without such quotation. The sources used are the same as in the past, i. e., the National Reporter System, published by the West Publishing Co., and the Washington Law Reporter for the District of Columbia. With a few exceptions the cases used are those which were published during the calendar year 1918, the volumes covered being as follows:

Opinions of the Attorney General, volume 30, page 241 et seq.

Supreme Court Reporter, volume 38, page 65, to volume 39, page 20.

Federal Reporter, volume 245, page 817, to volume 253, page 480.
Northeastern Reporter, volume 117, page 849, to volume 121, page 80.

Northwestern Reporter, volume 165, page 305, to volume 169, page 576.

Pacific Reporter, volume 168, page 1121, to volume 176, page 320.

Atlantic Reporter, volume 102, page 337, to volume 104, page 895.

Southwestern Reporter, volume 198, page 817, to volume 206, page 576.

Southeastern Reporter, volume 94, page 481, to volume 97, page 608.

Southern Reporter, volume 76, page 825, to volume 80, page 24.

New York Supplement, volume 167, page 705, to volume 172, page 816.

Washington Law Reporter, volume 46.

Decisions of particular interest are one of the Supreme Court declaring unconstitutional the Federal child-labor law; those sustaining the minimum-wage laws of Massachusetts and Washington, and those sustaining acts creating a workmen's compensation aid board in New Jersey, and establishing a special fund to compensate for second injuries in New York; also, decisions penalizing sabotage, one a common-law decision and the other under a statute; an application of the Clayton Act as authorizing secondary boycotts; and various others granting injunctions on the basis of war emergencies. The anti-tipping law of California was declared unconstitutional.

This review is an attempt to present in brief the salient points passed upon by the courts in cases under consideration. Technicalities are omitted as far as practicable in the more extended reports and are almost entirely eliminated in this briefer review. In some instances the case is referred to under more than one head because of the fact that more than one point is involved in the discussion.

OPINIONS OF THE ATTORNEY GENERAL.

Only two opinions of the Attorney General seem to be of sufficient general interest to warrant mention. One of these relates to the eight-hour law of June 19, 1912, the Secretary of War submitting the question whether or not it was applicable to the work of preparing marble for the Lincoln Memorial (p. 45). The opinion is suggestive rather than decisive, and after giving expression to the principles involved leaves their application to the Secretary. The second opinion relates to the powers of the United States Employees' Compensation Commission (p. 46). This body submitted an inquiry as to its authority to pass upon the inclusion or exclusion of

employees of the United States Shipping Board Emergency Fleet Corporation. Citing the provision of the law that the commission has power to "decide all questions arising under this act," the Attorney General declared that, upon the presentation of the question, the power of deciding the point submitted rested with the commission.

DECISIONS OF THE COURTS.

ALIENS.

The construction of the immigration law was involved in two cases, one (*Ex parte Prout*, p. 49) calling for an interpretation of the term "offers or promises of employment." Officials of the Department of Labor had held that statements by agents of steamship companies that there were great opportunities for work in the United States were such solicitation as made the immigrants liable to deportation as contract laborers, a view which the United States district court refused to accept, and the order for deportation was revoked. In the second case (*United States v. Royal Dutch West India Mail*, p. 48), an employee of the company named was directed to proceed from his working place in Amsterdam to a branch office in New York for employment there for a short time. In this case also the district court ruled that there was no inducement to immigrate in consequence of any agreement to perform labor in this country, so that the case was not within the act.

Another aspect of the subject of alienage is involved in the case of *Morin v. Nunan* (p. 49). *Morin* was an alien and had procured a license to drive an automobile, but was fined for driving in the township of Weehawken, N. J., which had a local ordinance forbidding the operation of motor vehicles for hire by one not a citizen of the United States. The conviction was contested on the ground that the ordinance was unconstitutional, but it was declared valid by the supreme court of the State.

CONTRACT OF EMPLOYMENT.

ENFORCEMENT.

Hardly classifiable as a labor contract, but involving identical principles, is the case of *Tribune Association v. Simonds* (p. 53). *Simonds* was a newspaper correspondent engaged to do editorial work for the plaintiff association. Following some disagreement as to the conduct of affairs, *Simonds* undertook to engage in work for another corporation, disregarding his covenant not to write for any other publication or periodical during the term of the contract, and the Chancery Court of New Jersey held that an injunction was properly issuable prohibiting the rendition of any service except that

agreed to under the original contract, and that the alleged injuries were not a sufficient warrant for a breach of contract.

A second case before the same court (*Driver v. Smith*, p. 55) involved an interference with the business of a manufacturing company. One member of the company undertook to withdraw and to establish a competing business, proposing to take with him three skilled workers from the old plant. Injunction was sought against the withdrawing official to prevent his interfering with the original business and also against the three workmen to prevent their carrying out their new contracts and violating agreements to work for none but the original company. The court ruled that, as a general principle, the original contract should be observed, the employer being entitled above others to the services of the workmen. When the workmen had learned the facts regarding the new employment, they sought to withdraw from the new contracts, and in a cross bill asked that they be canceled, a petition which the court allowed. However, the circumstances did not warrant the issue of any injunctions under the circumstances as they had developed.

BREACH.

In the case of *Ressig v. Waldorf Astoria Hotel Company* (p. 50) a cook, who had agreed not to join a labor union and not to strike, but to give eight days' notice of his desire to terminate his employment, joined a union and went on strike at the dinner hour, putting his employer to much difficulty and expense. The contract provided that if *Ressig* should violate it he should forfeit any unpaid wages due him. In spite of this he sued to recover the balance claimed, whereupon the employer interposed a counterclaim for his outlay in hiring another cook. The contention of the employer was maintained by the Supreme Court of New York, Appellate Division, on the ground that there was no excuse for the breach, but that it was rather a willful violation calculated to injure the employer.

That a breach was justified was held in the Massachusetts case of *MacIntosh v. Abbot* (p. 57). *MacIntosh* was a farm laborer and with his wife and two children was to reside, by the terms of the contract, with his employer. Being disturbed by *Abbot* after he had retired *MacIntosh* angrily protested, whereupon his employer demanded an apology. This was refused in rather disrespectful language, and *Abbot* then discharged the plaintiff. The judgment in behalf of the plaintiff was affirmed on the ground that there was not such insubordination as warranted the discharge, and that the reciprocal obligation of the employer to avoid offensive acts should also be observed.

The discharge of a foreman was held to be warranted in a case (*Ackerman v. Siegel*, p. 61), where it was shown that the plaintiff

had been guilty of asking workmen under him to pay him a commission on their wages. This was held by the Supreme Court of New York, Appellate Term, to be conduct tending to imperil the morals and success of the shop.

Involving more unusual conditions was the contract entered into by which it was agreed to protect a workman employed during a strike against acts of violence (*Hansen v. Dodwell Dock & Warehouse Co.*, p. 51). The strikers rioted and severely injured Hansen, who sued for damages, claiming an oral agreement to furnish ample protection and a safe place to work. The company contested on the ground of impossibility of performance, claiming also that such an agreement was against public policy, and that it would amount to a contract of insurance, but was not in conformity with the statutes on that subject. The Supreme Court of Washington rejected all these grounds, and also limited the effect of a receipt for money paid, holding that it was not a release; a judgment for damages was therefore affirmed.

Another case that may be noted here (*Sloss-Sheffield Steel & Iron Co. v. Taylor*, p. 59) is one in which a company doctor refused to render a service claimed by a workman to be due him under his contract. Deductions were made from the wages of the workmen in return for which medical service was to be rendered to them and, in the case of married employees, to their families. Taylor's wife fell ill and the services of the physician were requested but not given until five days after. In the meantime, the case had become acute and another physician had been called in. An action for damages by the woman as beneficiary of her husband's contract was held by the Court of Appeals of Alabama to have been properly brought, and judgment in her favor was affirmed.

INTERFERENCE WITH EMPLOYMENT.

In the first case to be noted under this head (*Oxner v. Seaboard Air Line Railway Co.*, p. 56) a judgment for damages was affirmed by the Supreme Court of South Carolina, where the company had enticed away four of the plaintiff's employees, who were known to be under contract for a year's work. This was held to be a common-law offense, so that the improper citation of an inapplicable statute did not affect the validity of the decision in the court below.

The second case (*S. C. Posner Co. (Inc.) v. Jackson, et al.*, p. 58) might also have been considered under the heading "Enforcement." Sarah C. Posner was an expert designer of women's clothing, her skill being the main asset of the plaintiff company. This company had been organized on the basis of a five-year contract for her services. She was induced to breach this contract by an offer of

increased compensation, whereupon the original company sued her new employer and recover a judgment for damages. This judgment was affirmed, the Court of Appeals of New York adding that if such remedy should be inadequate, an injunction to prevent her from rendering service to the rival organization could properly be had. As action was brought, it was a proper proceeding against one knowingly interfering with an existing contract.

REGULATION.

In the case *Ex parte Farb* (p. 60) the validity of a California statute regulating the disposition to be made of tips was up for consideration. The law undertook to make tips the property of the employee, but Farb arranged to receive them for himself as employer. He was convicted but secured his release on the ground that there was no authority in the legislature to interfere with any contract made between an employer and his employee not in conflict with public safety or morals, the law being declared unconstitutional.

WAGES.

MINIMUM WAGES.

Of principal interest under the heading of wages are the decisions of the Supreme Courts of Massachusetts and Washington, sustaining the validity of the laws of these States providing minimum wages for women and minors. The point involved in the Massachusetts case (*Holcombe v. Creamer*, p. 144) was as to the authority of the minimum wage commissioners to require information to be given by employers as to the wages paid women and children, as provided for in the act. The act was held to be constitutional and the employers were directed to furnish the information.

In the Washington case (*Larsen v. Rice*, p. 145) it was held that the minimum wage fixed by the commission is beyond the power of parties in interest to modify by contract, so that a settlement on a basis of a lower wage payment than that fixed by the commission was no defense against a claim for the unpaid balance. The act in general was held to be constitutional on the basis of the reasoning in the Oregon cases.

PAYMENT.

The Supreme Court of the United States held (*Sandberg v. McDonald*, p. 141) that the seamen's law forbidding the payment of advances at the time of hiring could not be held to invalidate advances legally made on a British vessel, under British law, and in a British port.

The California statute continuing wages for 30 days as a penalty for nonpayment on the termination of contract was held to be con-

stitutional in *Moore v. Indian Spring Channel Gold Mining Co.* (p. 147). A similar law of Arkansas was appealed to in the case of *Dickinson v. Atkins* (p. 148), and recovery was allowed for 16 days' pay accruing between the date of the discharge and the time when payment was tendered.

A New York statute fixes the rate of wages for employment on public works at the current rate in the locality for work of the same nature. Under this statute recovery was allowed a lock tender for services rendered during the seasons of 1893 and 1894 (*Wright v. State*, p. 149). Allowance for overtime was also made for part of a period during which 8 hours was a legal day's work, while 12 hours' service was rendered.

SECURITY.

It was held by the Supreme Court of Washington in *National Market Co. v. Maryland Casualty Co.* (p. 149) that checks given to laborers in payment for services and indorsed by them to a supply company were protected by the usual contractor's bond to secure the payment of claims for labor and materials. Such a bond was held by the Supreme Court of the United States (*Brogan v. National Surety Co.*, p. 150) to cover food supplies furnished for workmen whom the contractor was compelled to board and lodge by reason of the isolation of the place of work.

HOURS OF LABOR.

The application of the Federal eight-hour law for railway employees was involved in the case of *Nelson v. St. Joseph & G. I. Ry. Co.* (p. 103). The law was held by the Kansas City Court of Appeals, Missouri, to apply both as limiting the hours of service per day and as requiring overtime payment, although the contract was on a basis of a monthly salary and made no allusion to overtime. The earlier Hours of Service Act was held by the Supreme Court to apply to employees in charge of switches, receiving instructions by telephone connected with the yardmaster's office, such service being limited by the act to nine hours per day (*Chicago & A. R. Co. v. United States*, p. 104).

An act of the Alaska Legislature limiting the hours of labor of workmen in mines, smelters, etc., was held unconstitutional by the District Court of Alaska by reason of a defective title (*United States v. Howell*, p. 104).

SUNDAY LABOR.

The Kentucky statute forbidding work other than that of charity or necessity on Sunday was held to forbid the operation of a moving picture theater on that day in the case of *Capital Theater Co. v. Commonwealth* (p. 143).

EMPLOYMENT OF CHILDREN.

The Supreme Court of the United States by a vote of five to four held unconstitutional the Federal statute denying admission into interstate commerce of goods produced by children under 14 years of age, or by those between 14 and 16 years of age working more than 48 hours per week (*Hammer v. Dagenhart et al.*, p. 96). It may be noted that the end in view in this act is embodied in a new statute levying a special tax upon goods produced under such circumstances and offered for shipment in interstate commerce.

A Pennsylvania statute forbidding work at night by children under 16 years of age and requiring the procuring of an employment certificate was held constitutional in a case (*Commonwealth v. Wormser*, p. 95) in which the constitutionality of the statute was the only point involved.

RESTRICTIONS ON EMPLOYMENT.

The Illinois statute requiring barbers to pass an examination after three years' preparation was held constitutional by the supreme court of the State (*People v. Logan*, p. 130). However, the court admitted that the term of preparation seemed long, but not so unreasonable as to void the statute.

A city ordinance requiring cement contractors, before a license to do business was issued, to give bond that their work would stand five years was held unconstitutional by the Supreme Court of Wyoming (*State ex rel. Sampson v. City of Sheridan et al.*, p. 130).

A restriction directed against aliens is noted on page 49.

LIABILITY OF EMPLOYERS FOR INJURIES TO EMPLOYEES.

ASSUMPTION OF RISK.

A laborer trimming coal cars and injured by the negligent switching of other cars onto the track where he was working was held by the Supreme Court of Missouri not to have assumed the risk of such injury, nor was he guilty of contributory negligence by standing with his back to the approaching train (*Johnson v. Waverly Brick & Coal Co.*, p. 61). Similarly a workman injured by a drill defectively welded was held by the United States circuit court of appeals to be entitled to damages, since he had not assumed a risk of injury from such a cause (*Gold Hunter Mining & Smelting Co. v. Bowden*, p. 62). In the same case a release signed under the impression that the injuries were but slight was held not to bar recovery in the light of a subsequently developed permanent total disability.

NEGLIGENCE.

An unusual case was that of *Manwell v. Durst Bros.* (p. 91), in which suit was brought to recover damages for the death of an employee who had been secured to clear the employer's premises of strikers. The hazardous nature of the employment was held by the Supreme Court of California to be so evident as to put Manwell on his guard, so that in the absence of a pleading that what was done was done negligently, no cause of action was shown.

The power of State legislatures to enact laws shifting the burden of proof with regard to negligence, at least so far as Federal courts are concerned, was denied in *New Orleans & N. E. R. Co. et al. v. Harris* (p. 80).

A seaman injured on board ship waived his maritime rights and sought to recover in a common-law action for damages, claiming negligence. This was not allowed, the Supreme Court declaring that the rights and liabilities in the case must be determined in admiralty (*Chelentis v. Luckenbach S. S. Co. (Inc.)*, p. 139).

FELLOW SERVANTS.

Car repairers working on the same car are held to be fellow servants; and the Louisiana statute abolishing the doctrine of fellow service as affecting employees of public service corporations was held to be unconstitutional (*Mason v. New Orleans Terminal Co.*, p. 66)—this on the ground that by including all employees in one class no distinction was made between hazardous and nonhazardous operations, and that it affected public service corporations unfairly.

That a fellow workman may be a vice principal in the discharge of a specific duty was held in *Bradshaw v. Standard Oil Co.* (p. 67), and a judgment against the employer was accordingly affirmed by the Kansas City Court of Appeals, Missouri. The liability of the employer for supplying an incompetent fellow workman was affirmed by the Supreme Court of Oklahoma in *Lusk et al. v. Phelps* (p. 69). In this case a man was put to work with dynamite on the promise that an experienced helper would be given, and relying on this promise, which was not kept, the workman was fatally injured.

SAFE PLACE AND APPLIANCES.

Failure to furnish a guard for a shaping machine was held in *Camenzind v. Freeland Furniture Co.* (p. 68) to make the employer liable for an injury to the plaintiff's hand, but the Supreme Court of Oregon ruled that damages should not be allowed for embarrassment that might result from the changed appearance of an injured man, since this was regarded as a sentimental doctrine, "too remote and indefinite to constitute a possible element of damage."

In contrast with the foregoing is the case of *Boyer v. Crescent Paper Box Factory (Inc.)* (p. 93), in which the Supreme Court of Louisiana held that a woman whose scalp was entirely removed by her hair being caught in negligently exposed machinery was entitled to damages because of the injury sustained, "greater than a temporary disability." The State of Louisiana has a compensation law and the employer claimed that the case should be settled in accordance with its provisions. The court below rejected this contention and awarded damages, whereupon the case was appealed. The supreme court first ruled that the case came under the compensation law which it declared constitutional, but subsequently ruled that its provisions did not cover an injury of this nature and a judgment for damages was affirmed.

Furnishing a miner a more sensitive grade of dynamite than that to which he was accustomed, without notice of the change, was held by the Supreme Court of Kansas to be negligence on the part of the employer in *Terleski v. Carr Coal Mining & Mfg. Co.* (p. 85). That an employer is not responsible for injuries following the diversion of appliances from their intended use was the decision of the Supreme Court of Mississippi in *Ten Mile Lumber Co. v. Garner* (p. 86). Where, however, the tools furnished are defectively dangerous, it was decided by the Court of Appeals of the District of Columbia that the fact that it is a simple tool, in the use of which the employee would normally be required to assume the risks, does not relieve the employer of liability where his representative directs its use as necessary (*Cooper v. Penn Bridge Co.*, p. 90). The same holds true in regard to an assurance of safety as to the place of work (*Chess & Wymond Co. v. Wallis*, p. 87). In this case, a laborer called attention to a hanging limb over the place where he was directed to work, but was assured that there was no danger. The contention that the danger was equally open and known to the employee was not allowed by the Supreme Court of Arkansas, as the foreman's assurance and greater experience were held to charge the employer with liability. An inexperienced workman uninstructed as to the dangers of an electrical shock from contact with charged wires, was given judgment for damages, the employer being regarded as negligent in failing to instruct as to the dangers of the place, and the workman not assuming the risks, according to a decision affirmed by the Kansas City Court of Appeals, Missouri (*Kimberlin v. Southwestern Bell Telephone Co.*, p. 87).

Where an employee was compelled by his foreman, over his own protest, to remove a guard for dangerous machinery, the employer was held liable by the Supreme Court of California, even though he had himself approved the installation originally (*Scherer v. Danziger*, p. 88). On the other hand, the Supreme Court of Iowa ruled that

the employer can not be held responsible for an injury alleged to be due to the lack of a guard when a suitable equipment is provided and the workman is familiar with its use, its adjustment being necessary with the changing conditions of the work (*Kancevich v. Cudahy Packing Co.*, p. 89).

An Arizona statute requiring warning to be given before the discharge of blasts in a mine was held to impose that duty on the employer, even though not so stated in the act, this duty being imposed in general terms by the constitution of the State (*United Verde Copper Co. v. Kuchan*, p. 89). Failure of a mine operator to provide efficient ventilation was held to be negligence, and the resultant injury as truly actionable as if it had been traumatic (*Gay v. Hocking Coal Co.*, p. 63).

UNLAWFUL EMPLOYMENT OF CHILDREN.

The Supreme Court of Wisconsin held (*Reiten v. J. S. Stearns Lumber Co.*, p. 65) that the unlawful employing of a boy under 16 years of age in a dangerous occupation, without a permit, made the company absolutely liable for injuries received by him while so employed. This doctrine was rejected, however, by the Supreme Court of New York, Appellate Division, which denied liability for injury to a boy under 14 years of age, operating an elevator, because of his contributory negligence (*Karpeles v. Heine et al.*, p. 64). The statute makes the age of legal employment 16 years. More technical grounds furnished the basis for a judgment against the employer in *Chabot v. Pittsburgh Plate Glass Co.* (p. 66). In this case a boy 14 years of age was employed in an establishment which had properly procured an employment certificate, but had not kept or posted lists of the children employed, as prescribed by the Pennsylvania law. Failure to do this was held to render the company unable to plead compliance with the child-labor law, and a judgment for damages was affirmed.

RAILROADS—FEDERAL STATUTE.

Assumption of risk.—The Federal employer's liability law applicable to railroads limits the doctrine of assumption of risk, but, contrary to the opinion of some, it does not abolish it. Thus, where a fireman undertook to board a moving train and was killed, it was held that the injury followed his own choice of a course of action, he being an experienced railroad man and aware of all the risks involved. Damages were therefore denied by the Supreme Court of Kansas (*Briggs v. Union Pacific R. Co.*, p. 70). A similar conclusion was reached by the Supreme Court of the United States, in a case where an experienced yard conductor was killed while between two cars attempting to adjust a faulty coupler, having gone to the place without

observing the prescribed precautions (*Boldt v. Pennsylvania R. Co.*, p. 71). Where, however, equipment actually defective appears to have been used, the same court ruled that the fact that it has been passed as approved by a Government inspector is not an adequate defense (*Great Northern R. Co. v. Donaldson*, p. 72).

Negligence.—A railroad company was held not liable for negligence when an experienced civil engineer stepped on a rotten crosstie, causing him to fall and suffer injury (*Nelson v. Southern R. Co.*, p. 80). The defect was not of a character to impair safety in operation, so that the company was declared by the Supreme Court not to be negligent in permitting its existence. On the other hand, where a brakeman was found dead in the engine tender, under circumstances indicating that he had been struck by a low bridge, it was held by the United States Circuit Court of Appeals that there was negligence, despite the fact that certain telltales were provided, since the bridge to which the injury was attributable offered unlooked-for dangers requiring specific warning (*Marland v. Philadelphia & R. Ry. Co.*, p. 81).

Interstate commerce.—The perennial problem of determining between interstate and intrastate service was involved in the case of *Kenna v. Calumet, H. & S. E. R. Co.* (p. 74). It was there held by the Supreme Court of Illinois that a factory switching system, connecting up with two belt lines by which cars are sent into interstate commerce was under the Federal statute and not under the compensation law of the State. Another case in which the relation of the principles of compensation and liability was involved was decided by the Supreme Court of Washington (*Spokane & I. E. R. Co. et al. v. Wilson et al.*, p. 82). The injured men were employed by electric railway companies, doing both interstate and intrastate business, and had obtained awards under the compensation law of the State. The companies opposed the award on the ground that the case came under the Federal law. The supreme court reversed the award without deciding as to the nature of the commerce, on the ground that the State compensation law did not cover railroad service of any kind that involved questions of interstate and intrastate distinctions, but relegated such employees to a suit for damages either under the Federal statute or under a State law of identical provisions.

A cook in a camp car, injured while the car was on a siding where the gang was repairing a bridge, was held to come under the Federal statute by the Court of Appeals of Maryland, as being engaged in interstate commerce (*Philadelphia B. & W. R. Co. v. Smith*, p. 75). A similar view was taken by the Supreme Court of Missouri in the case of a timekeeper for a gang of men engaged in repairing the main track of an interstate railway, though killed after work hours

by an intrastate work train (*Crecelius v. Chicago, M. & St. P. R. Co.*, p. 78).

The removing of old ties and throwing them into a fill with the object of strengthening and reinforcing the roadway was held to be work in interstate commerce by the Court of Appeals of Kentucky (*Ohio Valley Electric R. Co. v. Brumfield's Admr.*, p. 79). Where, however, the work of removing old rails from the right of way in no respect affected the safety of the roadway, it was held by the Supreme Court of Utah that the Federal statute had no application (*Perez v. Union Pacific R. Co.*, p. 77).

The interrelation of the State and Federal laws was discussed in an Iowa case (*Breen v. Iowa Central R. Co.*, p. 76), where a suit had been prosecuted through three trials under the State law. At the final trial it developed that the parties were probably at the time of the injury engaged in interstate commerce, and the company sought to make this fact a defense. This was not permitted by the supreme court of the State on the ground that the issue had not been raised and that it would not be in accordance with the principles of justice to permit alternative remedies to be played one against the other.

RELEASES.

A release signed under a misrepresentation of the facts by the employing company, the injured workman being in a state of mental debility due to the injury, was held by the District Court of Appeal of California not to be binding in the case of *Carr v. Sacramento Clay Products Co.* (p. 83). Where, however, there was no evidence of physical or mental incompetency, the employee was not permitted by the Supreme Court of New Mexico to void his release, even though he claimed to have signed it without knowing its contents (*Morstad v. Atchison, T. & S. F. Ry. Co.*, p. 84). In another case, *Swan v. Great Northern R. Co.* (p. 85), decided by the Supreme Court of North Dakota, there was no question raised as to the knowledge by the employee of the contents of the release signed by him. However, failure of the company to carry out an agreement orally made was held to sustain the right of action for damages, but not without tendering a return of the money accepted under the repudiated release. Changed physical conditions due to the injury, not apparent at the time a release was signed, afford a ground for setting aside a release, according to the United States Circuit Court of Appeals (*Gold Hunter Mining & Smelting Co. v. Bowden*, p. 62).

RELATION TO WORKMEN'S COMPENSATION ACTS.

A Louisiana case (*Philps v. Guy Drilling Co.*, p. 92) involved alternative actions, either under the liability doctrine embodied in the Civil Code or under the compensation law of the State. The

constitutionality of the compensation law was challenged on technical grounds, but was affirmed by the supreme court. The decision covered a situation in which the employee had not been in the employer's service for 30 days, which is the time allowed for election. The compensation law was held to apply, and that a suit for damages must therefore fall, reversing the decision in the Woodruff case (Bul. 246, p. 224).

WORKMEN'S COMPENSATION.

CONSTITUTIONALITY OF STATUTE.

Besides the incidental contest noted in the Philps case above, questions of constitutionality were raised in regard to the compensation laws of Alaska, Nevada, and Wyoming. In the Alaska case (*Johnston v. Kennecott Copper Corp.*, p. 173), the employer attacked the constitutionality of the act as being class legislation, since it applies to mining only. The classification was held by the court to be proper and the act was upheld.

In *Nevada Industrial Commission v. Washoe County* (p. 174) the law of Nevada was sustained as compulsorily applicable to public corporations, the money for compensation benefits being a proper charge upon the counties of the State as for a public use. Private rights were involved in the Wyoming case (*Zancanelli v. Central Coal & Coke Co.*, p. 175). The plaintiff sued for damages, but the employer opposed on the ground that he was under the compensation act. Plaintiff then claimed that the act was unconstitutional and called for a decision of the court on the point. The law was sustained on the ground of an amendment to the State constitution providing for its enactment and of decisions of the Supreme Court of the United States upholding such laws.

A supplementary act of the New Jersey Legislature was objected to in *Murphy v. George Brown & Co.* (p. 163), the act in question being one providing for an administrative board to have charge of the compensation law. The objections raised were overruled and the act sustained. An amendment to the New York law provides for a special fund to be made up of contributions by employers in cases where workmen leave no dependents, this fund to go for compensating cases of second injuries. The validity of this act was sustained in the face of adverse contentions in the case of *State Industrial Commission v. Newman* (p. 223).

PARTICULAR PROVISIONS OF THE LAW.

INJURIES COMPENSATED.

Accidents.—The Supreme Court of Michigan maintains a strictness of interpretation that was in evidence in the *Bischoff* case ("Arising out of and in course of employment," see Bul. No. 224,

p. 303; Bul. No. 203, p. 236), in cases involving the definition of the term "accident," as used in the law. In *Roach v. Kelsey Wheel Co.* (p. 153) an award was reversed which had been made in behalf of a workman who died from heat prostration after having worked for four days in a boiler room where the temperature was said to be for part of the time 136°. It was said that "he was doing the work which he and his associates were employed to do exactly in the manner he expected to do it. To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler, in the performance of his ordinary and accustomed labor, succumbed to heat prostration." Fortunately, a more humane view is taken in other jurisdictions. The Supreme Court of Pennsylvania (*Lane v. Horn & Hardart Baking Co.*, p. 156) and that of Rhode Island (*Walsh v. River Spinning Co.*, p. 154) regard heat prostration attributable to the conditions of employment to be a casualty compensable under their acts.

Heart failure in the form of mitral regurgitation, following prolonged effort, was held not to be compensable as an accidental injury in another Michigan case (*Guthrie v. Detroit Steamship Co.*, p. 151); so also in a case of inguinal hernia developed while lifting a heavy timber, though two judges concurred only because they felt bound by the majority decision in the *Roach* case noted above (*Tackles v. Bryant & Detweiler Co. et al.*, p. 156). In contrast with the latter decision is one by the Appellate Court of Indiana (*Puritan Bed Spring Co. v. Wolfe*, p. 157), in which there was a preexisting condition favorable to the rupture; the fact of the greater susceptibility was held, however, not to bar the right to a claim, since the accident actually occurred and was the real cause of the ensuing disability. A similar conclusion was reached by the same court in the case, *Indian Creek Coal & Mining Co. v. Calvert et al.* (p. 162), in which a diseased aorta was ruptured by strain, the ruling being that although the disease would ultimately have resulted fatally, even without severe exertion, the case was one of compensable injury under the law.

Occupational diseases.—Few States recognize occupational diseases, as such, as grounds for compensation. However, opinions were handed down in a number of cases last year, involving conditions closely approximating what are known as diseases of occupation or industrial diseases.

Thus in a Pennsylvania case (*McCauley v. Imperial Woolen Co.*, p. 158), an anthrax germ finding access to the system through an abrasion on the neck of a wool sorter, received while at his work, was held to be an accidental injury and compensated. Similarly, a case of arsenical poisoning from the fumes from the scum of molten zinc was held to be an accidental injury and not an occupational dis-

ease by the Supreme Court of Illinois (*Matthiessen & Hegeler Zinc Co. v. Industrial Board*, p. 159), and this though the poisoning was said to have been the accumulation of a number of years, the death resulting from a sort of climax. Another fatal case, though more rapidly developed, was that of the poisoning of a painter who on a cold day had warmed some paint in a small unventilated building so that it might flow more freely. The Supreme Court of Ohio did not regard this as an occupational disease but as an accident due merely to the man's presence in the room where injurious fumes were being developed (*Industrial Commission v. Roth*, p. 160).

California is one of the few States in which the term "accident" was not so strictly defined, and now by its law includes occupational diseases. Prior to this amendment, however, a sign writer used large quantities of wood alcohol as a solvent, applying the colors by the use of compressed air. This resulted in such an affection of the eyes that he was no longer able to use them for any work. This was held to be a compensable injury by the supreme court of the State in *Fidelity & Casualty Co. v. Industrial Accident Commission* (p. 161).

Proximate cause.—The Wolfe and Calvert cases already noted involved the question of proximate cause, i. e., whether the accidental injury claimed or the preexisting condition afforded the real ground of the disability. The question stands out more prominently, however, in a case decided by the Supreme Court of Louisiana (*Behan v. John B. Honor Co. (Ltd.)*, p. 208), in which the injured man developed locomotor ataxia, which had been latent but entirely unknown. Admitting that the resultant disability was worse than it would have been in the case of a well man, the court held that the accident was none the less the proximate cause of the existing disability and affirmed an award for compensation.

EMPLOYMENT STATUS.

Several cases were noted involving the right of the injured party to claim the status of an employee within the meaning of the act. Thus in *McNally v. Diamond Mills Paper Co.* (p. 181) a person engaged in installing an engine for the company was injured, and the question was raised whether or not his work was that of an independent contractor. An examination of the facts led the Court of Appeals of New York to reverse the court below and affirm an award made by the State industrial commission in behalf of the injured man as an employee. It was admitted that the employment was both temporary and casual, but since the amendment of 1916 casual employees are entitled to recovery under the law of the State. In another case before the same court a painter furnishing his own rigging and simply agreeing to do a specific piece of work for a fixed sum was held to be outside the law, as an independent contractor (*Litts v.*

Risley Lumber Co., p. 182). The same question was involved in a California case (*Rosedale Cemetery Association v. Industrial Accident Commission*, p. 183), in which a man skilled in the use of dynamite was employed to do some work at a daily rate. He was not supervised by his employers, since it was assumed that he knew better how to do the work than they did. However, the court held that this was but natural in view of his superior knowledge and did not indicate a different status from that of an employee.

A workman injured on the first day of his employment, during which he was to demonstrate his ability for continued service, was held by the Supreme Court of Illinois to be an employee, since he was at least for that day in the service of his employer, with a prospect of continuance (*Marshall Field & Co. v. Industrial Commission*, p. 182).

The claim of a partner in a firm to be regarded as an employee because he did work in the furtherance of its undertakings was rejected by the Supreme Court of California (*Cooper v. Industrial Commission*, p. 184) on the ground that the law did not contemplate such a mixed relationship, involving practically self-employment.

CASUAL EMPLOYEES.

The exemption of casual employees from the purview of the laws generally leads to a continued discussion as to the meaning and effect of this provision. Much depends upon the use of the conjunction in the phrase "casual and (or) not in the usual course of the employer's business," as appears from the decision in a California case, *Walker v. Industrial Accident Commission* (p. 172). In this State the conjunction "and" is used, and work done by a casual employee but in the usual course of the employer's business was held to be within the act and an injury arising in the course of employment was held compensable. In Illinois the conjunction "or" is used instead of the conjunction "and" in the corresponding clause, so that a structural-iron worker employed for a specific piece of work, although in the customary line of the employer's business, was held to be a casual employee and not entitled to the benefits of the law (*Chicago Great Western R. Co. v. Industrial Commission*, p. 172). The law of this State has since been amended by striking out the clause as to the exclusion of casual employees. A third case involved the construction of the Wisconsin statute, which also used the disjunctive "or." However, this was held not to bar the claim of a carpenter hired from time to time to make repairs on a creamery building, since the work must be done on occasion, even though irregularly, and was a necessary part of the business (*Holman Creamery Association v. Industrial Commission*, p. 171). As in Illinois, the excluding phrase as to casual workmen has been stricken out in Wisconsin.

A decision as to the usual course of the employer's business, made by a lower court, was reversed by the Supreme Court of Minnesota, and compensation was allowed in the case of a carpenter building a shed for an extension of the employer's business (*State ex rel. Lundgren v. District Court*, p. 229).

HAZARDOUS EMPLOYMENT.

The cases noted under this head are complicated with other factors, the first (*Hahnemann Hospital v. Industrial Board et al.*, p. 188), being brought within the Illinois statute by reason of the equipment of the building with an elevator which was an instrumentality subject to regulation by statutory or municipal ordinance—this without regard to the nature of the business carried on therein. In a second case (*State v. Postal-Telegraph Cable Co.*, p. 189), the contention of the employers that they were not engaged in hazardous work was said by the Supreme Court of Washington to be of no effect "because it is a denial of a legislative declaration."

Farm labor is excluded from most acts, either as nonhazardous or for other reasons, and a thresher man injured in the course of his duties was held not to be within the scope of the Minnesota law (*State ex rel. Bykle v. District Court*, p. 187).

EXTRATERRITORIALITY.

Where the employment requires a workman to go from point to point in the discharge of his duties, the Supreme Court of Colorado held that the law of the place of contract followed him beyond the boundaries of the State, so as to entitle his beneficiaries to an award under the Colorado statute, even though the death took place in another State (*Industrial Commission v. Aetna Life Ins. Co.*, p. 185). A similar view was taken by the Supreme Court of Minnesota, where the employee was required to travel outside the State in the prosecution of his business (*State ex rel. Chambers v. District Court*, p. 186).

JURISDICTION.

A company constructing and operating a telegraph system claimed that all its employees were engaged in interstate commerce, and that to compel them to pay compensation benefits would be placing a burden on interstate business in violation of Federal law. The Washington Supreme Court held (*State v. Postal Telegraph-Cable Co.*, p. 189) that even though sending messages was interstate business the construction of a line not yet in use was not such business, but was within the provisions of the State law.

A similar conclusion was reached by the Supreme Court of California in a case (*Southern Pacific Co. v. Industrial Accident Commission*, p. 221) where work was being done on the main line which

conveyed electricity for use in moving both interstate and intrastate cars.

The question of maritime jurisdiction was involved in a California case where work had been done on a vessel prior to its launching. There had been a stipulation that the employment was within the scope of the State compensation law, and the court refused to hear the objection subsequently raised that the Federal law had exclusive control (*Employers' Liability Assurance Corporation (Ltd.) v. Industrial Accident Commission*, p. 213). The right of the State to enforce its law was also held in a Texas case (*Southern Surety Co. v. Stubbs et al.*, p. 212) where the widow of an employee on a dredge boat was awarded compensation for his death. The court held that the decision in the Jensen case did not rule against the right of State courts to entertain suits in personam simply because the cause of action was of maritime origin.

NONRESIDENT ALIENS.

A single case is noted under this head, the Court of Civil Appeals of Texas holding that neither the compensation act nor the general law of the State excluded nonresident aliens from the right to inherit, so that there was no bar to the claim of such persons simply on the ground of their nonresidence (*Southwestern Surety Ins. Co. et al. v. Vickstrom et al.*, p. 163).

ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

In general the compensation laws of the various States require the double test of arising out of and in course of employment. Obviously not every injury arising while at work is due to the employment. Thus the Supreme Court of Michigan (*Cennell v. Oscar Daniels Co.*, p. 165) set aside an award in behalf of workmen who were compelled to wait for a little time before proceeding with their duties and went to an adjacent locality to see other activities which were being carried on. While there they were injured, one fatally. Compensation was denied on the ground that they were where they were simply in the gratification of curiosity and not by reason of their employment. On the other hand, the Supreme Court of Errors of Connecticut reversed the court below and affirmed an award in favor of a claimant where the injury occurred after work, the injured man not having gone as promptly from the danger zone as he might (*Merlino v. Connecticut Quarries Co.*, p. 167). The court held that his delay in leaving was tacitly consented to so that the accident practically arose out of employment and was within its scope. Similarly liberal was the ruling of the Supreme Court of California in a case where a man whose injured hand had been wrapped in a bandage

saturated with turpentine was burned by striking a match to light a cigarette (*Whiting-Mead Commercial Co. v. Industrial Accident Commission*, p. 164). Declining to answer the question as to the necessity of the use of tobacco, the court remarked that it was a common habit, and that the facts must be dealt with as they are. A similar view was taken by the Supreme Court of Pennsylvania (*Dzikowska v. Superior Steel Co.*, p. 176). In this case the workman's clothing was saturated with oil from the material handled, and, lighting a match in order to smoke during an interval of relaxation, he was burned fatally. The court held that his conduct had not been unreasonable and was in the course of his employment. The law of this State does not require that the injury should arise out of the employment.

A case of heat prostration was declared by the Supreme Court of New York, Appellate Division, to be an accidental injury, but was denied compensation on the ground that it did not arise out of the employment, there being no special or increased hazard involved therein not common to the public in general (*Campbell v. Clausen-Flanagan Brewery*, p. 165). Where, however, it appears that the nature of the employment causes a special exposure, an injury due to excessive temperature may be found compensable. Thus in *Ellingson Lumber Co. v. Industrial Commission* (p. 195), a lumberman was awarded compensation for frozen feet where it appeared that he had made extra exertions in the line of his employment, and his feet becoming wet with perspiration were frozen while he was returning to camp, the award being affirmed by the Supreme Court of Wisconsin.

Where a workman was chilled from exposure to cold and wearied by his labor, according to a decision of the Supreme Court of Connecticut, there was neither willful negligence nor a departure from the line of duty in seating himself near the fire box of a boiler while waiting for an elevator to become available for his further work. It followed that the injuries by burning received from his greasy apron catching fire while dozing were compensable (*Richards v. Indianapolis Abattoir Co.*, p. 193).

Drinking acid by mistake for water with fatal results was said by the Supreme Judicial Court of Massachusetts to be a compensable injury where the bottle containing the acid was placed in a position customarily used by the employee for storing his drinking water, a causal connection being found between the employment and the accident (*In re Osterbrink*, p. 195).

Where, however, there is a departure from the service on a personal errand, as for the purchase of tobacco, resulting in a fatal street accident, it was held that the hazard was not due to the employment and the injury not compensable (*In re Betts et al.*, p. 204). The same court (Indiana Appellate Court) refused to extend this

doctrine so far as to bar the claim of a workman injured while undertaking to heat water to wash himself after completing his work, the custom being acquiesced in by the employer, although there was some deviation in the instant case (*In re Ayers*, p. 201). So, also, the Supreme Court of Errors of Connecticut (*Robinson v. State*, p. 201) allowed compensation where a foreman on highway work was struck by an automobile while crossing the road to speak to a friend, there being nothing to show that the act would interfere with his employment.

The eating of lunch on the premises was shown to be a custom in the case of *Humphrey v. Industrial Commission* (p. 202), so that an employee injured during the lunch hour while operating an elevator which he was permitted to use was held by the Supreme Court of Illinois not to have departed from the course of employment, and compensation was awarded. Where, however, a workman undertook to leave his work place for lunch by an unusual route when a safe method had been provided by his employers, a resultant injury was said by the District Court of Appeal of California not to arise out of the employment, nor to have occurred in its course (*Moore & Scott Iron Works et al. v. Industrial Accident Commission et al.*, p. 203).

Injuries received while going to and from work are compensable or not according to the conditions surrounding the individual case. Thus, where an employee on his way to work was invited into his employer's automobile to aid in procuring material, and was injured while on the trip, it was ruled by the Supreme Court of Illinois that he was within the course of his employment and the injury arose out of it (*Scully v. Industrial Commission*, p. 197). So, also, where a workman used his motorcycle to procure supplies and was injured on the trip, the injury came within the terms of the Nebraska statute (*Coster v. Thompson Hotel Co.*, p. 198); and a salesman who may have been either on his way home at the close of the day's work or intending to visit another customer and was fatally injured while crossing the street, was held by the Appellate Court of Indiana to be within the scope of his employment, since his duties led him to be in just such places as the one in which the accident occurred (*Bachman v. Waterman*, p. 199). However, the principle was not allowed by the Supreme Court of Illinois to cover an employee who was sent on an errand and did not complete his work until after the end of the working day in his employer's establishment and was killed by a street accident while on his way home from the place to which he had been sent (*N. K. Fairbanks Co. v. Industrial Commission*, p. 200). So, also, where an employee was absent from home and was killed while returning for a week-end sojourn, the same court denied compensation since the injury was not one arising out of and in the course of employment (*International Harvester Co. v. Industrial*

Board et al., p. 200). A contrary position was taken by the Supreme Court of Minnesota in the case of *State ex rel. McCarthy Bros. Co. v. District Court* (p. 196), in which an award for compensation was affirmed where a traveling salesman was drowned while attempting to return to his home to spend Sunday in accordance with his regular custom.

An injury inflicted in anger or malice was compensated in a case passed upon by the Supreme Court of Illinois (*Pekin Cooperage Co. v. Industrial Commission*, p. 191), where a quarrel had arisen concerning the work in hand and one of the men assaulted the other with serious results.

A contrary doctrine was adopted in a Connecticut case (*Jacquemin et al. v. Seymour Mfg. Co.*, p. 192) where workmen quarreled over the possession of a tool, the court saying that the fact that quarrels sometimes occur does not make the injury one arising out of the employment. Compensation was awarded in a New Jersey case and affirmed by the supreme court of the State, but reversed by the Court of Errors and Appeals, where skylarking was followed by a serious assault (*Mountain Ice Co. v. McNeil et al.*, p. 193). It was held that the fact that officials had observed the skylarking did not give them notice of the possibility "of an atrocious assault." A different situation arises when the assault is due to the employment, as the murder of a watchman by a trespasser, and if the injury is found to be due to the status and not to personal enmity, compensation will be awarded (Supreme Court of Illinois: *Mechanics' Furniture Co. v. Industrial Board*, p. 204).

It was held in a California case (*Williamson v. Industrial Accident Commission*, p. 194) that a person volunteering to perform work outside the scope of employment is not covered by the act, the particular case being that of a chambermaid attempting to do a difficult task usually performed by the janitor, the work being undertaken without the employer's consent and against the advice of a superior fellow employee.

INJURIES DUE TO THIRD PARTIES.

An injury due to the negligence of a third party was compensated for by the employer, the latter thereupon suing for the damages to the employee. The suit was for a larger sum than the amount awarded as compensation, and a verdict allowing the same amount was rendered. The Supreme Court of Michigan held (*Albert A. Albrecht Co. v. Whitehead & Kales Iron Works*, p. 205) that recovery must be limited to the compensation awarded and that only the amount paid as compensation at any time could be recovered by the employer; neither could there be any excess recovery to go to the employee.

In another case in the same court (*Vereeke v. City of Grand Rapids*, p. 207) the mother of a deceased employee was granted an award under the compensation law of the State, while the father undertook to arrange to sue the third party, to whose negligence the death of his son was due. A suit was brought and damages recovered, whereupon the employer sought to have the amount accredited in its favor on the amount of compensation to be paid by it, making its claim under the act that forbids an employee to claim compensation and sue for damages for the same injury. The court held, however, that this restriction did not apply in the case of dependents where the injury was fatal.

The Kansas statute does not allow both compensation and damages in any case, but an employer can not by tendering compensation bar an action against the negligent third party, where the dependent has not elected which course of procedure to follow (*Swader v. Kansas Flour Mills Co.*, p. 206). Likewise the Supreme Court of Washington refused to interfere with a claimant's right to elect between a suit for damages and a claim for compensation by extending the term "plant" to include the entire trackage of a street car company. In the instant case (*Carlson v. Mock*, p. 208), a track oiler of the company was injured by an automobile driven by a third party, who thought to prevent the action by citing the compensation statute, which forbids suits where the injury occurs at or about the employer's plant.

AWARDS.

Concurrent awards were allowed by the Court of Appeals of New York in the case of a woman whose hair was caught in a revolving shaft, producing disfiguring injuries, allowance being made for both the disfigurement and for any proved disability or loss of earning power that might be subsequently proved (*Erickson v. Preuss et al.*, p. 167). In *Colorado (Employers' Mutual Insurance Co. v. Industrial Commission*, p. 169) successive awards were held valid in the case of an injury the results of which were not determinable at the time of the preliminary award; neither could an injunction be secured to suspend payments during an appeal, since one of the prime objects of the law was to secure prompt relief. The right of review was held by the Supreme Court of California (*Georgia Casualty Co. et al. v. Industrial Accident Commission*, p. 168) to be limited to cases in which causative facts arose warranting a change in the awards originally made. The increase of disability, through infection, of a compensated injury was held (*Enterprise Fence & Foundry Co. v. Majors*, p. 169) to warrant a revision of the award in accordance with the increased disability. The injured man's insistence against an operation unless absolutely necessary was said by the Appellate Court of Indiana not to be willful misconduct barring his claim for the increased benefits.

Noted here for lack of a better classification is a Kansas case (*Vogler v. Bowersock*, p. 222), in which a collective insurance system, to which the workmen contributed, was held to be independent of any award due an injured workman under the compensation law, and a general release was subject to proof of its real scope, the question of fraud not being necessarily involved.

DEPENDENCE.

In a Minnesota case (*State ex rel. London & Lancashire Indemnity Co. v. District Court et al.*, p. 177) a widow was allowed compensation for the death of her husband in spite of the fact that she had lived apart from him for about 12 years, the evidence showing that the separation was not voluntary, but due to threats of violence. Partial ability to support herself apart from her husband was held by the Supreme Court of Appeals of West Virginia not to bar the claim of a widow resident in Italy for the death of her husband in this country (*Poccardi v. Ott*, p. 178).

The Illinois statute of 1913 did not require actual dependence but made certain relatives beneficiaries if the deceased workman had contributed to their support within four years of his injuries. An award was therefore affirmed in a case (*Mechanics' Furniture Co. v. Industrial Board et al.*, p. 204) in which an adult daughter had been cared for by her father for various periods during illness within the preceding three years. The law at present requires actual dependence.

In this connection may be noted a decision under its original act by the Supreme Court of New Jersey, relative to the rights of widows upon remarriage, in which it was held (*Hansen v. Brann & Stewart Co.*, p. 170) that an award once made was a vested right, unaffected by subsequent marriage. This provision has been changed by an amendment of 1913.

DISABILITY.

The distinction between the loss of an eye and the loss of sight was considered by the Court of Appeals of Kentucky in *Nelson v. Kentucky River Stone & Sand Co.* (p. 179), in which the court held that loss of an eye should be compensated on the general basis, and not in accordance with the schedule provision for the loss of sight. A rather narrow distinction was involved in the New York case of *Frings v. Pierce Arrow Motor Car Co.* (p. 180). An injury to the eye necessitated the removal of a lens, but by the use of a correcting glass the sight of this eye was rendered normal. It would not, however, focus with the other eye, so that but one eye could be used at any given time. A claim for compensation as for the loss of the use of the eye was denied, however, by the Supreme Court, Appellate Division, the court holding that if an injury should destroy the vision

of either eye, a useful eye would still remain. This case was distinguished from the case of *Smith v. F. & B. Construction Co.* (p. 181) decided by the same court, where the aid of glasses restored but one-third of the normal vision of the injured eye and it could not then be used in conjunction with the good eye. In this case there was an award for the loss of the use of the injured eye "equivalent to the loss of the eye."

The Supreme Court of Errors of Connecticut had before it a case (*Franko v. William Shollhorn Co.*, p. 224) in which an injury to the hand caused temporary total disability, while a necessary amputation of a finger caused permanent partial disability. The total disability involving loss of use was held to be compensable by a separate award from that due on account of the later loss of the member. Where, however, there was an injury with immediate amputation, the period of total incapacity was held to merge in the schedule period fixed by law for the permanent partial disability (*Kramer v. Sargent & Co.*, p. 225). A third case (*Olmstead v. Lamphier*, p. 226) before the same court involved multiple injuries, consisting of a partial disability of the shoulder, and an injury involving amputation of the leg. An award was made for the partial disability due to the shoulder injury and for the loss of the leg in two separate amounts; an award was made also to supply the cost of an artificial leg. The employer claimed that he was responsible only for the major award, that is, for the permanent partial disability due to the loss of the leg and not for the shoulder injury or for the artificial leg. The court held that the two injuries were each compensable, the payments to be consecutive and not simultaneous, and that the requirement for surgical aid and service was broad enough to include the supplying of artificial limbs.

A case of total disability due to the loss of the second eye was considered by the Supreme Court of Rhode Island (*In re J. & P. Coats (Inc.) et al.*, p. 228), where the employee had lost an eye some years before in military service. The court ruled that it was a total disability due to the loss of his single eye, and compensable as such; but that special additional compensation was payable under the schedule only for the loss of one eye and not for the loss of both.

MEDICAL SERVICES.

The provision of law fixing the period during which medical treatment may be rendered was construed by the Supreme Judicial Court of Maine (*In re McKenna*, p. 213) in a case where the disability began a week after the receipt of the causative injury; the law allows medical services for two weeks from the injury, and the board awarded two weeks' benefits, starting from the inception of the disability. This was reversed by the court, which held that the injury should date from the accident and not from a subsequent period when the disability might

develop. A contrary rule has been adopted in Indiana, but where any medical attention is given immediately following the accident, a subsequently developing disability after the time limit has expired will not warrant a renewal of the medical treatment; in other words, the period for medical treatment can not be divided and apportioned to different dates (*John A. Shumaker Co. v. Kendrew*, p. 214).

The supply of an artificial limb was held to come within the scope of the surgical aid prescribed by the law of Connecticut (*Olmstead v. Lamphier*, p. 226).

INSURANCE.

The provision of the law of Utah requiring employers within the act to take out insurance or otherwise give security for the payments that may become due was contested in a case (*Industrial Commission v. Daly Mining Co.*, p. 209). The court upheld the commission's demand that the company should make the provision required, and also approved the method of collecting the tax proposed by it, i. e., by mandate and not by a suit at law. The third contention that no insurance was necessary since the employees were sufficiently protected, was disposed of by saying that the commission had decided otherwise, and its authority must prevail. The same court sustained the authority of the commission to reject policies not requiring a payment of the premium rates fixed by it as adequate (*Scranton Leasing Co. v. Industrial Commission*, p. 211). An evasion of the law by the incorporation of a participating clause was also condemned.

In a California case (*Employers' Liability Assurance Corporation (Ltd.) v. Industrial Accident Commission*, p. 213) the question of the validity of a policy was held to be subject to the jurisdiction of the commission, so that the insuring company could not avoid its duties by a mere denial of such validity.

NOTICE AND CLAIM.

Where a supposedly slight injury was received and there was actual knowledge of the fact on the part of both the employer's representative and the company physician, the Appellate Court of Indiana holds that such notice is valid as regards all subsequent developments (*Vandalia Coal Co. v. Holtz*, p. 218). In this case an apparently slight injury to the eye was pronounced by the company physician as but temporary, but after the time for notice had elapsed it was discovered that the vision was lost. However, the original knowledge of the accident was held to be adequate notice. Quite similar circumstances were involved in a Michigan case (*Cooke v. Holland Furnace Co.*, p. 219). In this case a man was struck on the head and was given first-aid treatment by his foreman. About two months later unfavorable symptoms developed

and nearly a year afterward an operation became necessary. An award for the medical treatment was reversed by the court as not having been preceded by proper notice, the period having expired. As decided in the McKenna case above (under "Medical services"), the accident producing the injury was taken as a starting point, and not some later date when the injurious results became manifest. Notice to the foreman was held by the Supreme Judicial Court of Maine to be sufficient notice as to an agent of the employer where a claim for an infected wound was presented without the submission of a written notice of the injury (In re Simmons, p. 220).

Under this head may be noticed a decision of the Appellate Court of Indiana (In re Burk, p. 222), in which it was held that reports of injuries must be furnished by all employers, whether or not they accept the compensation provision of the act.

MINOR ILLEGALLY EMPLOYED.

The employment of a minor in an occupation forbidden by law was held by the Court of Civil Appeals of Texas, in *Waterman Lumber Co. v. Beatty* (p. 215), to take him outside the scope of the compensation law of the State, which relates only to valid employment contracts, and also outside the insurance policy of the employer which covered only employees legally employed. A suit for damages was therefore said to have been brought properly.

The question of the effect of unlawful employment has not been passed upon by the State court of last resort in New York, but an appellate court has awarded compensation in case of illegal employment. Following this the trial court in *Robilotto v. Bartholdi Realty Co.* (p. 216) denied the right of an administrator to sue for damages for the death of a minor illegally employed in operating an elevator, relegating the parties to their rights under the compensation law of the State; this action was said to be taken by the judge against his own opinion that the better rule would bar the compensation rights and leave the settlement of the question to a suit for damages.

The Supreme Court of Ohio enforced the rule of liability of the employer in the case of *Acklin Stamping Co. v. Kutz* (p. 217), holding that the compensation law did not apply where employment was illegal.

WILLFUL MISCONDUCT.

The laws of most of the States do not apply to injuries due to the willful misconduct of the injured party. The Court of Appeals of Maryland (*Baltimore Car Foundry Co. v. Ruzicka*, p. 229) ruled that while in the instant case the injury was due to the injured man's negligence, willful misconduct could not be charged even though warning of danger had been given and another mode of procedure

was available. In Indiana also (*Haskell & Barker Car Co. v. Kay*, p. 230) the failure of a workman to use an available safety device, more efficient than the one employed by him, was held not to be classifiable as willful misconduct.

Quite similar was the decision of the Supreme Court of Oklahoma in the case of *Wick et al. v. Gunn et al.* (p. 232), where the safety device was complicated and difficult to apply. On the other hand an appellate court of California held (*Bay Shore Laundry Co. v. Industrial Accident Commission et al.*, p. 231) that the removal of an appropriate safety device by an experienced workman, resulting in his injury, was a willful act, barring the right of recovery under the compensation law.

PENSIONS.

The city of West Chicago Park had established a pension fund for its police, but denied the right to a claimant to receive his pension because he had been discharged from service for violation of the civil-service rules. It was held by the Supreme Court of Illinois (*Stiles v. Board of Trustees*, p. 132) that the reasons for his discharge were not the reasons fixed by the pension law as grounds for withholding payment, and since the legislature had prescribed the basis, the claimant could not be deprived of his rights for other reasons.

An initiated act of Arizona undertook to establish a system of old-age and mothers' pensions, but the supreme court of the State held it unconstitutional because of certain conflicts of principle as well as for technical reasons (*State Board of Control v. Buckstegge*, p. 131). Under this head may be noted the action of a railroad employee to recover from his employer the money retained by it under a contract for membership in a relief association. It was claimed that the law of Indiana invalidated such contracts, but the supreme court of the State construed the law differently and refused to order the amount returned (*Pittsburgh, C. C. & St. L. R. Co. v. Miller*, p. 133).

EMPLOYMENT OFFICES.

A law of Mississippi levies an annual license fee of \$500 for each county in which an agent does business in the way of securing workmen to go beyond the limits of the State. The constitutionality of the act was challenged in the case of *Garbutt v. State* (p. 101), but was upheld by the supreme court as a proper tax on an occupation and not a burden on interstate commerce. The application of a similar law of Georgia was passed upon in *Chambers v. State* (p. 101), in which it was held that an individual merely making a statement that the inquirer could get a job, but without promising him any employment or offering to pay his way, was not acting as an emigrant agent in violation of the law. In Alabama also, it was

held (*Braxton v. City of Selma*, p. 102) that a section hand who picked up some workmen at the request of his employer to take with him for work outside of the State was not engaged in the business of migrant agent, and had not violated the law by his contact.

LABOR ORGANIZATIONS.

INTERFERENCE WITH EMPLOYMENT.

An injunction was granted by the Supreme Court of New York, trial term, against persons seeking to unionize employees of a shoe manufacturer for the purpose of promoting a strike for a closed shop (*Rosenwasser Bros. (Inc.) v. Pepper*, p. 105). Prior differences had been adjusted, and a contract between employers and workmen procured by a representative of the War Department, for which the manufacturer was working, and the injunction was based in large part on the obligations incumbent on the parties to maintain production during the emergency of the war against Germany. There was also the ground of preventing the promoters of the union from inducing a breach of the contract, which was said to be a basis for an injunction. Threatened breach of contract by striking was also enjoined by the Supreme Court of Georgia (*Burgess v. Georgia F. & A. R. Co.*, p. 106), but a general injunction was limited to the period for which the contract was entered into. Another case arising out of the same events, and having the same title (p. 107), led to an injunction against workmen who had resigned, forbidding them to go upon or near to the premises of their former employer to persuade others not to take jobs with the company. However, this did not interfere with such persuasion as the presentation of fair argument elsewhere.

A somewhat different aspect of the general question was involved in a Massachusetts case (*Haverhill Strand Theater (Inc.) v. Gillen et al.*, p. 108). In this case the union had adopted a rule that no union musician would be allowed to play in any theater which employed less than five musicians, and this was held to be an interference with the individual's right to carry on his business in accordance with his own judgment and preventing the free flow of labor to which an employer is entitled.

BOYCOTTS.

Where the interference with employment takes the form of a boycott, the courts have rendered quite diverse decisions as to the propriety of issuing a restraining order. This situation is in evidence in two cases here considered. In one (*Thomson Mach. Co. v. Brown*, p. 115), the Court of Chancery of New Jersey issued an injunction where there was very definite interference with the flow

of labor to the employment and threats open and implied made against users of the machinery and employees working thereon in other establishments. In the other case (*Duplex Printing Press Co. v. Deering et al.*, p. 109), the United States Circuit Court of Appeals regarded the Clayton Act as legalizing acts done by way of enforcing a secondary boycott against a manufacturer of printing presses, pressure being brought to bear on buyers and workmen, including teamsters, expressmen, installation men, etc. Earlier decisions, including one of the Supreme Court of the United States, which had declared unlawful interference with interstate commerce, were held to be set aside by the new legislation so that no injunction would issue to prevent the action complained of. There was a strong dissenting opinion, in which the ground was taken that the acts complained of were illegal in themselves, and that nothing illegal was legitimated by the Clayton Act.

STRIKES.

Not the promotion of a strike, as in the *Rosenwasser* case, but the actual engaging in one was held by a United States District Court to be enjoinable where it involved the bringing about of conditions unfavorable to the prosecution of the war (*Kroger Grocery & Baking Co. v. Retail Clerks I. P. A.*, p. 116). The success of the strike would have caused the loss of large amounts of perishable food, and this was an important factor, in view of the Food Conservation Act of Congress, in leading to a decision in favor of granting an injunction. However, violence and also insulting and intimidating language were indulged in. The same district court claimed jurisdiction in a labor dispute because of the fact that the company seeking an injunction to prevent strikes was engaged in the production of war material (*Wagner Electric Mfg. Co. v. District Lodge*, p. 119).

The legality or illegality of the purpose of a strike will decide whether or not it may be enjoined, and where both aspects appear, individual strikers can not clear themselves by repudiating the illegal purpose involved and claiming that for their part they are striking only for legitimate ends (*Baush Machine Tool Co. v. Hill et al.*, p. 127).

PICKETING.

In a strike to secure changes in wages and hours in a restaurant picketing was resorted to, but an injunction against its continuance was refused by the Supreme Court of Arizona on the ground that there was no coercion or intimidation, but a mere publication of the facts in dispute (*Truax et al. v. Bisbee Local No. 280*, p. 121). Similar circumstances were considered by the Supreme Court of Washington in the case of *Baasch v. Cooks' Union, Local No. 33 et al.* (p. 122). Active annoyance of patrons and threats of secondary boycotts had

marked the course of the proceedings and damages in the amount of \$1,500 were claimed to have been inflicted. When the matter came to trial the strikers offered no defense but asked that the action be dismissed since they had ceased picketing and would not resume it. The lower court dismissed the action accordingly, but the supreme court ordered it reinstated with a requirement that the defendant plead and that the question of damages receive proper consideration.

Picketing was limited but not forbidden in an injunction approved by the Supreme Court of Arkansas (*Local Union No. 313 v. Stathakis*, p. 124). Like the foregoing, this was a strike against a café, seeking to unionize its employees. The right to give notice to the public was upheld, but not in such a way as to offer physical interference or prevent access to the employer's place of business. Picketing "at or near the appellee's premises" was therefore held to be properly enjoined. A cessation of picketing activities was ordered by the Court of Civil Appeals of Texas in the fourth case of a like nature with the foregoing, the picketing being done entirely by outside parties, the employees of the café being satisfied with their employment and continuing to work. The legitimacy of the end in view was held not to validate the course of conduct engaged in, which was held to be a malicious invasion of the complainant's rights (*Webb v. Cooks', Waiters', & Waitresses' Union*, p. 125).

A less common feature was involved in the case passed upon by the Supreme Court of Minnesota (*Roraback v. Motion Picture Machine Operators Union*, p. 123), in which the owner of a motion-picture theater was a qualified picture machine operator, but was not eligible to union membership because of the fact that he was the owner of the business. Then because he was not a union member, union members were not permitted to work with him, so that he was forbidden to work in his own business. A preliminary injunction against picketing the place as unfair was refused by the Supreme Court, owing to some doubt in the evidence, and the case was sent back for trial. It was pointed out that one could not be arbitrarily deprived of the right to work in his own business, and if the claims made by the proprietor were supported at the trial he would then be entitled to relief.

CONTEMPT.

An effort was made in the case of *Tosh et al. v. West Kentucky Coal Co.* (p. 128) to bring strikers in 1917 within the purview of an injunction issued 10 years earlier, so as to charge them with contempt for its violation. That the injunction might be still valid under certain conditions was definitely maintained by the United States Circuit Court of Appeals, but it was likewise held that it could not be made to apply to persons not properly connected with either the

events or the parties affected by the original injunction. The judgment for contempt was therefore reversed.

SABOTAGE.

This term of rather recent adoption in this country may properly be held to cover the mode of procedure proposed in a labor dispute resulting from an attempt to unionize a plant engaged at the time in war production. Plans for disabling an essential tool were formulated, but suspicion and watchfulness prevented their accomplishment. An indictment was drawn charging an attempt to commit sabotage in violation of the Federal enactment (*United States v. De Bolt et al.*, p. 138). The claim was advanced that the statute only penalized sabotage and that attempts were not properly the subject of an indictment. This contention was rejected by the United States District Court, the indictment being declared sufficient, and the case was directed to be proceeded with.

A State law forbidding the advocacy of syndicalism and sabotage was attacked as unconstitutional in *State v. Moilen et al.* (p. 134). The Supreme Court of Minnesota discussed the various constitutional points involved at some length, upholding the statute. Then passing to the nature of the acts charged, it was held that they constituted a violation of the law, so that a conviction was affirmed.

OPINIONS OF THE ATTORNEY GENERAL.

EIGHT-HOUR LAW—MARBLE FOR LINCOLN MEMORIAL—*30 Op., p.—(May 12, 1915).*—The Secretary of War is charged with the erection of a marble structure in the City of Washington, designated as the Lincoln Memorial. A subcontractor undertook to furnish Colorado marble of certain quality and dimensions, and the question was submitted by the Secretary to the Attorney General as to the application of the act of June 19, 1912 (37 Stat. 137), commonly known as the Federal eight-hour law, to the work of cutting and preparing the marble.

It was stated that the work of erecting the structure generally was within the act, and that it would apply to this particular undertaking unless the contract was for "such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not." The question therefore resolved itself into one as to "what is the test as to whether materials or articles may be bought in open market."

Cases are cited and quotations made, the conclusion being drawn that—

the exception must be held to embrace materials or articles of the kind which are usually manufactured in standard forms and which producers or dealers usually offer for sale in the course of their business, as distinguished from materials and articles of the kind which are usually made to order or manufactured in a particular manner, shape, or condition, according to the specifications of the person for whom they are made.

The application of this construction of the act was held to be an administrative function, to be discharged by the department interested, the Attorney General saying as to a specific ruling of his predecessor (30 Op., p. 211):

I think that, instead of himself deciding that the specific article there in question was within the exception, the Attorney General should have defined the meaning of the exception and then left it to the Treasury Department to apply the definition to that particular case.

The opinion concludes as follows:

If you find that the marble cut and finished for use in building construction is a material or article which is usually manufactured

in standard forms for the general market and which producers or dealers usually offer for sale in the course of their business, the subcontract should be excepted from the operation of the statute. If, on the other hand, you find that it is not such a material or article, but a material or article usually made to order or manufactured in a particular manner, shape, or condition, according to the specifications of the person for whom made, then the subcontract is subject to the operation of the act, and you should compel compliance with its provisions on the part of the contractor.

WORKMEN'S COMPENSATION—SCOPE OF ACT—POWERS OF UNITED STATES EMPLOYEES' COMPENSATION COMMISSION—30 Op., p. — (March 21, 1918).—The President transmitted to the Attorney General an inquiry of the United States Employees' Compensation Commission as to its authority to pass upon the persons and classes of persons coming within the provisions of the act administered by it (act of Sept. 7, 1916, 39 Stat. 742). By its terms the act is limited to, but includes all, "civil employees of the United States and of the Panama Railroad Company." More specific inquiries being called for, the question was submitted as to the authority of the commission to decide whether employees of the United States Shipping Board Emergency Fleet Corporation are within the act.

The Attorney General first quoted section 32 of the act, which authorizes the commission to make necessary rules and regulations for its enforcement and to "decide all questions arising under this act."

Reviewing briefly the history of the act, and classing it with similar legislation in many of the States of the Union, the opinion declares that the language of section 32 is clearly employed in no narrow or technical sense and is to be taken in its ordinary and colloquial meaning.

It is the commission, therefore, which must determine whether the claimant has or has not been injured while in the performance of his duty or as a result of his own willful misconduct or intoxication; whether his disability is total or partial in character; whether upon review the amount awarded shall be increased or diminished; how it shall be apportioned among the beneficiaries; and when it may be commuted for cash, etc. But before any of these questions can come on for disposal, it must first of all appear that the claimant is an employee of the United States, and this basic fact the commission must decide at the very threshold.

I have no hesitation, therefore, in concluding that the commission has power when the question is properly presented to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of the act.

A word of caution is added as to the propriety of making any general decision or mass rule in advance of the presentation of a specific claim, the opinion concluding:

In view of the diversities which constantly appear among cases which upon first impression seem of the same general character the unwisdom of dealing with them in the mass would seem to be apparent.

~~I express no opinion, none being requested, as to the merits of the questions with which the commission is confronted nor as to the finality of its decision and the manner in which it could be reviewed, if at all, either by the Government or by a rejected claimant.~~

DECISIONS OF COURTS AFFECTING LABOR.

ALIENS — CONTRACT LABORERS — INDUCEMENT TO IMMIGRATE —
United States v. Royal Dutch West India Mail, United States District Court, Southern Division of New York (Apr. 22, 1918), 250 Federal Reporter, page 913.—The defendant had employed one Sjoerd Mook for three years as a clerk in its offices in Amsterdam; then, requiring his services in its New York branch offices, it sent him to New York, paying his passage and expenses, with the intention of sending him, in time, to its offices in Dutch Guiana. The United States charged the defendant with the violation of a Federal statute which lays a fine of \$1,000 on any person "who shall induce the importation or migration of any contract laborer into the United States." The Government moved for judgment on the pleading. In denying this motion District Judge Learned Hand said:

As I have said, Mook was certainly induced and assisted to migrate to this country. He was also expected to perform labor here of a skilled kind. The question narrows, therefore, to this only: Was he induced to migrate by an offer or promise of employment, or in consequence of an agreement to perform labor here?

In principle it seems to me clear that the case is not within the statute. In no fair sense can it be said Mook was induced to migrate by an offer or promise of employment. He was already employed under a contract which subjected him to the order of his employer in this respect. The statute includes only offers of employment in this country, and the offer itself must include employment here. More is to be said for the plaintiff's position under the second phrase in the statute: "In consequence of agreements * * * to perform labor in this country."

Yet here, too, the purpose seems to me clearly limited. The agreement must by its terms include the performance of labor in this country. Mook's contract was made in Holland, and did not include such performance, though, it is true, it subjected him to the possibility of being ordered to this country, or to Dutch Guiana, or possibly elsewhere, if the defendant desired. I think that the statute requires that the incentive held out to the alien must be employment here, and this accords with its general purpose, which is to prevent migration of aliens under the attraction of work in the United States. That is the motive which must cause their migration.

Since this was not evident from the pleadings, the motion for judgment at this stage was denied, the court saying that if the defendant could prove the statements made in the pleadings, the case is not within the statute.

ALIENS—CONTRACT LABORERS—OFFER OR PROMISES OF EMPLOYMENT—*Ex parte Prout, United States District Court, District of Massachusetts (June 26, 1918), 253 Federal Reporter, page 97.*—Nine Portuguese immigrants came to America and were held for deportation at Boston because, as it was alleged, they had been induced or solicited to migrate to this country by offers or promises of employment and were "contract laborers." They had been approached by steamship company agents. No three had been approached by the same agent and no two lived in the same locality. They were simply told that there were great opportunities to procure work in the United States but none of them had been promised any particular job or any definite work. They were all bound for Palmerton, Pa., where a number of their countrymen lived. No employer in Palmerton had engaged any of them or knew anything about them. The Immigration Board and the Secretary of Labor both held the evidence sufficient to warrant exclusion under Comp. St. 1916, sec. 4244 (Bul. 244, p. 375). The district court in deciding that the evidence offered was insufficient to warrant exclusion said:

It seems clear that "offers or promises of employment," in order to come within the statute, must be made by, or with the authority of, the person proposing to furnish the employment. A mere assurance or promise, in general terms, of employment after reaching this country, made to an alien by a foreign steamship or transportation agent, is not ground for exclusion.

ALIENS—PROHIBITION OF DRIVING AUTOMOBILES FOR HIRE—CONSTITUTIONALITY OF ORDINANCE—*Morin v. Nunan, Supreme Court of New Jersey (Mar. 21, 1918), 103 Atlantic Reporter, page 378.*—A municipal ordinance of the township of Weehawken regulated jitneys and all motor vehicles operated for hire, and later a supplementary ordinance was passed, which forbids the operation of motor vehicles for hire by anyone not a citizen of the United States. Samuel Morin was convicted before Andrew L. Nunan, recorder of the township, of violation of this ordinance, and fined \$10. The legality of this prosecution was contested on the ground that the ordinance was unconstitutional.

Morin, who was admittedly an alien, had secured a driver's license, and the machine, which he was driving for another, was licensed. The fundamental question was said to be whether the township has the right to discriminate against aliens by refusing them licenses to carry passengers upon its streets for hire, and this turns upon the point whether the use of the public streets for private purposes of gain is a vested right or simply a privilege. The court held that it is the latter, and affirmed the validity of the ordinance and Morin's

conviction. The cases upholding laws denying to aliens in New Jersey the right to hunt and fish, and cases in other States upholding analogous discriminations, are cited. This matter was thought to fall within this class of cases rather than with those which have been held invalid as depriving aliens of the opportunity to labor for a living at the ordinary kinds of business. In concluding the opinion Judge Black for the court said:

We think that the operation of vehicles for the transportation of passengers for hire, on the public streets of the township, is a privilege subject to the control of the township. It is not one of those inalienable rights which belong to human beings, a right to labor for a living. The township of Weehawken had a right to limit the license to citizens of the United States. We find nothing illegal in the ordinance.

CONTRACT OF EMPLOYMENT—AGREEMENT NOT TO JOIN A UNION OR TO STRIKE—LIQUIDATED DAMAGES—*Ressig v. Waldorf-Astoria Hotel Co., Supreme Court of New York, Appellate Division, First Department (Nov. 22, 1918), 172 New York Supplement, page 616.*—Ressig was employed by the hotel company as a sauce cook. He entered into a contract in writing of hiring from month to month whereby he was to receive \$75 per month. He agreed to observe the rules and regulations of his employer and, among other things, he agreed that he would not become affiliated with the International Hotel Workers' Union, or any kindred organization, and that he would not strike, but would give eight days' notice before the end of the month when he wanted to leave. He, without notice and during the dinner hour, went on a strike at the order of the union called the "Enterprise Federation of the Culinary and Alimentary Syndicates," of which he was a member. The hotel company had to hire another cook at \$10 per day for 10 days and \$5 per day for 4 days thereafter. Part of the contract provided that if it was violated by the employee he should forfeit as liquidated damages all wages then due. He then sued for wages for the month preceding his breach of the contract, and the employer interposed a counterclaim for the hire of the substitute cook. The lower court allowed Ressig judgment and dismissed the hotel company's counterclaim. In reversing this judgment, Judge Laughlin, expressing the opinion of the court, stated that by joining the union, leaving without cause, and failing to give notice, the defendant had been guilty of breaches any one of which was a ground for a claim in damages. Continuing, Judge Laughlin said:

The contract is to receive a reasonable construction, and, so construed, I think it means that the employee, in the event of such breaches of the contract by him, should forfeit any claim for services

rendered down to the time of the breaches, which had not theretofore become due and payable, and had not remained unpaid through the failure of the employer to perform the contract on its part. So construed, the contract could in no event require a forfeiture of the plaintiff's wages for more than a month and 10 days, or wages aggregating not to exceed \$100. If, therefore, the provision be regarded as only for liquidated damages, it would not, I think, be unreasonable, and would bar a recovery by the plaintiff.

There is, however, another theory on which I think the complaint should have been dismissed. At the time the plaintiff joined in the strike and left defendant's employ no wages were due him under the contract. He could not recover wages without showing performance of the contract on his part * * *

There is no particular hardship to the plaintiff in the construction of the contract I have indicated. We are not now concerned with an excusable violation of the contract by the employee, such as sickness, accident, or otherwise, but with a willful violation calculated to result in damage to his employer. The courts of this State have never allowed a recovery by an employee for services rendered under contract where he has abandoned performance during the entire period, performance during which was prerequisite to a recovery, and I am of the opinion that, if the provisions of the contract could not be sustained on the theory of forfeiture of wages as liquidated damages, they should in any event be construed as an agreement on the part of the plaintiff that the wages for the period now in question should not become due and payable in the event of such breaches of the contract on his part.

CONTRACT OF EMPLOYMENT—AGREEMENT TO PROTECT EMPLOYEE AGAINST VIOLENCE BY STRIKERS—LEGALITY—RELEASE—*Hansen v. Dodwell Dock & Warehouse Co., Supreme Court of Washington (Jan. 31, 1918), 170 Pacific Reporter, page 346.*—Nels Hansen was a longshoreman employed by the company named, and was severely injured in a riot participated in by striking longshoremen and their sympathizers. The employee brought suit against the company for damages, basing the action upon an oral contract alleged to have been made when he entered upon the employment, under which the company agreed to afford him "ample protection from violence, injury, or hurt from said union longshoremen" and to "furnish plaintiff a safe place in which to work free from assault on the part of any person whatsoever." A verdict was rendered in the plaintiff's favor, and the company appealed. The first ground taken up was that the evidence was insufficient to establish the making of the contract. The court showed that the plaintiff and another witness testified positively to the alleged facts, and that, while there was a denial by the person who did the hiring, it was clearly for the jury to decide where the truth lay in the conflicting evidence.

The company further claimed the contract to be void for three reasons:

(1) Because it is impossible of performance; (2) because it is against public policy; and (3) because it is a contract of insurance and was not entered into in conformity with the statutes regulating insurance.

It was held that the contract was not invalid for any of these reasons. The general principles of the law having to do with impossibility of performance were discussed by Judge Fullerton, who then said:

The contract was not impossible of performance within itself, nor is such a contract forbidden by any legal principle or by any statute law, nor was there any change of condition in the subject matter of the contract which rendered its performance impossible. It may have been impossible of performance by the appellant, in whose behalf the promise was made, but manifestly its inability to perform it as an individual or corporation did not relieve it from liability for its breach so long as the contract was capable of being legally performed.

The argument with regard to public policy was based on the assumption that protection could only be given by the employment of private armed guards, which is contrary to the policy of the law. The court shows that there is no such implication in the contract, and that other means might have been employed:

The appellant might have done effectively what it attempted to do and did ineffectively; it might have erected an impassable barrier across the way of approach which the rioters were obliged to take in order to reach the respondent's place of work. Again, it might have called upon the public authorities for protection.

The fact that some police protection was given, which proved inadequate, it is said, "does not prove an exhaustion of the possible means of protection." It is further held that the contract was not one of insurance, Judge Fullerton saying as to this:

Assuredly, when a master employs a servant, he may enter into a binding agreement with him to protect him against the hazards of the employment, or the hazards surrounding the employment, without resorting to the forms of contract prescribed by the insurance code.

There was introduced in evidence a document signed by Hansen after the occurrence of the injury, acknowledging the receipt of "\$11 in full of the amount due me to date." It also contained a statement of the number of hours worked as regular time and as overtime, with the rates of wages, the total being \$11. That this was not a release of the claim for damages for the injury was held by the court, the opinion including the following statement:

No evidence was offered showing or tending to show that the receipt was intended as a full settlement of the demand the respondent might have against the appellant for his injury, or that it was anything other than it purported on its face to be, namely, a receipt for wages theretofore earned.

The failure to give certain instructions requested by the company was held not to be reversible error and the damages assessed at \$500 not excessive. The judgment in favor of the plaintiff was therefore affirmed.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—GROUNDS FOR INJUNCTION.—*Tribune Assn. v. Simonds, Court of Chancery of New Jersey (May 2, 1918), 104 Atlantic Reporter, page 386.*—The defendant, Frank H. Simonds, is a writer who is especially versed in the subject of the great European war of 1914. The Tribune Association is a syndicate for the publication of news in the New York Tribune and other newspapers over the country who affiliate with it for this purpose. In January, 1915, Simonds entered into a written contract with the Tribune Association whereby he was to act, for a period of four years, as an editorial writer and was to have charge of the editorial page of the New York Tribune. As a part of his undertaking, Mr. Simonds covenanted that he "will not write for or contribute to any other publication or periodical during the term of this agreement, except that he shall have the right to contribute to monthly magazines or to weekly magazines, which are not to be published in connection with or as a part of any newspaper." After entering upon his work Mr. Simonds made an additional agreement whereby he was to write war articles for the Sunday edition of the New York Tribune, which were to be syndicated. He was to and did continue his other work under the original contract, this work also being syndicated. The Tribune spent a large sum of money in sending Simonds to the seat of the war and another large sum in exploiting him and his work. On January 15, 1918, Simonds severed his connection with the Tribune by a formal letter of resignation and later went to work for the McClure Syndicate, whereupon suit was brought to restrain the breach of the Tribune contract. In granting the injunction as to Simonds, Judge Backes spoke in part as follows:

Mr. Simonds is manifestly violating his covenant, unless it is made to appear that his contract of employment is at an end, by a mutual rescission, which, of course, is not pretended, or that he is absolved from further performance because of such violation of the contract by the Tribune Association as evinced an intention not to be further bound by its terms, or because of such misconduct of the association, inimical to the relation of master and servant, as to make further performance on the part of Mr. Simonds reasonably impossible.

Mr. Simonds made two objections to the injunction besides his attempted justification for leaving his employer. He said that the Tribune Association syndicated his editorial writings and that the contract to write for the Sunday Tribune superseded the original contract. The court's opinion was:

While this [syndicating the editorials] may not have been a part of the arrangement, it does appear that he at all times acquiesced, and I fail to see how it can now be seized upon as having violated his rights.

It [the second contract] was a new contract, but as such it was distinct and independent of the existing one and in no respect took its place.

The court then took up the causes that led to the break, the culminating one being the printing of certain articles in a different order than intended by Mr. Simonds. As to this, Judge Backes said:

He [Simonds] was oversensitive, and he possibly fancied that he was being overridden by some one else, but a sensible man would have inquired and investigated and put the blame where it belonged; he would not have thought himself injured to the point of resigning. Had he inquired he would have readily discovered that the transposition of the editorials was the result of a misunderstanding and not of disobedience of his orders.

I find that the rupture was not brought about by the employer, and that the servant was not justified in quitting his service.

Continuing, the court said:

Now, as to the remedy: Counsel has advanced several reasons why this court should not interfere.

The first is that the complainant has not offered to reinstate Simonds. * * * In circumstances like the present, where the servant left his employment without cause, it is his duty to return without invitation, and the presumption is that upon application of this kind the complainant intends to fulfill its part of the contract. However this may be, when the point was raised in the course of the argument, leave was given to amend the bill by inserting a formal invitation to Mr. Simonds to return to his employment, and thereupon, when asked of counsel whether he would avail himself of it, there came an equivocal answer. So that point is out of the case.

A second reason argued for withholding relief is that complainant has suffered no irreparable injury. * * * For such an injury the legal machinery furnishes no adequate means of measuring the damage, and in such an event equity steps in to prevent the damage from becoming irreparable. * * * Here the services engaged were of a peculiar character, and for the loss of which the damages are unmeasurable at law, hence the preventive remedy.

An injunction was, therefore, granted restraining Mr. Simonds "from writing for or contributing to any other publication other than the New York Tribune."

CONTRACT OF EMPLOYMENT—ENFORCEMENT—PUBLIC POLICY—INTERFERENCE WITH WAR WORK—*Driver v. Smith, Court of Chancery of New Jersey (Aug. 24, 1918), 104 Atlantic Reporter, page 717.*—This was an action brought in equity against Smith, Travers, and Saylor and against the Driver-Harris Co. The action against the first three was for the enforcement of negative covenants in contracts of employment, which would prevent the three men from working for anyone but the plaintiff, Driver. The action against the Driver-Harris Co. was to prevent that company from interfering with Driver's business. The complainant is Wilbur B. Driver, who had once been the vice president and a director of the Driver-Harris Co. He had a disagreement with his brother, who was the president of the company, and determined to establish a business of his own. He resigned his position as vice president and proceeded, for the purpose of injuring and hindering the company, to make contracts with the three defendants who were specially trained and skilled men essential to the satisfactory prosecution of the Driver-Harris Company's contracts, which were to supply the United States with essential materials to aid in the prosecution of the war against Germany. These men after realizing the character of the new contracts refused to comply with them and now, in a cross bill, ask that they be declared invalid. Wilbur Driver agreed to employ these men, but at the time of bringing suit he had not established a plant and the court refused to believe that he needed the men for the work of establishing the said plant. The court first took up the question of enforcing the agreement of the three men not to work for anyone else during the term of the contract with the complainant, Driver, saying in part:

First. Will a court of equity enforce the negative covenants? That the court will, under certain circumstances, enforce negative covenants of this nature is settled. In most of the cases which have been cited in which negative covenants have been enforced it will be found that failure to enforce them would cause loss or damage to complainant other than that occasioned by a mere deprivation of the services of the employees; for instance, cases in which employees under contract to serve for a certain length of time have obtained trade secrets, to permit a disclosure of which to rivals would cause injury to the employer. In the present case there is no such element present. The sole purpose of the suit is to compel the employees to work for the complainant by preventing them from working for anyone else. The suit, therefore, while not so in form, is actually one for specific performance.

In considering the consequences the interests of the Driver-Harris Co. may be taken into account. The three individual defendants were, at the time their contracts were made with Wilbur B. Driver, employees of the Driver-Harris Co., and that company was entitled, as against others, to their continued employment and good will. That the employment was at will does not alter the situation. The

effect of granting the relief asked for by complainant will be to deprive the Driver-Harris Co. of the services of its employees. The three employees are essential to the organization. The public interests require that they should continue employment with the Driver-Harris Co.

The court concluded, therefore, that the enforcement of the covenants would do more injustice than justice, and refused it.

Second. Will the contracts be canceled or will the complainant be permitted to seek such remedy as he may at law?

It must be taken as settled that the employer has a property right in the services of his employees, and is entitled to protection against interference with no sufficient justification. And it is likewise true that an employee at will may at any time leave his employer, and that a stranger may, by an offer of higher wages, induce him to leave his employment and become employed with the stranger. A stranger may not, however, interfere with the employment for no justifiable reason.

While it may be too much to say that there was any public policy which prevented labor from moving from plant to plant of its own volition, induced by offer of higher pay or what not, yet I think it safe to say that there was a public policy which was offended when a person, for his own advantage, deliberately proceeded to demoralize an organization, the continuation of which was essential to the production of necessary war material.

What I hold, and all that I hold, is that contracts obtained as part of a scheme, which, if successful, would have the effect of disrupting the organization of a plant engaged in the manufacture of war material, essential to the prosecution of the war, are voidable so long as they remain executory. And this is so, whether the parties intended to advantage themselves and had in mind no thought of injury to the Government or not.

The employees in repudiating the contracts did only that which a sound public policy required them to do at the time.

Equity, having assumed jurisdiction, will determine the entire controversy in order to prevent a multiplicity of suits. I think the individual defendants are entitled to a cancellation of their contracts.

The court refused to issue a restraining order against the Driver-Harris Co. from interfering in the business of Wilbur B. Driver, holding that such interference as had thus far occurred was justified.

CONTRACT OF EMPLOYMENT—ENTICING AWAY WORKMEN EMPLOYED UNDER CONTRACT—DAMAGES—*Owner v. Seaboard Air Line Railway Co.*, *Supreme Court of South Carolina* (Aug. 15, 1918), 96 *South-eastern Reporter*, page 659.—This is an action for damages for the enticing away, by defendant, of plaintiff's servants. The plaintiff had four employees who were under contract to work for him during the year 1917. The agents of the defendant knew of this contract.

On April 22, 1917, an agent of the defendant approached one of plaintiff's servants and after speaking with him induced him to get the other three servants. The agent then placed the laborers on a midnight train so they would not be observed and transported them on a pass to North Carolina. The opinion of the court is in part as follows:

The evidence, as a whole, tends to prove what the plaintiff alleged, that this method of obtaining laborers was in accord with defendant's general policy, a policy which is condemned by law as well as sound morals, and one which justifies the infliction of punitive damages.

The judgment for damages in the court below was therefore affirmed.

CONTRACT OF EMPLOYMENT—GROUNDS FOR BREACH—INSUBORDINATION—*MacIntosh v. Abbot*, *Supreme Judicial Court of Massachusetts* (Oct. 10, 1918), *120 Northeastern Reporter*, page 383.—Abbot agreed to employ the plaintiff for one year at stipulated wages for himself and his wife. The work was to be done on defendant's farm and MacIntosh, with his wife and two children, was to live in the same house with Abbot and his sister. One July night Abbot and his sister, with a party of guests, came into the house, slamming doors and making considerable noise. Plaintiff, who had been aroused from his sleep, called down the stairs in a disrespectful and angry voice for Abbot to desist, saying if Abbot wanted him to get out to come up and tell him "straight." Abbot demanded an apology. Later MacIntosh came to defendant and told him that he could not apologize, using rather disrespectful language in doing so. Defendant thereupon discharged him. From a finding for plaintiff the defendant excepted and the court in affirming the decision said:

The words of the plaintiff, while lacking in ordinary politeness on both occasions, did not amount to insubordination. They were a breach of courtesy, but did not indubitably manifest a disposition not to perform his contract. No order respecting his work was disregarded. He was acting under some provocation due to the conduct of the defendant, which, although unintentional, might have been construed as designed to cause annoyance.

Hasty utterance of the nature here disclosed touching a single matter is not necessarily a breach of contract or a sufficient ground for ending it.

Among the obligations of the employee as an implied term of the contract is that he shall not be insubordinate, but shall show just regard for the rights of the employer. The reciprocal obligation of the master is that he shall not be arrogant or excite resentment or wantonly wound the feelings of his employees.

CONTRACT OF EMPLOYMENT—INDUCING BREACH—DAMAGES—*S. C. Posner Co. (Inc.) v. Jackson et al., Court of Appeals of New York (Apr. 23, 1918), 119 Northeastern Reporter, page 573.*—The complaint in this case stated that Sarah C. Posner was an expert designer of women's clothing, with a high reputation established among those engaged in trade in that line. She had organized the plaintiff company, and become a director and its president. Various persons had been induced to buy stock with the expectation that the company would deal in gowns designed by her, and a contract had been made by the company with her for five years, in which she agreed to devote her time to its work, and not to give her services to any other concern during the life of the contract. E. A. Jackson (Inc.) was a rival company, Emanuel A. Jackson being the principal stockholder and president. He induced the designer, by an offer of increased compensation, to leave the Posner Co. and use her services and skill in the business of the Jackson company, and the former brought suit against the latter, alleging damages at \$25,000. The complaint was demurred to as not sufficiently setting forth a cause of action, and both parties rested their case upon their contentions on this point. The trial court gave judgment for the plaintiff company, which the appellate division of the supreme court reversed. The case was then carried to the court of appeals, which affirmed the original judgment for the Posner Co., holding that it had in the complaint stated a good cause of action. Quotations from the opinion delivered by Judge Chase show the attitude of the court as to the questions involved:

The employee's failure to perform her contract so far as appears was inexcusable. She is liable at law for the damages occasioned by her failure to perform her contract. As the services to be performed by her under the contract were special, unique, and extraordinary, if the remedy at law is inadequate, an action could have been sustained in equity to restrain her from violation of the negative covenants to which she became bound in connection with her employment. [Cases cited.]

The faithful performance of the covenants by the employee was of vital importance to the employer. It is apparent from the allegations of the complaint that if the contract is not performed, serious injury to the plaintiff must necessarily result therefrom. When the defendants induced the employee to break her contract with the plaintiff "it was well known to them that the plaintiff had been organized" by the employee, and "that she was one of the principal persons engaged in its management, that she had loaned to its enterprise her name, and she was then a director and president thereof, and in the employ of the plaintiff, and that she was a party to a written contract of employment for her exclusive services for a period of years to come."

In persuading the employee to break the contract with the plaintiff the defendant Jackson acted for himself and for the defendant cor-

poration. He intended "to injure the plaintiff in its business," and entice such employee from the plaintiff and persuade her to break her contract with the plaintiff for the purpose of "depriving it of her services and of securing such services for a competitor and of thereby injuring this [plaintiff] corporation."

It is alleged that in pursuance of a wrongful, corrupt, and malicious purpose the defendants induced the employee to abandon and break her aforesaid contract and in violation of the same to enter into the employ of the defendant E. A. Jackson (Inc.), "a competing business." Such a contract as that described is a property right. An interference with such a property right by which it is lost to an employer is a wrong in morals, and, when without justification or excuse, may be an actionable tort for which damages can be recovered against the wrongdoer.

If a person knowingly and intentionally interfere with the express contract rights of an employer with his employee and the purpose and intent of such interference is to injure such employer, and it does result in his injury, an action will be sustained to recover damages therefor. [Cases cited.]

CONTRACT OF EMPLOYMENT—MEDICAL SERVICES—REFUSAL OF COMPANY DOCTOR TO ACT—DAMAGES—*Sloss-Sheffield Steel & Iron Co. v. Taylor*, Court of Appeals of Alabama (Nov. 13, 1917), 77 *Southern Reporter*, page 79.—Ellen T. Taylor, wife of an employee of the company named, sued the company and also the "company doctor" for damages for injuries suffered by her because of the refusal of the physician to attend her under a contract between the company and the employee, by which medical services were to be furnished to him and his family. The company deducted 75 cents per month from the wages of single employees, and \$1 each from the wages of married employees, agreeing, in the case of a married man, to render medical services to himself and family. Such deduction was made from Taylor's wages on February 9, 1914, of which 90 cents was paid to the company doctor, and 10 cents was retained by the company. Mrs. Taylor was taken ill on March 5, and on that day and the 6th and 7th, according to testimony produced, repeated requests were made that the doctor should visit her at her home about 50 yards from his office. He failed to do this, but sent certain medicine, which, from the nature of the illness as it developed, was useless. On the evening of the 7th Mr. Taylor called in another physician. Mrs. Taylor was suffering from an abscess, which burst before the 10th, on which day the company's physician, after having some conversation with her father, called on her. She had then so far recovered, however, as not to need treatment. After the other physician had been called in, the company doctor gave that fact as his reason for not complying with a request of the sister of the sick woman that he visit her. The court sustained the judgment rendered on the jury's verdict awarding Mrs. Taylor \$300 damages. It was held that the suit was

properly brought in her own name, she being a beneficiary of the contract between the company and the physician, and that the summoning of the other physician did not excuse the nonperformance of the contract by the doctor. Since it was shown that Mrs. Taylor underwent great physical and mental suffering for three or four days, the damages as assessed were held not to be excessive.

CONTRACT OF EMPLOYMENT—TIPPING—CONSTITUTIONALITY OF STATUTE—*Ex parte Farb, Supreme Court of California (July 30, 1918), 174 Pacific Reporter, page 320.*—Sam Farb entered into a contract as to tips received by his employees which violated a statute (ch. 172, Acts of 1917) which prohibits "an employer from entering into a contract requiring an employee to surrender to the employer all tips or gratuities received for services rendered to the public on behalf of the employer." On his conviction Farb applied for a writ of habeas corpus on the ground "that this statute permits a violation of the rights of employers and employees freely to enter into contracts, that it is in conflict with the Federal and State constitutions, and that it seeks to make an improper extension of the police power of the State." The respondent employees contended that the contract is a fraud on the public because the tips do not actually remain with the person to whom given, and that the law is proper as designed to relieve the public from such fraud and imposition, coming under the constitutional provision permitting laws to "provide for the comfort, health, safety, and general welfare of any and all employees." Judge Melvin, speaking for the court, said, in part:

The statute, if defensible at all, must be upheld therefore as a measure tending reasonably to protect employees in their health, or safety, or to preserve their morals or to promote their general welfare.

"The means adopted to produce the public benefit intended, or to prevent public injury, must be reasonably necessary to accomplish that purpose and not unduly oppressive upon individuals. The determination of the legislature as to these matters is not conclusive, but is subject to the supervision of the courts, and, if the above qualities are wanting, a law arbitrarily interfering with the right of contract, or imposing restrictions upon lawful occupations, will be held void." (In re Miller, 162 Cal. 687, 124 Pac. 427.)

Upon the principles above announced, courts have not hesitated to sustain statutes enacted in pursuance of the police power having the legitimate function of protecting the health and morals of certain classes, but they have been equally ready to apply constitutional rules to the overthrow of laws which under the guise of such regulation have interfered with the freedom of contract.

Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditure of one's earnings.

The statute under review is void because it is in conflict with the "due process" provision of the Constitution of the United States and with section 12 of Article I of the Constitution of California.

CONTRACT OF EMPLOYMENT—WRONGFUL DISCHARGE—IMPROPER CONDUCT—FOREMAN ACCEPTING FEES—*Ackerman v. Siegel, Supreme Court of New York, Appellate Term (May 15, 1918), 170 New York Supplement, page 522.*—Plaintiff Ackerman was employed as foreman in defendant's shop under a written contract whereby he agreed that, should he through bad behavior or fast living imperil the morals of the shop and its success, the agreement was to become null and void. Ackerman was discharged and sued his employer for unlawful breach of the contract. Defendant presented evidence that plaintiff solicited and demanded a commission from the various employees under him on the amount of their wages. This testimony was objected to on the ground that it was inadmissible under the pleadings. The objection was overruled and the evidence submitted to the jury, which brought in a verdict for the defendant employer. This verdict was set aside and a new trial ordered, whereupon the defendant appealed. The verdict was reinstated, and the order for a new trial was reversed. The opinion of the court as expressed by Judge Delahanty is, in part, as follows:

The court was correct in its ruling. The conduct of the plaintiff in soliciting the alleged commission was certainly behavior tending to imperil the morals and success of the defendant's shop. If the plaintiff was not prepared to meet that specific charge, it is no fault of the defendant. Plaintiff should have demanded a bill of particulars.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—RULES OF EMPLOYERS—*Johnson v. Waverly Brick & Coal Co., Supreme Court of Missouri (July 5, 1918), 205 South-western Reporter, page 615.*—The coal company maintained a loading chute for the purpose of loading coal on freight cars. The company's chute was located in such a position that a bluff concealed any approaching trains until they were only 180 feet distant. A car was under the chute being loaded and Johnson was trimming it. Other cars were switched onto the same track and bumped the car on which he was working, throwing him under the car and injuring him. Neither the coal company nor the railway company notified Johnson of the intention of switching additional cars onto the track. The supreme court in affirming judgment to plaintiff Johnson said in part:

It is next insisted by the counsel for defendants that the evidence showed that the plaintiff was guilty of such contributory negligence as to prevent a recovery as a matter of law, by standing with his back to the approaching train so he could not see it. This insistence is untenable. The evidence shows the plaintiff did not know that the train was approaching, and, under the rules of the railway company and the custom of the coal company, he had no reason to apprehend

a train would approach him without notice first being given to him. This point is ruled against the defendants.

Counsel for defendants also insist that the plaintiff is not entitled to a recovery in this case because his injury was the result of a risk incident to his employment; that is, he assumed all risks incident to his employment, and that his liability to be knocked off of the car mentioned and being injured is one of those risks. This insistence is untenable for two reasons: First, because this was not a risk incident to his employment. Such risks are purely incidental to the employment, and an injury is liable to occur thereby at any time during the performance of the work undertaken, unaided in any degree by the negligence of the employer. * * * The second reason before suggested why this insistence is untenable is that the evidence tended to show that it was the negligence of the defendants which caused the injury, and not the result of an assumed risk. The evidence presented a question of fact for the jury, and the court properly submitted it to them.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—RELEASE—CHANGED CONDITIONS—*Gold Hunter Mining & Smelting Co. v. Bowden, United States Circuit Court of Appeals, Ninth Circuit (June 3, 1918), 252 Federal Reporter, page 388.*—Bowden was in the employ of the smelting company, operating a steel drill which the company provided, and which had once been broken and repaired by welding. While in operation the drill broke in the weld and caused Bowden to receive certain injuries. The court held that, although Bowden had assumed the risk of operating welded steel drills, it could not be said that he assumed the risk of a defectively welded drill and the question of the quality of the drill was properly left to the jury. Bowden had been treated by a physician for a while, and, on the statement of the latter as to the nature of his injuries, signed a release. Bowden met an agent of the company at the request of the physician in the latter's office. The agent asked the nature of Bowden's injuries and was told that they were not serious and that \$200 would be enough to cover the expenses of treatment. After some discussion a release was signed and a draft for \$200 made out. Later complications developed from the same injuries and Bowden's leg was removed, for which he brought suit and recovered judgment. The release was set up by the company as a defense, but Bowden claimed that the release did not cover the loss of a leg. The court of appeals in the course of its opinion said:

It would be a very strained construction to hold that plaintiff, a healthy man, in the prime of life, dependent upon a calling which requires unusual physical strength, intended to accept \$200 (all of which was paid by the indemnity insurance company to the hospital and physician, for attention to injuries received before the serious injuries to the leg and arm developed) as full compensation for the permanently helpless condition in which he evidently is. A fair con-

struction of the evidence is that the release was made under the belief by both parties that there was no injury other than those specified (strained back and bruised scrotum), and which were deemed not serious.

Judgment for Bowden affirmed.

EMPLOYERS' LIABILITY—DISEASE—OCCUPATIONAL DISEASE—INJURY—IMPAIRMENT OF HEALTH—VIOLATION OF STATUTE—*Gay v. Hocking Coal Co., Supreme Court of Iowa (Nov. 16, 1918), 169 Northwestern Reporter, page 360.*—Gay was in the employ of the coal company when he was stricken down by reason of breathing foul air as he was working in room No. 10 of the company's mine. The air had become laden with "damps" and other impurities. The result was that plaintiff was unable to work for eight months and then his health was so impaired that he was unable to do the same amount of work as he had formerly done. The company had elected to reject the provisions of the workmen's compensation law and plaintiff accordingly brought suit for damages for personal injuries. The counsel for defendant claimed that the injury sustained by Gay was an occupational disease, and then rather inconsistently argued that as recovery for occupational diseases could not be had under the workmen's compensation act, Gay should not be allowed to recover. The laws of the State of Iowa provide that mines must be ventilated and that a certain amount of pure air must be provided both man and beast working in the mine, and it further provides that the air must not be permitted to become noxious. After reviewing and quoting two instructions of the lower court to the jury where it was stated that the jury, although it found plaintiff had sustained such injuries as he claimed, must also find that they were not the result of an occupational disease, the court reversed the judgment of the lower court in favor of the defendant, saying in part as follows:

We can not avoid the conclusion that the charge so far as quoted is erroneous both in substance and effect. An "occupational disease" suffered by a servant or employee, if it means anything as distinguished from a disease caused or superinduced by an actionable wrong or injury, is nothing more nor less than a disease which is the usual incident or result of a particular employment in which the workman is engaged, as distinguished from one which is caused or brought about by the employers' failure in his duty to furnish him a safe place to work. If the employer fails to provide a reasonably safe place to work, or fails to observe the specific requirements of the statute with respect thereto, and as a result of such neglect the employee is injured, the liability of such employer can not be avoided by calling such injury an "occupational disease" or by showing that disease of that nature is often the accompaniment or result of such employment, even when all due care has been exercised by the

employer. * * * There is no principle or rule of law where, in order to make a *prima facie* case, plaintiff was bound to plead and prove that he was not suffering from an occupational or other variety of disease, except as such negation may be implied from proof that his injury was the proximate result of defendant's failure to perform its statutory duty to expel the gas from the mine or otherwise render it harmless. It may also be added, in view of the argument of counsel, that if defendant did fail in its duty in this respect, and the plaintiff was thereby physically overcome or disabled to a degree causing him to suffer injury or loss, defendant's liability is neither avoided nor lessened by reason of the fact that plaintiff sustained no wound or bruise or other hurt of a traumatic character or origin. A wrongful injury which operates to destroy or undermine or impair the health of another is no less actionable than is a wrong from which the injured person sustains wounds or bruises or broken bones.

The judgment in favor of the mine company was therefore reversed, and the case remanded to the court below for a new trial.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—AGE LIMIT—CONTRIBUTORY NEGLIGENCE—*Karpeles v. Heine et al.*, *Supreme Court of New York, Appellate Division* (Dec. 7, 1917), 167 *New York Supplement*, page 925.—Hans Karpeles, a boy 13 years and 10 months of age, was employed by Marie C. Heine and others to operate an elevator in an apartment house. Section 93 of the Labor Law of the State forbids the employment of children under 16 years in the operation of elevators. After taking a window cleaner to one of the upper floors, as directed, he stepped into the hall, and when he attempted to step back into the elevator cage he was injured by falling down the shaft, as the elevator had moved, apparently through a defect permitting it to move upward when empty, without power. It was shown that there was no light in the elevator, and little in the hall. The trial court charged the jury that the unlawful employment constituted negligence on the part of the employers, but that if the plaintiff was guilty of contributory negligence he could not recover. Under these instructions the jury found for the defendants, but the boy's counsel on appeal contended that the violation of the statute created an absolute liability. The majority of the court took the same view as the trial court, the opinion delivered by Judge Smith citing *Bachman v. Little*, 152 App. Div. 811, 137 N. Y. Supp. 699, and other cases. Two of the five judges hearing the case dissented, Judge Page expressing their views in a dissenting opinion. He distinguishes the present case from the others, and states that the question has not been squarely presented in New York, but that in other States it has been held that unlawful employment makes the employer absolutely liable for injury. Stating that the purpose of the prohibition of the employment of children in the dangerous occupation is for the protection of the children and also of the public

riding in elevators, from the lack of "judgment, discretion, care, and caution" presumed not to exist in persons so young, he points out the inconsistency of requiring the exercise of such judgment and care on the part of a child unlawfully employed, in order that he may recover damages in case of injury.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—*Reiten v. J. S. Stearns Lumber Co., Supreme Court of Wisconsin (Feb. 5, 1918), 165 Northwestern Reporter, page 337.*—Bernard Reiten, a boy 15 years of age, was employed on Saturday, May 27, 1916, without an employment permit, to throw edgings from live rolls carrying boards and edgings. On the following Monday he was injured by a board striking his thigh. A bony growth, which necessitated two operations, developed, and in May, 1917, it was found to be growing a third time, making another operation a probable necessity. Through his guardian he sued the company named, his employer, for damages, and a jury rendered a verdict in his favor for \$5,500. The court gave him the option of a new trial or the reduction of the amount to \$2,500. He accepted the reduction, and the company appealed. The court had submitted only the matter of damages to the jury, holding that the company was absolutely liable, because it had unlawfully employed a boy under 16 years in a dangerous occupation without a permit. This view was sustained, and the judgment affirmed, the court holding also that the damages after the reduction were not excessive. Judge Eschweiler delivered the opinion, quoting the language of the statute as to the class of employment forbidden to boys of that age, and commenting as follows upon the dangerousness of the work the boy was doing:

"23. Any employment dangerous to life or limb, injurious to the health or depraving to the morals."

We are satisfied under the undisputed testimony in this case that the judgment may and ought to be supported upon this last-quoted provision of the child labor law. His freedom of motion was limited to the small area of 3 feet in width by 6 or 7 feet in length. Heavy planks passed before him on the table along live rollers, the motion of which evidently, so far as he was concerned, was practically irresistible. There was the ever-present possibility of planks or material becoming choked and caught anywhere along the table, thereby misplacing the planks and forcing them over into the space in which he was confined. All warrant and compel us, upon the undisputed facts and circumstances, to say as a matter of law that there was an employment of this boy under 16 years of age within the prohibition of the language of the statute and that particular subdivision 23, above.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—POSTING OF NOTICES—SAFE PLACE TO WORK—*Chabot v. Pittsburgh Plate Glass Co., Supreme Court of Pennsylvania (Jan. 7, 1918), 103 Atlantic Reporter, page 283.*—Paul Chabot, a boy 14 years of age, was employed by the company named in hauling plates of glass on a truck, which plates it was his duty to place in racks behind and near to the cutter's table. While he was removing a plate from the truck he collided with a cutter, causing the glass to fall from his hands and strike his foot and injure it. Through his father he sued the company for damages, and, upon the jury's verdict in his favor, judgment was rendered in the court of common pleas of Armstrong County. On appeal the company contended that there was not evidence to sustain the plaintiff's claim that a safe place to work had not been furnished him in that the space between the cutters' table and the racks was only $3\frac{1}{2}$ feet, an insufficient amount of space to allow the cutters and the boy to move about without interference such as actually occurred. The court held that the question was for the jury, and that it had been properly submitted by the instructions given by the judge of the trial court. It was also held that the company was negligent as a matter of law because of a violation of the law relating to the employment of children. It had secured and kept an employment certificate for Chabot as required, but had not kept nor posted lists of children employed, as it was incumbent upon it to do under the provisions of the law. It was held that the proper attention to the lists was as essential a part of the employer's duty as any, and that failure to observe it would constitute the proximate cause of any injury happening to a minor unlawfully employed because of failure to keep and post the lists. It was pointed out that where such failure existed it was impossible for the company to sustain its burden of proving that it had brought itself under the exceptions to the prohibition of the employment of children under 16 years of age.

EMPLOYERS' LIABILITY—FELLOW SERVANT—CONSTITUTIONALITY OF STATUTE—*Mason v. New Orleans Terminal Co., Supreme Court of Louisiana (May 27, 1918), 79 Southern Reporter, page 26.*—Mason was employed by the defendant as a car repairer. While he was repairing the brake beam of a car another workman, a carpenter, dropped a large piece of wood from the top of the car and it fell upon Mason and injured him, whereupon he sued, and recovered damages. Defendant alleged that the carpenter at work on top of the car was a fellow servant with plaintiff Mason, who was repairing the iron-work of the same car; also that the statute of the State abrogating the fellow-servant rule for all servants generally of public-service

corporations is unconstitutional. The opinion of the supreme court sustaining these two allegations is as follows:

It is essential that fellow servants be engaged in the same work under the same master and that their work, to a certain extent, bring them into contact with each other. The requirement that they be engaged in the same work does not mean that both must be doing exactly the same thing at the same time. If they are engaged on the same general work, and in the course of their work come into contact with each other, or that each knows of the presence of the other and knows of the work that the other is doing, that is all that is required.

The car carpenter and the car repairer in this case were in the actual presence of each other working on the same car, and knew of the presence of one another, and they knew what the other was doing. They were fellow servants.

Act No. 187, 1912, p. 333 [Bul. 148, p. 865], is unconstitutional because it includes, in one class of employees, those engaged in non-hazardous occupations as well as those engaged in hazardous occupations by certain corporations; and for the further reason that it denies to public-service corporations, and in favor of individuals, the equal protection of the laws, and it denies to public-service corporations, and in favor of all other corporations which may be doing identically the same work, the equal protection of the laws.

The judgment of the court below was therefore reversed, and judgment was rendered in the company's favor.

EMPLOYERS' LIABILITY—FELLOW SERVANT—VICE PRINCIPAL—DUAL CAPACITY—*Bradshaw v. Standard Oil Co., Kansas City Court of Appeals, Missouri (June 10, 1918), 204 Southwestern Reporter, page 831.*—Plaintiff was employed by the defendant as a laborer with a view to becoming in time a fireman. One of the regular still firemen failed to appear for work and plaintiff, who had completed his day's work, was told by his foreman to do the work. The foreman called one Walgenbach, who was another still fireman, and said to him: "Here is a man that will help you. You will tell him what to do." And, turning to plaintiff, he said: "Do as he tells you to do." Plaintiff went to work and while lighting the gas burners under the stills there was an explosion because the gas was turned on too soon by Walgenbach, and plaintiff was injured. He sued for damages, and from a judgment in his favor the defendant appealed, claiming that Walgenbach was the fellow servant of plaintiff, and was at the time of the injury doing an act as a fellow servant and not as a vice principal. Just prior to the injury, Walgenbach had said to the plaintiff: "I will turn on the gas, because I know more about it than you do. You go back and stick your lighter in and I will turn on the gas."

Under its instructions the jury had found that Walgenbach was at the time exercising his functions as a vice principal, and the court of appeals, in passing on this point, said:

There is no question that Walgenbach became the defendant's vice principal when the general foreman told Walgenbach, "You tell him (plaintiff) what to do," and told plaintiff, "Do as he (Walgenbach) tells you to do." By these orders and directions Walgenbach was made defendant's vice principal in the work to be done.

Although the doctrine of dual capacity has been severely criticized, there is no question but that it is the law in this State. One may be acting as a vice principal and at the same time be acting in a dual capacity; that is, also as a fellow servant. And inquiring into the question as to whether he is so acting, it must be borne in mind that it is the character of the act, and not the rank of the servant, which determines the liability or nonliability of the master. When the doctrine of dual capacity is urged, the question is: Was the vice principal at the time exercising some authority vested in him as such, or was he in the performance of a mere manual act of service incident to the common employment?

Of course, if Walgenbach was at the time teaching the plaintiff the work, the former was exercising the authority of a vice principal. Whether Walgenbach was manifesting at the time the authority of a vice principal was for the jury under all the facts in evidence.

The judgment of the court below was therefore affirmed.

EMPLOYERS' LIABILITY—GUARDS FOR DANGEROUS MACHINERY—PERSONAL APPEARANCE AS BASIS FOR DAMAGES—*Camenzind v. Freeland Furniture Co.*, Supreme Court of Oregon (June 18, 1918), 174 Pacific Reporter, page 139.—Plaintiff was employed by the defendant as a woodworker and it was his duty to operate a shaping machine which had vertical spindles to which knives were attached. These knives were not protected by any form of guard. While plaintiff was operating this machine a piece of wood became stuck and jerked his hand against the spindles and the knives cut off two of his fingers. Action was brought under the employers' liability act which required that all dangerous machinery must be provided with guards where practicable, and judgment was in the employee's favor. An appeal was taken by the defendant, who secured a reversal, together with an order for a new trial, on account of an instruction as to grounds for damages. As to guarding the machine, the court said in part:

There are two principal questions to be answered: Does the machine involve risk or danger? Is it practicable to guard the danger and at the same time preserve the efficiency of the machine? It is conceded that the shaper involves a risk or danger, and therefore comes within the embrace of the statute; but since the answer denies that it is practicable to guard the machine, it was competent for the

plaintiff to offer evidence concerning Exhibit F. Evidence relating to the guard used in Switzerland was competent, not for the purpose of showing that the defendant should have used that particular guard, but to show that it was practicable and reasonably possible to guard the spindle.

On the subject of the duty of the employer the court said:

If, in order to completely perform the duty imposed upon him by the statute, the employer must attach and maintain a guard on a machine when it can be kept there constantly without the necessity of removal or readjustment, then by the same token he must, in order to completely perform his duty as to any given piece of work with which it is practicable to use a guard, attach the guard to the machine and see that it is kept there while the servant is engaged with such piece of work. The statute, of course, does not require a guard to be used unless it is practicable to do so.

It is the duty of the employer to attach and maintain a guard when it is practicable to use a guard; and that duty is absolute, non-delegable, and continuing. If an employee, who operates a machine, attaches the guard to the machine, he has merely performed the employer's duty; but if the employee fails to attach a guard, though furnished and available, he has merely not done what is not his duty to do, but is the duty of the employer to do.

Grounds for reversal are shown in the following paragraph:

It was prejudicial error for the court to instruct the jury that in estimating the damages they could consider "any embarrassment that may result from his changed appearance." There is a conflict of authority as to whether a recovery may be had for mortification or humiliation arising from the contemplation of the disfigurement of the person; but this court has committed itself to the doctrine that humiliation and embarrassment, wholly sentimental, arising from the contemplation of a disfigurement of the person, is too remote and indefinite to constitute a possible element of damage.

A new trial was therefore declared necessary.

EMPLOYERS' LIABILITY—INEXPERIENCED FELLOW SERVANT—*Lusk et al. v. Phelps, Supreme Court of Oklahoma (Apr. 9, 1918), 173 Pacific Reporter, page 371.*—Needham Phelps, deceased, had been in the employ of the St. Louis & San Francisco Railroad Co., of which Lusk and others were receivers. The action was brought by W. H. Phelps, administrator, to recover damages for the death of Needham Phelps. Phelps had been engaged in working for the defendants in a gravel pit near Mill Creek. His duties consisted chiefly in operating a drill, and, with other employees of the defendants, in preparing and exploding charges of dynamite with which the blasting was done. A short time prior to the accident which caused Phelps's death he complained to the foreman of the defendants

stating that he and his fellow workers were inexperienced in the handling of dynamite. The foreman promised to get an experienced man as soon as he could and requested that deceased and his coworkers get along as best they could until that time. Shortly afterwards, in discharging a charge of dynamite, Phelps was killed. Plaintiff alleged that the defendant was guilty of negligence in not supplying experienced men for the handling of dynamite, and judgment was in his favor, whereupon the defendant procured a writ of error.

Touching upon the duty of the defendants under the above circumstances the supreme court, affirming the judgment of the court below, said:

It was the duty of the defendants when intrusting the use of dangerous agencies and instrumentalities to servants to see that the servants employed by them possessed such qualifications mentally, morally, and physically as would enable them to perform their duties with that degree of skill and experience required by the nature of the employment and without exposing themselves and their coemployees to a greater danger than the work necessarily entailed in the due and careful prosecution thereof, and for a failure upon their part to use ordinary care when selecting servants to whom the use of such dangerous agencies and instrumentalities were intrusted to see that such servants possessed the requisite qualifications, they would be liable for any injuries that might result as a proximate result of such negligence.

In this case the court refused a motion for a new trial. The case again came before this court on November 14, 1918, on error and the award was again affirmed (175 Pac. 756).

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—BOARDING MOVING TRAIN—*Briggs v. Union Pacific R. Co., Supreme Court of Kansas (Apr. 1, 1918), 175 Pacific Reporter, page 105.*—Briggs was employed by the defendant as a fireman on a freight train. At the time of the accident he was working as a fireman on a freight train engaged in interstate commerce. When the train reached Topeka the engineer and Briggs left their engine and went into a restaurant to get a lunch. The engineer left before Briggs and started the train; later Briggs jumped on one of the cars and while walking over the tops of the cars to the engine tripped and fell between the cars and was killed. The engineer said that in starting the train without the fireman he was only following a long established custom. It was, however, against the company's rules. The administrator brought suit for damages under the Federal employers' liability act and from an adverse judgment brought this

appeal to the supreme court. On the question of assumed risk, the only question considered, the court, in affirming the judgment of the court below, said:

The fireman had a right to assume that the engine would not be started until he was in the engine cab. It was started, however, without him. When he came out of the lunch room the engine and a number of cars had already gone by, and the train was going forward. He was immediately and manifestly confronted with all the difficulties and dangers to be encountered in reaching his place on the engine. It would be fatuous to say he was not aware of them, and it would be an impeachment of the mental capacity of a competent man to say he did not appreciate them.

The plaintiff says the time was nighttime. It was a night train, and no one was better aware of the darkness than the fireman. The plaintiff says there was smoke. The record does not so show, but, if there was smoke, it was a normal incident to the operation of a freight engine. The whole situation created by the engineer's negligence lay before the open eyes of this experienced trainman the moment he stepped out of the lunch room. He voluntarily chose his course, and voluntarily assumed the risk attending his choice.

The court pointed out in a concluding paragraph that the decision was based on the Federal law as construed by the Supreme Court of the United States, and was not to be regarded as a precedent for the construction of the State law on employers' liability.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—GOING BETWEEN CARS—*Boldt v. Pennsylvania Railroad Co., Supreme Court of the United States (Jan. 7, 1918), 38 Supreme Court Reporter, page 139.*—Edward J. Boldt was killed in the service of the railroad company named, and his administratrix brought suit under the Federal employers' liability act. The verdict and judgment in the district court were for the company, and these were affirmed by a circuit court of appeals. The employee who was killed was an experienced yard conductor, and was at the time of his death between two cars near the south end of a "string," trying to adjust a faulty coupler. Another string of cars running down grade from the north in charge of a brakeman struck violently against those at which Boldt was at work, causing his death. A rule forbade employees to go between cars without taking certain precautions, which rule was not observed in this case. Mr. Justice McReynolds delivered the opinion of the Supreme Court affirming the judgment below. After quoting parts of the charge to the jury, he stated that only one assignment of error, in which objection is made to the denial of a requested charge relating to assumption of risk, was properly

placed before the court. Following is part of the language of the opinion on this subject:

Plaintiff asked a charge that:

"The risk the employee now assumes, since the passage of the Federal employers' liability act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employees."

Denying the request the court said:

"Under the employer's liability act the employee simply assumes the risk of his employment. Section 4 reads 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death, of such employee.' I decline to charge as requested, because this is not an action of the kind specified in section 4."

In cases within the purview of the statute the carrier is no longer shielded by the fellow-servant rule, but must answer for the employee's negligence as well as for that of an officer or agent.

In *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 503, 34 Sup. Ct. 635, 639 [Bul. No. 169, p. 80], we said:

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

The request in question did not accurately state any applicable rule of law and was properly refused. Already the jury had been told that deceased assumed the ordinary risks of his employment—a statement more favorable than plaintiff could properly demand. The risk held to have been assumed in the *Horton* case certainly arose from negligence of some officer, agent, or employee; and if the negligence of all these should be excluded in actions under the employers' liability act, it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risks.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—
DEFECTIVE BOILER—APPROVAL BY FEDERAL INSPECTOR—*Great Northern Ry. Co. v. Donaldson*, Supreme Court of the United States (Mar. 4, 1918), 38 Supreme Court Reporter, page 230.—Vance H. Thoms, engineer for the company named, was killed by the explosion of the boiler of his engine, and his administratrix, Adaline Donaldson, brought suit under the Federal employers' liability act to recover damages for the company's alleged negligence causing his death. It was alleged that the boiler was defective in the following respects:

1. The button heads of the crown bolts of the boiler were excessively and unnecessarily large and consequently unduly exposed to the direct heat produced by the oil fuel used on the locomotive.

2. The boiler was not provided with fusible safety plugs.

3. Scale was negligently allowed by defendant company, its officers and employees, to accumulate upon the crown sheet of the boiler.

There was testimony that the engine had been a coal burner, and it was claimed on the part of the plaintiff that when it was changed to burn oil the bolt heads should have been changed to a much smaller type, and that the size of the heads caused deterioration of their material and the weakening which was in part the cause of the explosion. The company introduced testimony tending to show that the water was too low in the boiler at the time of the explosion, due to the fault of the engineer; on the other hand, evidence was given disputing this. The verdict of the jury and the judgment of the trial court were for the plaintiff, and the judgment was affirmed by the Supreme Court of Washington. As to the conflicting evidence, the Supreme Court of the United States simply said that under the circumstances it was not its province to weigh and pass upon it.

The trial court had refused to give a charge requested by the company on the matters of assumption of risk and of the effect of the Federal boiler inspection act. The provisions of section 2 of that act, and the instructions requested and those actually given to the jury, are quoted in the opinion delivered by Mr. Justice Day. It is said that the charge as given was more favorable to the company than the law requires. As to the alleged approval by the Federal inspectors of both kinds of button heads the court, which affirmed the judgment below, said:

The further contention is that the effect of this charge was to leave to the jury to determine the type of boiler construction, in respect to the use of the large button heads which are alleged to have made the engine unsafe to operate. And it is contended that there is testimony tending to show that the use of either the large or small kind of button heads was approved by the Federal department of boiler inspection. Attention is directed to the testimony of an expert witness, offered by the defendant for the purpose of showing that low water was the cause of the explosion, in which he spoke of the use of the button heads of the larger and also of the smaller or taperhead kind, and was asked whether the United States Government made certain requirements as to how boilers and engines should be constructed, to which he answered:

"No. Not as long as we had the proper factor of safety. * * * They have a factor of safety, and the factor of safety is five on the shell of the boilers; that is, if we have a 200-pound pressure boiler it should stand up to a test of 1,000 pounds; five to one."

Asked whether the Government inspects engines and locomotives in general, he answered: "Yes; by the United States inspector," and that there was a standard to which locomotives must be built in order to pass inspection. Asked as to the type of the crown bolt permitted, he answered that either type is acceptable when properly applied. It is evident that this testimony, whatever might be its effect, is far from showing an approval by Government inspectors of the use of the large type of button head upon an oil-burning engine.

Nor can we agree with the contention of the plaintiff in error that so long as the large button head had not been disapproved by the Government inspector such fact is conclusive of the sufficiency of the type in use. We find nothing in the boiler inspection act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of the construction which has been found unsafe has not been disapproved by the Federal boiler inspector.

EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FACTORY SWITCH—SAFETY APPLIANCE LAW—WORKMEN'S COMPENSATION ACT—*Kenna v. Calumet, H. & S. E. R. Co., Supreme Court of Illinois (June 20, 1918), 120 Northeastern Reporter, page 259.*—The plaintiff, Kenna, was in the employ of the defendant company and brought action for damages for the loss of his hand resulting from an accident due to the unsafe condition of a coupler on a car operated by defendant and the negligence of the defendant's conductor, judgment being in the plaintiff's favor. Kenna was a switchman and while switching cars for defendant he was compelled to go between two cars because of a defective coupler. While there the conductor caused the cars to kick and plaintiff's hand was crushed. The defendant is a duly organized railroad company, operating over 5 miles of track which constitutes the switching system necessary to the business of the By-Products Coke Co. The defendant served only the By-Products Co., delivering cars to its plant and taking cars away. For this purpose it had connections with two belt line railways, the cars handled being sent from one State to another. As to a claim of the defendant that it is not a common carrier, the court said:

A railroad corporation, therefore, can not be organized for any other purpose than the transportation of goods and persons for the public. It can not be organized for the purpose of private transportation. When it engages in the business of transportation it does so only by virtue of its charter, by reason of the fact that it is authorized, as a common carrier, to engage in that business. It is the right of the public to use the road and demand service, and not the extent of the business, which determines its character.

The defendant also claimed that the case was subject to the conditions of the workmen's compensation act, though it is conceded that, where the Federal employer's liability act is applicable, it excludes the workmen's compensation act. As to the contention that the Federal safety appliance act also excludes the workmen's compensation act, the court said:

The safety appliance act is equally exclusive. In *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482 [Bul. 224, pp. 205—

208], it was held that a violation of the safety appliance act gave an injured employee a right of action even though he was not at the time of the injury engaged in interstate commerce.

It is argued that the workmen' compensation act does not conflict with or abrogate any of the provisions of the safety appliance act, but only changes the remedy. The safety appliance act by irresistible inference, as held by the Supreme Court of the United States, confers a private right of action for the death or injury of an employee caused by a violation of its terms. This right of action was to recover compensatory damages for the loss suffered. The workmen's compensation act would take away this right of action and confer instead a right to a sum fixed by statute without regard to damages in the particular cases except by reference to the wages which the employee was then earning in his particular employment. The workmen's compensation act substitutes, not a different remedy for the employee, but a different thing for him to recover.

Regarding the relation of the By-Products Coke Co. and the defendant corporation to the operation of the factory switch the court said:

A system of internal trackage constructed and operated by an industrial corporation to meet the necessities of its business in the process of manufacture may be regarded as a plant facility and does not make the corporation a common carrier. Where, however, the system is operated by an independent corporation organized as a common carrier, which, in addition to the service rendered in the industrial operation of the plant, also engages in the transportation in commerce of the product of the plant to customers and of material required by the plant in the conduct of its business from all shippers to the plant, such additional service is that of a common carrier. The fact that under its discretionary power over joint rates the Interstate Commerce Commission may have refused to allow the company to participate in through rates because such participation would create an unjust discrimination does not establish that the company is not a common carrier within the meaning of the safety appliance act.

The judgment of the lower court, awarding damages under the Federal statutes, was therefore affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—INJURIES SUSTAINED IN CAMP CAR—Philadelphia, Baltimore & Washington Railroad Co. v. Smith, Court of Appeals of Maryland (Feb. 27, 1918), 103 Atlantic Reporter, page 945.—The defendant railroad company operated a branch line of its railroad from the town of Clayton, in the State of Delaware, to the town of Oxford, in the State of Maryland, over which it transported passengers and freight in interstate and intrastate commerce. The plaintiff, Smith, was employed by the defendant as a "carpenter laborer," in connection with a gang of bridge carpenters employed by the defendant in the repair of its bridges and abutments. This

gang worked over the entire line of the defendant. Plaintiff's duties required him to look after the camp car in which the gang ate, slept, and lived, and also to prepare the meals for himself and the other members of the gang. On December 23, 1915, the gang was engaged in repairing a bridge in Easton, Md., and the camp car was temporarily on a siding near by. The camp car had another car on either side of it. On the day of the accident the plaintiff was engaged in preparing the dinner for the gang, when, without warning to the plaintiff, a locomotive ran into the car to which the camp car was coupled with such force that plaintiff was knocked down and struck his head on the door of a clothes press sustaining the injuries for which he sued under the Federal statute to recover damages. From a judgment in his favor, the defendant appealed, contending that the case did not come under the Federal employer's liability act. In discussing this the court used the following language:

If the plaintiff had, through the negligence of the defendant, sustained the injuries complained of while he and the other members of the gang were being transported in the camp car over the defendants' line from a point in Delaware to a point in Maryland to repair a bridge in the latter State, his right to recover under the Federal statute could not be questioned. How, then, can the fact that the camp car was temporarily located on a siding of the defendant in Maryland, while the carpenters were repairing a bridge there, before being moved to some other point on the line, perhaps in Delaware, for the same purpose, alter the relations of the work in which the plaintiff was employed in interstate commerce? The camp car, plaintiff, and carpenters were, at the time of the injury, employed by the defendant in the repair of its road, which was essentially and directly related to the interstate commerce in which the defendant was engaged, and we see no good reason why the plaintiff, under the circumstances, should be denied the protection of the act relied on.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—PLEADING—*Breen v. Iowa Cent. Ry. Co.*, *Supreme Court of Iowa (Sept. 30, 1918)*, *168 Northwestern Reporter*, page 901.—Myles Kellehen was employed as an engineer by the defendant. He was seriously injured September 29, 1908, by the breaking of a side bar while his locomotive was in motion, and for the injuries received, his assignee, one Breen, brought suit for damages under the State law and recovered. In the final trial, on the cross-examination, information was brought out tending to show that the parties were at the time of the injury engaged in interstate commerce. Three trials were had, but at no time did the defendant plead that the parties were engaged in interstate commerce and that the action should be brought under the Federal employers' liability act.

At the last trial, after all the testimony and evidence was in, the defendant company sought to amend its answer to permit this defense, which the trial court would not allow. The supreme court, in its opinion sustaining this ruling, said in part:

The situation in a case like this is peculiar, for there are two possible remedies for the same injury, depending solely on the relations of the parties to interstate commerce. Both remedies are administered by the same court, and it is important that these remedies shall be so administered that one may not be made a pitfall for, or played by an ingenious counsel against, the other; if, in an action under the State law, the defendant does not raise the issue that the parties were engaged in interstate commerce at the time, rulings on the admissibility of evidence are to be made as though that issue was not involved. If, however, facts bringing the alleged injury within the Federal employers' liability act are pleaded, then, of course, such issue is to be taken into account in limiting the range of cross-examination.

Nor might defendant show affirmatively, as a defense against the claim for damages alleged in the petition, in the absence of so pleading, that the engineer and the company were engaged in interstate commerce at the time of the injury. We so ruled in *Bradbury v. Railway*, 149 Iowa 51, 128 N. W. 1, and nothing to the contrary is to be found in the decisions of the Supreme Court of the United States.

The trial court did not err in sustaining objection to the proffered testimony.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING OLD RAILS—FELLOW SERVANT—*Perez v. Union Pacific R. Co., Supreme Court of Utah (Apr. 20, 1918), 173 Pacific Reporter, page 236.*—Perez was engaged as a laborer by the defendant to remove old rails, which had been detached from the ties by another gang of workmen, from the right of way to a scrap pile. Perez and seven other men worked together. It was their custom to have four men at each end of the rail grasp it in their hands and raise or lower it to or from a push car on which the rails were conveyed to the tool house. In the present case the four men on the opposite end of the rail from which Perez and his companions were working, dropped their end without giving the usual signal, causing the end on which Perez was holding to fall and strike his leg, inflicting a painful and perhaps serious injury. It is conceded that the injury was caused by the negligence of the men on the opposite end of the rail from Perez. Defendant claims this negligence is not attributable to it, and on this ground secured judgment in the court below, whereupon the plaintiff appealed. The injury was received in the State of Wyoming, so that the

law of the jurisdiction was applicable. The supreme court affirmed the judgment of the court below, saying in part:

The common law as to fellow servants and the liability of their employer for an injury caused to one employee by the negligence of another is in force in the State of Wyoming, and is controlling in this case so far as that point is concerned. The 8 men handling the rail above referred to, including the plaintiff, were undoubtedly fellow servants, and under the law referred to the defendant is not liable for the injury which the plaintiff sustained. If it is liable at all, it must be by virtue of some other law applicable to the facts of this particular case.

It is contended by appellant, Perez, that this case comes within the provisions of the Federal employers' liability act, which makes radical changes in the common law, especially as to the fellow-servant doctrine, which the act entirely abrogates and repeals.

In the case at bar the concrete questions at this time are: Was the plaintiff, at the time he was injured, employed in the doing of anything to facilitate the movement of commerce from one State to another? Was the instrumentality upon which he was employed calculated, in any manner, directly to contribute to or be in aid of commerce between two or more States? In the light of adjudicated cases construing the act of Congress, as we read them, these questions must be answered in the negative. If the plaintiff had been engaged in repairing a track admitted or proven to be an interstate track, and what he was doing tended to facilitate transportation from one State to another, in our judgment, he would have been engaged in interstate commerce. But here he was not engaged in repairing the track, rendering it capable of carrying commerce. If he and his fellow workmen carrying the rail had not removed it from the side of the track where it had been laid by those repairing the track, transportation on the road, so far as the record discloses, would have been just as effectual and commerce could have been carried on without interruption.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—TIMEKEEPER—*Crecelius v. Chicago, M. & St. P. Ry. Co., Supreme Court of Missouri (May 17, 1918), 205 Southwestern Reporter, page 181.*—Walter Crecelius was employed as a timekeeper by the defendant. While crossing the company's tracks he was run into and killed. His administrator brought action and recovered judgment under the Federal employers' liability act. Further facts of the case are stated in the opinion of the court which is in part as follows:

Deceased, on the day he was killed, was working as a timekeeper for a gang of men engaged in repairing the main track of an interstate railroad, and in constructing a temporary track to be used while the grade of the main track was being lowered. After work hours for the gang of laborers, but at a time when the duties of the deceased required him to make out and send the roadmaster of the de-

fendant a daily telegraphic report of the number of men engaged and the nature of the work done by the gang of which deceased was time-keeper, and after he had prepared his report, he was killed by an intrastate work train, while he was crossing the tracks of defendant on his way to the telegraph office to wire in said report.

We conclude therefore that at the time deceased met his death he was engaged in the performance of duties which were so closely connected with interstate commerce as to constitute a part thereof, within the purview of the Federal employers' liability act.

Though sustaining the court below in regard to the nature of the employment, the judgment was reversed and a new trial ordered because of improper instructions to the jury by the trial judge.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WORK ON ROADBED—*Ohio Valley Electric Ry. Co. v. Brumfield's Admr., Court of Appeals of Kentucky (May 28, 1918), 203 Southwestern Reporter, page 541.*—James Brumfield brought this action to recover for personal injuries received while in the employ of the Ohio Valley Electric Ry. Co. He died before this appeal was heard and his administrator prosecuted the action. Action was brought under the Federal employers' liability act. Brumfield had been engaged by the railway company to gather and move a lot of old and worthless ties from where they had been thrown along the right of way to a fill where he and his companions were to dump them. There had once been a trestle where the fill was now located. The ties were used in strengthening and reinforcing the fill. While engaged in this work Brumfield was injured, and for these injuries secured judgment in the trial court. The railway company operated a line from Ashland, Ky., to Huntington, W. Va. The appellant railway company contends that the work Brumfield was doing was not such as to be termed interstate commerce within the meaning of the Federal employers' liability act. In the course of the opinion of the court, sustaining the judgment of the court below, Justice Carroll said:

We think there can be no doubt about the proposition that, if these old ties were being thrown over the embankment for the purpose of strengthening or making it safer for use in interstate transportation, Brumfield, when injured, was engaged in such transportation, or in work so closely related to it as to be practically a part of it. It is not indispensable that the employee should be engaged in interstate transportation in the sense that he was assisting in the operation of a train engaged in such commerce, or in the repair of trains, fixtures, appliances, or tracks the repair of which was at the time indispensable or necessary in the conduct of the interstate transportation business. The repair of an embankment over which trains used in interstate transportation run is just as much a part of interstate transportation as are the rails and ties and cars themselves.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—BURDEN OF PROOF—STATE LAW.—*New Orleans & N. E. R. Co. et al. v. Harris, Supreme Court of the United States (June 3, 1918), 38 Supreme Court Reporter, page 535.*—This case was before the Supreme Court on a writ of error to the Supreme Court of the State of Mississippi. The latter court had affirmed without opinion a judgment in behalf of a plaintiff suing on account of the accidental death of one Van Harris, a brakeman in the employ of the railroad company. The error claimed by the company on this appeal was mainly in regard to instructions given by the judge in the trial court. In one paragraph the judge instructed the jury that under the statutes of Mississippi it was not necessary for the plaintiff to prove negligence, proof of injury being "prima facie evidence of the want of skill and care." (Mississippi Code, sec. 1985, amended by ch. 215, Acts of 1912.) The effect of this provision is to put the burden of proof upon the defendant company to show "by a preponderance of the evidence that its servants were not guilty of negligence."

The Supreme Court reversed the decisions of the State courts on the ground that such a shifting of the burden of proof under the Federal statute was not within the power of the State. Mr. Justice McReynolds, who delivered the opinion of the court, in speaking on this point, said:

The Federal courts have long held that where a suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. The Nitro-Glycerine Case, 15 Wall. 524, 537; *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 487, 26 Sup. Ct. 303, 50 L. Ed. 564; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 85, 34 Sup. Ct. 566, 58 L. Ed. 860. In proceedings brought under the Federal employers' liability act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts, and negligence is essential to recovery. [Cases cited.]

The established principles and our holdings in *Central Vermont Ry. v. White*, 238 U. S. 507, 511, 512, 35 Sup. Ct. 865 [Bul. 189, p. 85], we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several States.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—DEFECTS OF TIES AND BALLASTING—*Nelson v. Southern Ry. Co., Supreme Court of the United States (Mar. 4, 1918), 38 Supreme Court Reporter, page 233.*—Philip Nelson brought action against the railway company named, and a judgment in his favor was reversed by the Supreme Court of North Carolina. The dispute was as to whether the state of facts disclosed as causing the injury

constituted negligence for which the company was liable. The United States Supreme Court agreed with the State supreme court in holding that it did not, the brief opinion by Mr. Justice Brandeis stating the facts and the conclusion in the following language:

Nelson, a civil engineer who had been in the employ of the Southern Railway 11 years, was directed to make a survey in one of its yards. While doing so he walked on the main track between the rails where he had seen others walk. As he stepped upon a crosstie, a small V-shaped piece of it one and a half inches by six being rotten, splintered off under his weight. His foot slipped down between the ties where the ballast was five or six inches below the top of the tie; and stumbling, he fell and dislocated his knee. The defect in the tie could have been discovered by sounding with an iron rod and the standard of maintenance of roadbed prescribed by the railway was to ballast to the top of the ties. But neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of a character to impair safety in operation. Plaintiff knew that there were always some ties on the line which were partly decayed, and also that the ballast was occasionally below the top of the ties.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—WARNING OF LOW BRIDGE—SUFFICIENCY OF TELLTALES—*Marland v. Philadelphia & R. Ry. Co., United States Circuit Court of Appeals, Third Circuit (Nov. 7, 1917), 246 Federal Reporter, page 91.*—The body of William Marland, a brakeman, was found on a pile of coal in the tender of his train, with the skull crushed. His widow, Catherine Marland, brought suit against his employer, the company named, alleging that the employee struck a low bridge, and that the company had not fulfilled its duty in warning him of the danger from this cause. At the trial the evidence seemed to eliminate four of five bridges under which he passed, three because they were so high that he could not have come in contact with them, and the fourth because he could not have reached the position on the train where he was found, at the time this bridge was passed. It appeared that the fifth bridge was composed of three parts, and that the sides, which would first be seen by one approaching along the railroad track, had a safe clearance, while the center was some feet lower underneath, but, being blackened by smoke, could not be seen to be thus different. The court therefore dismissed the objection of the company to the charge to the jury, as to whether or not the supplying of telltales, without further warning as to the exact conditions, was a sufficient compliance with the duty of the road, and affirmed the judgment of the trial court, which had been for the plaintiff in

accordance with the verdict. Judge Buffington for the court said in part:

The question of notice, we think, was one especially for the jury. The bridge was, as we have said, of so peculiar and unique a character as to create latent and unlooked-for dangers to trainmen. It is true the railroad had provided telltales; but for the court to have instructed the jury that these recognized standard safeguards in and of themselves were a complete fulfillment of the duty of notice would have been error. The questions of notice given by the defendant and of knowledge acquired in any way by the deceased of such dangers was submitted to the consideration of the jury in proper terms. When the real atmosphere of the trial is sensed, the case was tried and determined upon two questions of fact: First, whether the deceased was struck by an overhanging bridge which had a latent and unusual danger; and, second, was the deceased carried under such bridge without notice or knowledge of its latent dangers?

Holding that the trial court had properly answered these questions in the affirmative, he affirmed its judgment.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—WORKMEN'S COMPENSATION—EMPLOYEES ENGAGED IN INTERSTATE AND INTRASTATE COMMERCE—*Spokane & I. E. Ry. Co. et al. v. Wilson et al.*, Supreme Court of Washington (Nov. 19, 1918), 176 Pacific Reporter, page 34.—This is an action against the Industrial Insurance Commission by three electric railway companies that do an intrastate and also an interstate business. Three employees were injured and awards were allowed against each of the companies. The railway companies claimed that the commission had no jurisdiction inasmuch as the companies are engaged in interstate commerce and the Federal employers' liability act must control.

The State compensation law had been amended in 1917 so as to exclude from its operation employees of common carriers engaged in interstate and foreign commerce, as well as in intrastate commerce, the former being, of course, entitled to recover under the Federal liability law, if the conditions warrant, while the latter were given the right to sue under like conditions under a State law of identical provisions. The supreme court of the State reversed the judgment of the lower court sustaining the award and directed a decree to be entered restraining the collection of the award.

Its opinion, delivered by Chief Justice Main, is in part as follows:

From the statement of the business engaged in by the three companies involved in these suits, it is apparent that a great number of employees are engaged in work so impossible of segregation, as to whether it is at any given time interstate or intrastate, that the question of whether they came within the State law or the Federal law is impossible of determination.

In attempting to remedy this situation, and at the same time not to remit employees to the uncertainty of the common law liability, the amendment of 1917 was enacted, and, as we view it, that act, instead of attempting to segregate employees into two classes—those engaged in interstate and those engaged in intrastate work—the legislature, in effect, said that it matters not whether the employees are engaged in interstate or intrastate work so long as the company for which they were working was a railroad actually engaged to some extent in doing an interstate, foreign, or intrastate commerce. In other words, the character of the business of the railroad company determines the status of the employees, and if a portion of the railroad company's business is interstate the employees engaged in its maintenance and operation, or in the maintenance and construction of its equipment, should not come within the operation of the State law, but that all such employees could recover in the State courts, not under the common law liability, but under the liability imposed under the amendment, which is the same liability fixed by the Federal employers' liability act.

Under this interpretation of the act, the employee is the beneficiary of a clear definition of his status.

EMPLOYERS' LIABILITY—RELEASE—FRAUD—*Carr v. Sacramento Clay Products Co.*, District Court of Appeal, Third District, California (Jan. 31, 1918), 170 Pacific Reporter, page 446.—E. G. Carr was injured on July 19, 1913, and in this appeal from the result of the trial of his suit for damages, in which he was awarded damages in the sum of \$7,500, it was not disputed that the evidence was sufficient to justify the finding of negligence as charged, or even that of gross negligence which the court made; nor was there any claim of contributory negligence, or of excessiveness of the damages awarded. The facts on which the effort to overturn the judgment was based were the giving of a release by Carr on August 29, 1913, and his delay in taking action to rescind this release, which it was claimed, being unreasonable, constituted laches and was fatal to his further recovery. There was evidence to warrant a finding that he signed the release, which was given in consideration of the payment of \$217, under the belief, fostered by the representative of the employer, that all that he could recover was 65 per cent of his wages for 12 weeks, and \$100 hospital, medical, and surgical bills, amounting in all to the sum paid him. He was not at that time aware that the company had not elected to be governed by the provisions of the compensation act of the State, and there was much evidence as to his weak physical condition caused by the injury, and also of a mental deficiency bordering on insanity. Testimony introduced on behalf of the company tended to prove the contrary, but since the jury's verdict had been for the employee, the court was under the necessity of considering the evidence in his favor as true. The court held that

fraud might be imputed to the company, since a matter of fact, namely, whether the company had accepted the compensation law, was involved, as well as matters of law. The delay in taking action to rescind the release until the following May was held not to be fatal, since the advice of competent counsel, that in view of the release it would be useless to attempt further recovery, had been followed. The judgment was accordingly affirmed.

EMPLOYERS' LIABILITY—RELEASE—FRAUD—*Morstad v. Atchison, T. & S. F. Ry. Co., Supreme Court of New Mexico (Feb. 23, 1918), 170 Pacific Reporter, page 886.*—Andrew Morstad was in the employ of the railway company named, and was engaged with a fellow servant, Knight, in unloading bridge timbers from a car standing upon a trestle, using cant hooks for the purpose. They had raised a timber nearly to the point where it would turn over and fall from the car when Knight's cant hook slipped from the timber. This caused the whole weight to fall against the cant hook which Morstad held, and threw him off the trestle to the ground, causing injuries to his knee and leg, for which he sought damages in this suit. The negligence of the employer alleged was the hiring of an incompetent servant, Knight, who, because of his inexperience, held the handle of the cant hook at an improper angle to the timber, and failed to secure a good hold. The company denied this negligence, and also pleaded the execution by the employee of a release in settlement of his claim. He asserted in reply that he was not in a condition to comprehend what he was doing when he signed the document, that he did not read it or know the contents of it, and believed that it was an application for transportation to the company's hospital, and that the foreman so represented it to him. The plaintiff recovered a verdict for \$2,950, on which judgment was entered. On this appeal both the question of negligence and of the validity of the release were decided against the employee, and the judgment was reversed. The release was signed while the employee was in a bunk, soon after the accident. The foreman presented the paper, saying, "Here is something you will have to sign before you go to the hospital." He started to read it, but testified that he did not do so because he did not have his glasses and because he was in pain, and his leg hurt when he sat up, so he signed the paper without further inquiry. The court failed to find any reason to believe that he was physically or mentally incompetent at the time, since he testified clearly as to all the circumstances surrounding the signing; and, emphasizing the necessity that written contracts should be binding in all but exceptional cases, it held that the plaintiff must abide by the results of his bargain.

EMPLOYERS' LIABILITY—RELEASE—REPUDIATION—TENDER—*Swan v. Great Northern Ry. Co., Supreme Court of North Dakota (June 10, 1918), 168 Northwestern Reporter, page 657.*—This is a personal-injury case, in which defendant appeals from a judgment for \$1,284. As a section hand in the employ of the defendant, plaintiff was on a gasoline motor which, running into an open switch, caused him to be thrown to the ground and severely injured. Some two months after the injury, a settlement was made with Swan, and he signed a release for \$375, which sum he received and retained. It was claimed that in part consideration for the release the company contracted to retain plaintiff in its services at some easy job but that in six weeks it discharged him without cause. The defendant company denied the promise to employ, but the court ruled that this was proper matter to submit to the jury, and, if fraud was found, the law would afford a remedy. However, the damage suit could not be maintained without a restoration of the sum paid in settlement, which had been retained. The judgment of the lower court was therefore reversed, Judge Christenson saying in the course of the opinion delivered by him:

It is undisputed that at the time plaintiff received the money he executed the written release. It is further undisputed that this release was carefully read over to the plaintiff before he signed it. He was not deceived as to its contents, or its purpose. He knew that its purpose and effect was to release and discharge his right of action against the defendant. He signed the very instrument which he intended to sign. If his signature to the release was obtained by fraud and deceit, the law affords him ample remedy. However, he has no right to retain that which he received as consideration, and repudiate the remainder of the contract.

EMPLOYERS' LIABILITY—SAFE APPLIANCES—NEGLIGENCE—QUALITY OF DYNAMITE SUPPLIED—*Terleski v. Carr Coal Mining & Mfg. Co., Supreme Court of Kansas (May 11, 1918), 173 Pacific Reporter, page 8.*—Terleski was a miner in the employ of the defendant. It was the custom of the defendant company to keep on hand a supply of dynamite which was supplied to and purchased by the miners as they needed it. Plaintiff, who had several years of mining experience, had always used the 40 per cent grade of dynamite and was familiar with the handling of this grade. He went to defendant's storekeeper and asked for the 40 per cent grade, and the storekeeper knowingly gave him the 60 per cent grade, which is more sensitive than the 40 per cent grade. The plaintiff, while tamping the dynamite in a drill hole which he had made, was injured by the premature explosion of the dynamite, causing him, among other injuries, to lose his eyesight. The court awarded plaintiff damages on the ground that the evidence that the defendant gave plaintiff a higher grade of dynamite

than was asked for was sufficient to sustain a charge of negligence on the part of the defendant. In affirming this judgment, the supreme court said in part:

The evidence in behalf of the defendant was contradictory of that offered by the plaintiff, but taking all the testimony, direct and circumstantial, it can not be said the findings and verdict are without support. The jury found that the defendant had been handling other grades of dynamite than 40 per cent, and had actually sold some of the 60 per cent; that the stick sold to the plaintiff was taken from a box containing 60 per cent grade and was of higher grade than 40 per cent; and that the one who sold the dynamite to the plaintiff had reason to believe it was more than 40 per cent in strength.

EMPLOYERS' LIABILITY—SAFE APPLIANCES—WRONGFUL USE—*Ten Mile Lumber Co. v. Garner, Supreme Court of Mississippi (June 3, 1918), 78 Southern Reporter, page 776.*—Garner was in the employ of the defendant lumber company and was engaged with a track and bridge crew. The crew had use for a tool called a maul. While they were working another crew came and borrowed their maul and left a damaged one which could no longer be used. The crew of the plaintiff had been using a cant hook which had in use become so bent as to become almost useless. Instead of sending the cant hook to the blacksmith, who was the proper person to make repairs, the plaintiff and his coworkers attempted to repair the cant hook themselves by laying it upon the maul and striking it with an ax. While doing this a piece of metal was struck out of the maul and came in contact with Garner's eye, causing an injury for which he sued. Plaintiff recovered damages and defendant appealed. The judgment was reversed, the following being quoted from the opinion of the court:

It appears that the defect was not in the ax or in the cant hook, but that it was in the maul, and that the maul was not being used for the purpose which it was assigned for use by the company, and that the ax was not a proper instrument to use in repairing a peavey, or cant hook. This case is governed by the case of *Illinois Central R. R. Co. v. Daniels*, 19 South. 830, where the court laid down the following rule:

"An employer is not liable in damages to one of its employees where the injury resulted from putting one of the appliances supplied to a use for which it was not intended in an improper manner."

It further appears that whatever defect there was in the cant hook was caused by its being bent in the course of the work, and it does not appear that there was any notice of this defect brought to the attention of the master or any neglect on the part of the master in having it properly repaired. The plaintiff, having undertaken to repair this tool under these circumstances, was not entitled to recover from the master.

EMPLOYERS' LIABILITY—SAFE PLACE—ASSUMPTION OF RISK—INJURY TO IGNORANT SERVANT BY ELECTRICAL SHOCK—*Kimberlin v. Southwestern Bell Telephone Co., Kansas City Court of Appeals, Missouri (Nov. 11, 1918), 206 Southwestern Reporter, page 430.*—Kimberlin was by trade a plasterer and was in the habit, during slack time in his work, of taking odd jobs of various kinds. A dangerous and poorly insulated electric wire belonging to the defendant company became broken so that a portion fell across an electric light company's highly charged wire and thence to the ground. Hutton, the company's head lineman, noting the trouble in the connections telephoned over to Grant City where the plaintiff lived and where the broken wire was. Upon being informed of the break and its general locality he asked the lady operator to get a man to fix it and she gave the job to Kimberlin. Kimberlin went to the place where the wire was broken and coiled on the sidewalk. When he grasped the wire he received a severe shock and was knocked unconscious, receiving injuries for which he later recovered damages. The court of appeals affirmed the judgment of the trial court, saying in part:

Now, if the plaintiff was ignorant of the danger in the place where he was sent and such danger was not so glaringly apparent that, as a matter of law, he should have known of it, and the defendant, with knowledge of the dangerous situation, negligently sent the plaintiff to the place without warning him, and plaintiff was injured, then defendant can not escape liability either upon the ground that the doctrine of a safe place to work is inapplicable or that the defendant assumed the risk.

The evidence tends to show negligence on the part of the defendant, both in the maintenance of its wires in dangerous proximity to the electric wires and in sending, without warning, one who was without knowledge of the danger incident to the place.

Hence, we can not say there was no evidence of negligence on the part of the defendant nor that plaintiff, as a matter of law, assumed the risk. The rule in Missouri is that the servant does not assume to bear the consequences of his employer's negligence.

EMPLOYERS' LIABILITY—SAFE PLACE—ASSURANCE OF SAFETY—*Chess & Wymond Co. v. Wallis, Supreme Court of Arkansas (Apr. 29, 1918), 203 Southwestern Reporter, page 274.*—On May 27, 1914, Wallis was engaged in cutting stave bolts for the Chess & Wymond Co. He had been directed to saw a log lying under a hanging limb by one Norman, his foreman. Wallis called the foreman's attention to the hanging limb but was assured by the foreman that there was no danger of the limb falling. Wallis commenced his task and while so employed the limb fell, severely injuring him. Action is brought by Wallis's father as his next friend. The Chess & Wymond Co. contend that the danger was open and obvious and that the foreman could have had no better knowledge than Wallis as to the danger.

The case was submitted to the jury and a verdict rendered in favor of plaintiff, Wallis. Justice Smith, rendering the opinion of the court on appeal, said in part:

It is argued that the danger was open and obvious, and that Norman could not have had any more knowledge of the danger than the appellee himself had, for according to the appellee's testimony the presence of the suspended limb was known alike both to himself and Norman. But it is just here that we think the jury question arises. The master is presumed to know the hazards of the employment, and the servant has a right to rely on the assurance of safety, unless the danger is so open and obvious that its existence is both known to and appreciated by the servant. The rule is stated in 4 Labatt on Master and Servant (2d Ed.) page 3965, as follows:

"But it has been held that the assurance of safety given by the master may be of such a character as to take away all question of assumption of risk, even if the risk is known to the servant. The same effect is reached in a number of cases which hold that the servant may recover if he is injured while relying upon an assurance of safety, unless the danger was so great and imminent that a reasonably prudent man would not have incurred it."

We can not say that the jury did not have the right to take into account appellee's age and experience as contrasted with that of his foreman, and to find therefrom that appellee had a right to rely upon the assurance given, and that he was not guilty of contributory negligence, and did not assume the risk.

The judgment of the court below was therefore affirmed.

EMPLOYERS' LIABILITY—SAFE PLACE—GUARDS FOR DANGEROUS MACHINERY—*Scherer v. Danziger, Supreme Court of California (May 8, 1918), 173 Pacific Reporter, page 85.*—Scherer was employed by Danziger on the latter's ranch as an engineer to operate a gasoline engine and two pumps. Scherer made some suggestions as to alterations designed to make the conduct of his duties more safe. The alterations were made with the approval of the defendant, Danziger, and included a sheet-iron cover or guard for some exposed cogwheels on one of the pumps. The defendant's foreman, Moebius, who was plaintiff's superior, objected to the guard over the cogwheels and ordered it removed, which order the plaintiff obeyed under protest.

The following day, as Scherer was passing the exposed cogwheels, a rag which he was carrying in his hand got caught in the wheels, drawing in his hand and injuring it, for which he recovered damages. The opinion of the court on appeal, affirming the judgment of the court below, is in part as follows:

This evidence fully warranted the jury in finding the defendant had failed in his duty to use ordinary care to furnish his employee a reasonably safe place in which to work. The plaintiff was not obliged to prove that the defendant had personal knowledge

of the removal of the cover. Moebius was in full control of the plant, and notice to him was, of course, notice to his principal. There is no force in the claim that there would have been no element of danger in the situation if the location of the railing (which had been around the cogwheels) had not theretofore been changed in accordance with the plaintiff's own suggestions. The alterations had the approval of the defendant, and, if carried out according to plaintiff's ideas, would have included the covering of the cogwheels. The dangerous condition was created, not by the adoption of the plaintiff's plan, but by the elimination of an important part of that plan.

EMPLOYERS' LIABILITY—SAFE PLACE—NECESSITY TO GIVE WARNING OF IMPENDING BLASTS IN MINES—*United Verde Copper Co. v. Kuchan, United States Circuit Court of Appeals, Ninth Circuit (June 3, 1918), 253 Federal Reporter, page 425.*—Kuchan was employed as a miner in the copper company's mine. While passing from a place on the 700-foot level, where he was put to work, to another place to eat his lunch, a heavy blast was discharged without warning, resulting in severe and permanent injuries to Kuchan, for which he secured a judgment for damages. The law of Arizona, where the mine is located, expressly requires a warning to be given before discharging blasts, but does not state who should give the warning, and it is the contention of the copper company that the duty rested upon the servant who discharged the blast and not upon the company. After reviewing the provision in the State constitution abrogating the fellow-servant rule the court of appeals, in affirming the judgment of the court below, used in part the following language:

It follows that, if it be conceded that the statute fails to place the duty to give the warning upon the mining company, nevertheless the constitution of the State, construed in the light of the general law, makes the company responsible for the neglect of such duty, and the same result is reached as though the statute had directly placed the duty of giving the warning upon the mining company. The responsibility of the mining company arises under the general law requiring all employers to use ordinary care to furnish a reasonably safe place within which their employees are required to work.

EMPLOYERS' LIABILITY—SAFE PLACE—USE OF GUARD—NEGLIGENCE—*Kancevich v. Cudahy Packing Co., Supreme Court of Iowa (Oct. 25, 1918), 169 Northwestern Reporter, page 186.*—Kancevich was in the employ of the defendant and it was his duty to load ice from a platform into railroad cars. The platform was so constructed that it was level with the tops of the cars when they stood alongside. Plaintiff was working on one occasion when the cars had been removed from alongside of the platform and in doing his work he

slipped on some ice and fell to the ground. He claims he was not given a safe place to work in because the platform had no rail, although the use of a rail would have rendered the platform useless, and because ice had accumulated on the platform. A board had been provided to put in place when the cars were away from the platform. Plaintiff had put up this board on previous occasions and knew of its use. In affirming the judgment of the lower court in favor of the defendant the court said:

Moreover, the mere putting up of a board that was at hand, which plaintiff knew how to put up, and had seen put up in the past, even if he had not himself done so, would have made as effective a guard as was needed for his safety. His failure to use this means of self-protection will alone dispose of the complaint of the absence of a permanent guard or rail.

The proximate cause of this injury was a slip on ice. There was no ice when he went to work. It came into existence because some ice would necessarily fall upon the platform as plaintiff worked, and because of his work. He slipped because of ice he knew must accumulate because of the work, work that he had been doing for more than a year. He was hurt because his bodily movements did not take into consideration what he knew to be a necessary incident of his work.

EMPLOYERS' LIABILITY—SAFE PLACE AND APPLIANCES—VICE PRINCIPAL.—*Cooper v. Penn Bridge Co., Court of Appeals, District of Columbia (Mar. 4, 1918), 46 Washington Law Reporter, page 164.*—The bridge company undertook to replace an underhung bridge span on the Pennsylvania Avenue Bridge with a new overhung span. One Hoffman was sent as foreman to oversee the job. Hoffman had a man under him by the name of Hoover who acted as foreman in his absence and who really directed the work. Hoover directed one Galloway to work on the top of the underhung span, which had been removed to a barge and at the bottom of which other men were working. Galloway went to get a maul, but found only one in the tool box and the handle on this one was loose. Galloway protested that the maul was dangerous and might fall apart. Hoover nevertheless directed Galloway to use it, as there was no other to be had. While using this defective maul the head fell off and struck Cooper, who had been working below, upon the head, severely injuring him, for which injuries Cooper brought action. In reversing the judgment of the lower court in favor of the bridge company this court used in part the following language:

It of course is not denied that it was defendant's duty to provide for the plaintiff a reasonably safe place in which to work, but defendant contends that this duty was performed when proper mauls and proper handles were furnished the men. While there is

some dispute under the evidence as to whether wedges for the handles were available, we do not consider this question material under our view of the case, for, though it may be conceded that where an employer furnished such a simple tool as a hammer or maul, he is not expected to superintend its use, and that he is not responsible for minor or simple repairs if he has furnished proper materials therefor, there is evidence in the present case that the master, through its representative Hoover, deliberately directed and thereby became responsible for the use of a defectively dangerous tool. While the plaintiff assumed the risk "normally and necessarily incident to the occupation" in which he was engaged, it is not to be assumed that his employer needlessly would subject him to a risk of an altogether different sort.

This is not a case where a simple tool has been furnished an employee and that employee, by carelessly failing to make a simple repair with material at hand, has injured a fellow employee, but rather it is a case where an employer has deliberately directed the use of a defective tool by one employee to the injury of another and innocent employee.

EMPLOYERS' LIABILITY—UNDERTAKING DANGEROUS WORK—NEG-LIGENCE TO BE PLEADED.—*Manwell v. Durst Bros., Supreme Court of California (Aug. 14, 1918), 174 Pacific Reporter, page 881.*—The defendant owned and operated a ranch on which he raised a large crop of hops. To pick the hops he employed about 2,500 persons of all ages, both sexes, and many nationalities. The sanitary conditions were bad and the pickers considered that they were underpaid. They appointed a committee of 12 who went to Ralph Durst, defendant, and demanded that the sanitary conditions be improved and that the pickers be given a higher wage. Durst promised to improve the sanitary conditions but refused the higher wage. The employees were not satisfied with these promises. Thereupon Durst struck Ford, the spokesman of the committee, in the face with his gloves and told him that he was discharged and that he should get off the premises. The committee felt they were affronted. Durst attempted to have a peace officer arrest Ford, but the other employees aided Ford in resisting the attempt. The employees then threatened to go on a strike and called a meeting, which about 1,000 attended. Speeches were made and the employees became incensed and excited. Durst employed Manwell to accompany him and the sheriff and certain deputy sheriffs to this meeting of the employees. Their purpose was to clear the premises of the strikers. Upon arriving on the scene Durst and his party were met by a mob of the employees and Manwell was shot by one of the employees and killed. His widow brought suit for \$150,000 damages on the ground that Manwell was employed for hazardous work and that Durst negligently failed to inform him of the risk involved.

Plaintiff's action was dismissed on the ground that no proper case against the defendant had been stated in the complaint. Chief Justice Angellotti, in rendering the opinion of the court, affirming the judgment of the court below, said in part:

Of course, allegation of negligence was essential to the statement of a cause of action. The complaint is not assisted in this respect by the general allegation contained in paragraph 5 that "the death of said Edmund T. Manwell, on said 3d day of August, 1913, was caused by the gross negligence of the defendants." While it is true, under the rule in force in this State, and in most jurisdictions, that negligence may be charged in general terms, that rule simply means, as has been stated many times, that, "what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." And it must appear from the facts averred that the negligence caused or contributed to the injury.

Regarding the implication that Durst, in employing Manwell, concealed from him the hazardous nature of the employment, the court said:

Indeed, in so far as the complaint shows anything in this regard, it indicates from the very terms of the employment notice to Manwell of the possible danger. He was employed to accompany Durst (quoting from the complaint) "and the sheriff and certain deputy sheriffs * * * to the said meeting of said employees," then and there to act in aid and assistance of the defendants "in any matter which should then and there arise," and he went with defendant and the sheriff and five deputy sheriffs. Many necessary employments are notoriously hazardous in the very nature of things, and certainly it is not the law that the mere fact of employing one to render such service constitutes negligence. Of course, in such case the employer must use what is reasonable care under the circumstances to protect his employee from injury in the rendition of his services; but there is no allegation of any omission in this regard.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION—ALTERNATIVE ACTIONS—CONSTITUTIONALITY OF STATUTE—*Philps v. Guy Drilling Co., Supreme Court of Louisiana (May 27, 1918)*, 79 *Southern Reporter*, page 549.—This action was brought by Margaret Philps against the defendant for damages for the death of her son while he was in the employ of defendant, or, in the alternative, for compensation under the State compensation act. The son was killed within 30 days after his employment by defendant. Plaintiff claimed that the compensation act is unconstitutional in so far as it deprives an employee or his dependent of any other remedy, because the object or purpose of the law is not expressed in its title, as required by article 31 of the constitution. Therefore plaintiff asked for damages under article 2315 of the civil code. The lower court held that the act in question was constitutional and granted defendant a nonsuit because plaintiff

had not conclusively shown her dependency. Judge O'Niell, in giving the opinion of the court, reversing the nonsuit and ordering a new trial, said:

The decision of the question of constitutionality of the act No. 20 of 1914 [Bul. 203, p. 545] is sustained by the ruling of this court in *Whittington v. Louisiana Sawmill Co.*, 76 So. 754. The decision in that case was that the title of the act No. 20 of 1914 expressed plainly enough the object or purpose of limiting the rights and remedies of an injured employee, and the rights and remedies of dependents or the representatives of a deceased employee, to the schedule of compensation established, and to the liability of the employer, as prescribed by the statute. Hence it goes without saying that an act prescribing the liability of an employer to make compensation for injuries received by an employee is an act limiting the rights and remedies of an employee, or his representatives, for injuries received by him.

The case of *Woodruff v. Producers' Oil Co.*, 76 So. 803 (Bul. 246, p. 224), which had declared the act unconstitutional in so far as it prevented an action for damages where the injury occurred within 30 days after the beginning of the contract of employment because of an apparent inconsistency between two of the act's subsections, was considered by the court and the following opinion rendered:

We find now, by comparison of the two paragraphs or subsections, giving every word its plain and only meaning, that there is no inconsistency between them.

The decision in *Woodruff v. Producers' Oil Co.* being founded upon a wrong premise must be overruled.

We conclude also that the demand for compensation under the employers' liability [compensation] act was not waived, and should not be dismissed, merely because it was urged in the alternative and only in the event the court should hold that the plaintiff was not entitled to damages under article 2315 of the civil code.

On the merits of the demand for compensation, we agree with the district judge that the evidence is not so certain as to the amount of the average weekly wages the plaintiff's son had earned, nor as to the amount he contributed to her support, as to enable the court to determine what compensation, if any, should be allowed. But we are of the opinion that the district judge should have reopened the case to permit plaintiff to introduce more evidence on those questions instead of rendering a judgment of nonsuit. We have concluded, therefore, to set aside the judgment of nonsuit on the demand for compensation and remand the case to allow the plaintiff to introduce more evidence as to the amount of the average weekly wages her son was earning and as to the amount he contributed to her support.

EMPLOYERS' LIABILITY—WORKMEN'S COMPENSATION LAW—LOSS OF SCALP—DAMAGES—*Boyer v. Crescent Paper Box Factory (Inc.)*, Supreme Court of Louisiana (Nov. 26, 1917), 78 Southern Reporter,

page 596.—While the plaintiff was in the dressing room of the defendant's factory, getting ready to go home after her day's work, her hair got caught in the negligently exposed wheels of some machinery, and her scalp was torn off. The negligence of the defendant is not in dispute. The plaintiff brought the action for damages under the Civil Code, denying the application and constitutionality of the State workmen's compensation law, entitled the employers' liability act. This view was adopted by the court below and judgment was rendered in the plaintiff's behalf in the amount of \$10,000. The company thereupon appealed and the supreme court held that the compensation law was constitutional and that the case should have been decided in accordance therewith. Regarding the constitutionality of the act the court held:

Coming to the question of constitutionality, the grounds of unconstitutionality are not stated with definiteness either in the pleadings or in the briefs. As we understand them, they are that the act is unconstitutional, (1) because of the several provisions therein contained relative to the insurance which the employer may take for his protection; (2) because it contains more than one object, and that the several objects which it contains are not expressed in its title; and (3) because it deprives the employee of his life and liberty by taking away from him his right of action under the general law of torts, and confining him to the remedy prescribed by the act.

The first of these objections has already been answered; these provisions relative to insurance take away nothing from the employee; their sole operation, so far as he is concerned, is to give him a right of action against the insurance company in which the employer may insure himself against liability under the act, this right of action being additional to that against the employer.

As to plurality of objects and nonexpression in title, we find that the act has but one object; it is an employers' liability act.

As to the act being unconstitutional because taking away plaintiff's right of action under the general law of torts, see *N. Y. C. R. R. Co. v. Sarah White*, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. 224, pp. 232-237], and other workmen's compensation cases, where this question is fully discussed and decided adversely to plaintiff's present contention.

The judgment of the court below was therefore reversed, and a trial ordered under the provisions of the compensation law. A rehearing was obtained, however, and the court after due deliberation reversed itself and held that the case was not one coming under the provisions of the act, and the action brought by the plaintiff was sustained. The opinion of the court is in part as follows:

Effie Boyer may be said to have sustained a personal injury "producing temporary total disability to do work" while she was in the hospital undergoing medical treatment after the accident to her. But she has sustained greater injury than a temporary disability. She has been deprived of her scalp. Such a condition can not be

termed a temporary disability, or a "disease or infection naturally resulting from the injury." She is not "entitled to compensation under this act" for the injury which she has sustained and which she now bears. Her right to damages, or to compensation, is not provided for in the act. The act only restricts the rights and remedies to those employed under the act, where it provides that compensation shall be made for personal injuries which affect the earning power of the employee.

The compensation act did not provide for compensation for the injury suffered by plaintiff, and she is therefore not entitled to compensation under that act. Her right to damages is not attempted to be excluded by the act. The rights and remedies given in the act are declared to be for a "personal injury for which he (she) is entitled to compensation under this act."

The judgment for damages was therefore affirmed.

EMPLOYMENT OF CHILDREN—CERTIFICATES—NIGHT WORK—CONSTITUTIONALITY OF STATUTE—*Commonwealth v. Wormser, Supreme Court of Pennsylvania (Jan. 7, 1918), 103 Atlantic Reporter, page 500.*—Joseph Wormser admitted that he had employed a boy under 16 years of age after 8 p. m. and before 6 o'clock a. m. in the glass factory of which he was manager, and that the boy was employed without the procuring of the employment certificate required by No. 286, P. L. 1915. He contended, however, that he could not properly be convicted of a violation of the act for the reason that it was unconstitutional. He was convicted of the offenses indicated by the superior court, and its judgment was affirmed by the supreme court, which adopted as its own the opinion rendered by the lower court. This opinion declared with regard to the object of the act, viz, "To provide for the health, safety, and welfare of minors," that "It is too clear for discussion that this is an appropriate subject for legislative action." Further quotations from the opinion show the stand taken on the validity of the two provisions of whose violation the respondent had been found guilty:

What is a reasonable time within which children should be excluded from places of labor is a legislative question. It can hardly be contended that the State is without authority to protect persons of immature years from exposure to the danger and exhausting toil of factories, and nothing has been brought to our attention which leads us to the conclusion that the period fixed by the statute is arbitrary and unreasonable. It was clearly within the authority of the legislature to provide that children under the age of 16 should not be employed in the factories at night at which time their highest mental and physical interests require that they have rest and sleep.

We find nothing incompatible with personal rights in the regulation that no minor shall be employed to work in any establishment unless an employment certificate has been issued as provided by the

statute. This legislation has reference to the education of the boys and girls of the Commonwealth who are of school age, and education is a subject with reference to which the Commonwealth has authority to prescribe. It is intimately connected with the good order and welfare of the people and is one of the chief subjects of governmental interest and care. The State having fixed the ages within which minors can work, the right to regulate the reasonable conditions of employment necessarily follows. The general employment certificates were intended to apply to those whose proficiency in school has been of such a character that the supplementary education provided for in the statute could take the place of that provided for in the general school system of the State. Such a classification is not unreasonable, but, on the contrary, is well adapted to accomplish the result intended; that is, to permit minors over 14 years of age whose education is sufficiently advanced to work at industrial employment.

We do not find anything in the provisions of the statute to which the appellant objects which would render it invalid.

EMPLOYMENT OF CHILDREN—FEDERAL STATUTE—INTERSTATE COMMERCE—STATE AND FEDERAL POWERS—*Hammer v. Dagenhart et al.*, *Supreme Court of the United States (June 3, 1918)*, 38 *Supreme Court Reporter*, page 529.—Roland H. Dagenhart filed a bill in the United States District Court for the Western District of North Carolina, on behalf of himself and his two sons, one between 12 and 14 years of age and the other between 14 and 16, to secure an injunction against the enforcement of the Federal child labor act. The father and sons were employees of a cotton mill in Charlotte, and under the North Carolina statutes the father is entitled to the earnings of the sons until they attain their majority, hence his interest in the matter personally. Under the State law also each of the boys is permitted to work 60 hours per week, while under the terms of the Federal act the younger could not be employed at all until he reached the age of 14, and the older could work only 48 hours per week until he became 16; or rather, if they were so employed in violation of the provisions of the Federal act, the employing company could not, during such employment or within 30 days thereafter, remove any products from its factory and ship them in interstate or foreign commerce.

The district court held the act unconstitutional and granted the injunction, without any written opinion. Hammer, the United States district attorney against whom the injunction was directed, appealed, and the Supreme Court affirmed the judgment below by a vote of five to four. Mr. Justice Day delivered the prevailing opinion, and, after stating the facts and quoting the provisions of the act, said:

The attack upon the act rests upon three propositions: First, it is not a regulation of interstate and foreign commerce; second, it contravenes the tenth amendment to the Constitution; third, it conflicts with the fifth amendment to the Constitution.

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within 30 days prior to their removal therefrom, children under the age of 14 have been employed or permitted to work, or children between the ages of 14 and 16 years have been employed or permitted to work more than 8 hours in any day, or more than 6 days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.?

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons v. Ogden*, 9 Wheaton 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, State or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The cases taken up at this point include those upholding the validity of laws against lotteries, food and drug adulteration, and the white slave traffic. The decision in each case is briefly summarized, with some quotations from the opinions. Mr. Justice Day then discusses the distinction between these cases and the present one, and expresses the opinion of the court that the matter of child labor is one for State rather than for Federal regulation, as appears in the remainder of the opinion, which is for the most part as follows:

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the State who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after 30 days from the time of their removal from the factory. When offered

for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power.

Commerce "consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State." (Mr. Justice Jackson in *In re Green*, 52 Fed. 113.) This principle has been recognized often in this court. *Coe v. Errol*, 116 U. S. 517; *Bacon v. Illinois*, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under Federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. *Kidd v. Pearson*, 128 U. S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children. In North Caro-

lina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; "this principle," declared Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, "is universally admitted."

A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce can not authorize the exercise of authority not intrusted to it by the Constitution. *Pipe Line Case*, 234 U. S. 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the Nation by the Federal Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the States, a purely State authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act can not be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

Mr. Justice Holmes delivered the dissenting opinion, in which Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concurred. This opinion is in the main given below:

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States in which within 30 days before the removal of the product children under 14 have been employed, or children between 14 and 16 have been employed more than 8 hours in a day, or more than 6 days in any week, or between 7 in the evening and 6 in the morning. The objection urged against the power is that the States have exclusive control over their methods of production and that Congress can not meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate

effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

The manufacture of oleomargarine is as much a matter of State regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769.

The pure food and drug act which was sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, with the intimation that "no trade can be carried on between the States to which it (the power of Congress to regulate commerce) does not extend," applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil.

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the Nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I can not believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that

case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

EMPLOYMENT OFFICES—EMIGRANT AGENTS—CONSTITUTIONALITY OF STATUTE—PROHIBITORY TAX—*Garbutt v. State, Supreme Court of Mississippi (Jan. 7, 1918), 77 Southern Reporter, page 189.*—W. H. Garbutt was convicted of violation of chapter 94, Laws of Mississippi of 1912, which requires each labor agent or employment agent, engaged in the business of soliciting or hiring laborers to go beyond the limits of the State, to pay an annual license fee of \$500 for each county in which such agent operates. He appealed, challenging the constitutionality of the act. The conviction was affirmed, Judge Stevens for the court saying:

The contention that this law burdens or is a tax on interstate commerce is settled against appellant by the following authorities: [cases cited.] The act, as we construe it, does not undertake to tax one who solicits or hires laborers for his own use or employment, the employer seeking labor for himself; the tax is laid upon the person doing a regular business of emigrant or employment agent. The title of the act makes this clear, as does also the general language in the body of the statute, especially section 2, stating:

“Any person doing the business of emigrant or employment agent,” etc.

In view of the activity of labor agents in Mississippi within the past few years, and the free emigration of laborers to other States, especially the heavy transportation of colored laborers to the Northern States—amounting the past year to a veritable “exodus”—we are not prepared to declare the tax prohibitory. The amount of the tax is primarily a legislative question.

EMPLOYMENT OFFICES—EMIGRANT AGENTS—DISINTERESTED OFFER OF EMPLOYMENT—BUSINESS OF HIRING—*Chambers v. State, Court of Appeals of Georgia (Nov. 7, 1918), 97 Southeastern Reporter, page 274.*—Chambers came to one Pettit, a licensed emigrant agent, and asked for work. Pettit offered him a job in Tennessee and his transportation to the place of work. Chambers accepted the job and received his ticket. At the station he was asked by one Davis where he was going, whereupon Chambers replied that he was going to Tennessee to work for \$2.50 a day and asked whether Davis did not want a job too, saying that he could get one at the same place. Chambers made no promise of employment and did not offer to pay Davis's transportation. Chambers was arrested and charged with

acting as an emigrant agent without a license and was convicted. In reversing the conviction the court quoted from an earlier decision, as follows:

In the case of *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, will be found an exhaustive and able discussion of the meaning of the term "emigrant agent," as used in the general tax act of 1898, under which the accusation in this case was brought. An "emigrant agent" was there defined as "a person engaged in hiring laborers in this State, to be employed beyond the limits of the same." To be engaged in work, in the sense contemplated by acts imposing taxation, would seem to necessarily imply that the person so engaged must make that work his business or occupation."

And in conclusion said:

Applying this principle to the evidence in the instant case, we think it quite evident that the defendant was not "engaged" in the business of an emigrant agent; and therefore the evidence did not authorize the verdict, and a new trial should have been ordered.

EMPLOYMENT OFFICES—EMPLOYMENT OF LABOR BY RAILROAD SECTION HAND—BUSINESS—*Braxton v. City of Selma, Court of Appeals of Alabama (June 29, 1918)*, 79 Southern Reporter, page 150.—Braxton was in the employ of the Louisville & Nashville Railroad Co. as a section hand. He and a number of other employees of the company were given a pass and permitted to visit the city of Selma. Braxton's foreman told him before he started on his journey that if any of the other employees would not return he was to employ other laborers to take their places. Braxton went to the city and it became necessary for him to employ some laborers to take the places of some others that were with him and who did not intend to return. He was tried and convicted under an ordinance of the city prohibiting persons from engaging in business or professions, etc., without first obtaining a license. In reversing the decision of the lower court Justice Bricken said:

The only position which the appellant held with the railroad company was that of section hand, and for services rendered by him as such he was paid, and not for obtaining labor; nor were his wages based on the amount of labor he should obtain. While on his visit to Selma the company paid his wages as section hand and not otherwise.

We feel no hesitancy in holding that the facts do not show that appellant was engaged "in business of seeking to induce laborers or other persons to remove from the city of Selma in violation of the ordinance," as charged in the complaint against him.

The term "business," as used both in the complaint and in the ordinance, means that employment which occupies the time, attention, and labor of the person engaged, for the purpose of livelihood or profit. It is his calling for the purpose of a livelihood. An occasional

act of business is for the time being the man's business who does the act, but the ordinance requiring the license which the appellant failed to obtain has reference to a regular and legal employment, and not one that is occasional, irregular, or illegal.

HOURS OF LABOR—FEDERAL EIGHT-HOUR LAW FOR RAILROAD EMPLOYEES—APPLICATION OF STATUTE—*Nelson v. St. Joseph & G. I. Ry. Co., Kansas City Court of Appeals, Missouri (Apr. 29, 1918), 205 Southwestern Reporter, page 870.*—Plaintiff, an employee on defendant's interstate passenger train, brought this suit to recover overtime compensation claimed to be due under the act of Congress of September 3, 5, 1916, known as the Adamson Law (Bul. 213, p. 153). This law provided a standard eight-hour day for all railroad employees engaged in interstate commerce. Plaintiff Nelson was engaged under a contract calling for a run of 252 miles, allowing one day off in every four days, and salary payable by the month in the amount of \$82.50. Although the contract made the monthly salary the basis of the rate of pay, the railway company kept records computing the pay of Nelson by the amount he received per day. The contract did not fix what was to constitute a day's work, nor make any provision for overtime and did fix the rate of pay on a monthly basis. Defendant claims that as the plaintiff is not being paid by the day the law above referred to does not apply. The court in holding that the law did apply said:

It is true that the act neither abrogates existing contracts nor makes new ones, and it may very well be that, if an employee makes a contract to which it is impossible to apply the law, then the employee may not be able to claim any benefits under that law. But it can not be successfully maintained that there is anything in the wording of the act showing that the intention was that the law should apply to some and not to all. The act fixes eight hours as "the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees" engaged in the movement of interstate trains. And there is nothing elsewhere in the act which can be construed as creating any distinction between employees so engaged, whether their contracts provide they are to be paid at a certain rate per month, per mile, per day, or per run.

Neither is there anything in the circumstances under which the act was passed, or in the purposes sought to be accomplished by it, to justify the inference that there is any such distinction to be made in applying the act to the various contracts of such employees. The circumstances calling for the act and the purposes of its enactment are set forth in the decision of the United States Supreme Court, in *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (Bul. 224, p. 144-159), wherein the constitutionality of the law is upheld.

We are unable to see any difficulty much less impossibility in applying the Adamson Law to plaintiff's contract nor reason why it should be held to be outside of and beyond the operation of said law.

HOURS OF LABOR—MINES, SMELTERS, ETC.—CONSTITUTIONALITY OF STATUTE—*United States v. Howell, District Court of Alaska (Oct. 23, 1916), 5 Alaska Reports, page 578.*—This was a prosecution to enforce a penalty for employing a workman in a mine in Alaska in excess of the period fixed by law. An act of 1913 (chapter 29), amended in 1915 (chapter 15), undertook to limit such employment to 8 hours in 24. The act was declared void because its form and enactment did not conform to the requirement of the organic act of the Territory providing that "no law shall embrace more than one subject, which shall be expressed in its title."

HOURS OF SERVICE—RAILROADS—SWITCH TENDERS USING TELEPHONE.—*Chicago & A. R. Co. v. United States, Supreme Court of the United States (May 20, 1918), 38 Supreme Court Reporter, page 442.*—Prosecution was instituted against the railroad company named for alleged violation of the hours of service act. The company had in its yard at Bloomington, Ill., $7\frac{1}{4}$ miles long, three switch shanties, each operated continuously night and day by two men, in 12-hour shifts. Each was equipped with a telephone connected with the yardmaster's office, which was used to issue instructions or orders to yard, train, or engine crews as to the handling of cars or trains. The Circuit Court of Appeals for the Seventh Circuit had approved a judgment of conviction, following previous decisions made by it which had apparently not been passed upon by the Supreme Court. (Bulletin No. 189, p. 153.) The Supreme Court affirmed this judgment, holding that the employees concerned were covered by the provisions of the act which forbid employment for more than nine hours per day of employees using the telephone to handle orders affecting train movements, in stations operated continuously. The conclusion of the opinion delivered by Mr. Justice McReynolds is as follows:

The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task.

The individuals within the ambit of the proviso's pertinent provisions are marked by the nature of service performed—an "operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." If, in due course of his work, an employee while in any of the locations specified uses the telegraph or telephone for sending or receiving messages concerning train movements he may not lawfully remain on duty therein exceeding 9 hours during any 24-hour period, except in case of emergency.

Here, the facts disclose the switch tender on duty for 12 consecutive hours in a shanty continuously operated night and day where,

by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great importance. By permitting this, the railroad violated both language and purpose of the act.

LABOR ORGANIZATIONS—INJUNCTION—INDUCING AND INCITING STRIKE—INDUCING BREACH OF CONTRACT—WAR LABOR BOARD—WAR EMERGENCY—*Rosenwasser Bros. (Inc.) v. Pepper, Supreme Court, Trial Term, Queens County (October, 1918), 172 New York Supplement, page 310.*—This was an action for an injunction against certain unlawful and destructive acts of employees, former employees, and representatives of the labor union known as the United Shoe Workers of America. This union was being “promoted” by one Gilman. He succeeded in creating internal trouble in the plant of the plaintiff company, which was engaged to four-fifths of its capacity in Government war work. This disturbance, which amounted to a strike, was mediated by a representative of the War Department, with the result that the strikers were recognized as a union, and that they were given shorter hours and more pay. The employer was permitted to maintain an open shop. This settlement was evidenced by a written agreement between the plaintiff employer and the employees and the labor union, which instrument was signed by them and by the mediator of the War Department. It seems, however, that the aforementioned Gilman, who was the representative of the labor union, chose to disregard this contract and the reason for which it was made, namely, to aid the United States in the prosecution of the war against Germany, and for the purpose of promoting the union which he represented he induced and incited the employees of the plaintiff to break their contract and to strike to force the employer to maintain a closed shop. In granting the injunction prayed for the court rendered the following decision:

It seems established as the law of this State, by decisions of the higher courts in cases which arose before the war, that a labor union may induce or persuade the employees of a manufacturing or any other business, which is conducted by the owner thereof either as an open or a nonunion shop, to become members of the union, and to strike in order to compel the owner to conduct his factory or business as a union shop.

It seems to me that the principles announced in cases which arose before the war can not be applied to the relation between workers and employers in war industries, in so far as they conflict with the principles and policies of the United States Government in the conduct of the war. The production of war industries is so closely connected with actual military operations that it may be said to be a part of them.

All the parties to the present controversy—the employer, the employees, and the labor union—recognized that their respective rights and relations to each other were modified and controlled by their obligations and duties to the United States Government. Their recognition of the principles and policies of the United States Government in the matter of the control of war industries is shown by the evidence. The contract entered into between the plaintiff and the representatives of its employees in October, 1917, was the direct result of the mediation of the War Department, and the department's approval of the contract is shown by the signature thereto of the mediator for the department. This contract was in accord with the principles and policies of the United States for the settlement of labor disputes in war industries. The principles and policies of the United States Government, which should be applied in the decision of this case, have recently been set forth in a pamphlet issued by the National War Labor Board.

It is elementary that a court of equity may restrain a trade-union from inciting employees to violence, or the doing of any tortious acts in the conduct of a strike, or to breach their contract of employment. There is no question that the plaintiff is entitled to an injunction within these rules. The question of greatest importance, however, is whether under the facts presented here the court should not go further and enjoin the defendants from inciting, aiding, and abetting strikes of plaintiff's employees for any cause, in view of the fact that the parties to this controversy have devised and set into motion appropriate machinery to settle by arbitration all differences existing between them, and because the life of our Nation is dependent upon an uninterrupted production of those things needed to successfully carry on the war in which our country is engaged.

It seems to me that an injunction should be granted on these grounds. The usual reciprocal rights and obligations of employer and employee are modified in these times by their respective duty to the United States Government. Duty to the Government was in contemplation of the parties in entering into the contract of employment, and they dealt with each other with reference to that duty.

For the defendants to incite the employees to strike merely for the purposes of promoting the private organization interests of the union is, under the circumstances, wicked.

An injunction will be granted substantially as follows:

1. The repetition of the acts of violence which occurred during the strike in September, 1917, to be enjoined.
2. The continuance of the factory disorders which have been going on from October 5 to the end of the trial to be enjoined.
3. Strikes for any cause whatever to be enjoined for the duration of the war.

LABOR ORGANIZATIONS—INJUNCTIONS—INDUCING STRIKE—BREACH OF CONTRACT.—*Burgess v. Georgia, F. & A. Ry. Co., Supreme Court of Georgia (Sept. 14, 1918), 96 Southeastern Reporter, page 864.*—The railway company brought this action for an injunction to restrain defendants from inducing, declaring, and conducting a strike. The plaintiff railway company was under contract with local labor

unions for the services of its employees who were members of these unions. This contract was without any fixed period of service. On May 5, 1917, however, a supplemental agreement was made under the Adamson Act and was to continue in effect until October 1, 1917. The plaintiff discharged an engineer. The unions made a prolonged effort to have him reinstated. Officials of the national unions interfered and finally all the unions demanded the engineer's reinstatement and a revision of the schedules of wages which had been fixed in the supplemental contract. Plaintiff was given 48 hours to concede these demands; otherwise a strike was to be enforced. At this juncture, before the local unions had taken a strike vote, plaintiff filed its petition for injunction. An injunction was granted restraining the officials of the national unions from inducing a strike, and restraining the local unions and individual employees from taking a strike vote, from striking, from reporting to the national unions, and from violating the contracts they had made with plaintiff until the issues could be passed upon by a jury, the men to have the right to resign or quit but not by concerted action. In affirming this interlocutory injunction, Judge George said:

In so far as the defendants, the officials of the national union, were enjoined from inducing and compelling plaintiff's employees to engage in a strike, the injunction was authorized under the pleadings and evidence.

The court did not abuse its discretion in enjoining the defendants, the local unions and the individual employees from taking a strike vote, striking, reporting that a strike had been called or was in effect upon petitioner's road, and from violating the terms of the service contracts with petitioner, the contracts being for a definite term of service which had not expired at the time the injunction was issued.

After declaring that the injunction was too sweeping and should not extend in point of time beyond the period of the contracts, the court ordered the injunction to be affirmed and modified as to time limit.

LABOR ORGANIZATIONS—INJUNCTION—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—*Burgess v. Georgia, F. & A. Ry. Co., Supreme Court of Georgia (Sept. 14, 1918), 96 Southeastern Reporter, page 865.*—The plaintiff railway company was granted an interlocutory injunction against Burgess, Turner, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen, the Order of Railway Conductors, and the Brotherhood of Railway Trainmen, and all individual members of these unions, enjoining them from taking a strike vote or declaring a strike. Each of the defendant employees of plaintiff, although under a contract to work until October 1, 1917, resigned his position. They then proceeded to interfere with

the other employees of the plaintiff, urging them to leave or refrain from entering plaintiff's service. They also went upon the premises of plaintiff and congregated around the plaintiff's locomotives and intimidated and threatened plaintiff's employees. Plaintiff petitioned for an injunction against defendants to prevent them from going upon its premises and from interfering with its business by inducing its employees to leave by threats, coercion, menaces, intimidation, etc. Judge George, expressing the opinion of the court in sustaining the injunction, said:

In so far as the defendants were enjoined from attempting by proper argument, elsewhere than on or near the premises of the plaintiff, to persuade others from taking their places, the injunction was not authorized. Equity will not enjoin employees who have severed their connection with the service of the employer from attempting by proper and fair argument to persuade others from taking their places, so long as they do not resort to force or intimidation.

Subject to the modifications indicated, the injunction was upheld on the authority of *Jones v. Van Winkle Gin, etc., Works*, 131 Ga. 336, 62 S. E. 236 (Bul. 79, p. 965).

LABOR ORGANIZATIONS—INJUNCTION—RULE REQUIRING THEATER TO EMPLOY A CERTAIN NUMBER OF MUSICIANS.—*Haverhill Strand Theater (Inc.) v. Gillen et al., Supreme Judicial Court of Massachusetts (Feb. 28, 1918), 118 Northeastern Reporter, page 671.*—The company named operated a moving-picture and vaudeville theater and employed one Coburn, a member of the local union of musicians, as organist. The union notified the company that a minimum rule would be put in force, requiring that five musicians be employed if the company wished to have the services of any union musicians. The company brought a bill for an injunction on September 9, 1916, against officers and members of the union, as such and as representing all the members, to prevent their enforcement of the rule, which was alleged to be illegal. After playing at the performances of September 10, Coburn left the company's employment "because of the existence of the rule and the penalties incident to its violation." After a time the company secured a nonunion organist, paying, however, about twice the salary that Coburn had received. The matter was referred to a master for ascertainment of facts, and he made certain findings, one of them being that the defendants had not put in force or threatened any strike or boycott. By agreement of the parties a question as to the right of a union to put into effect such a rule as the one in question was submitted to the court. The rule was held illegal and the injunction granted, Judge Loring saying in part in the opinion delivered by him:

With this explanation the question propounded to the court by the agreement of parties is this: Is a combination between musicians a legal one by which the plaintiff is compelled to employ a number of musicians specified by the members of the combination if he wishes to employ any member of the combination, even though it be the fact that in the plaintiff's opinion the employment of a single musician is the most advantageous way of conducting his (the plaintiff's) business and that the employment of more than one musician will cause him pecuniary loss? It is manifest that such a rule is an interference with a plaintiff's right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on the business in which he or it has chosen to embark. The right to the free flow of labor is not an absolute right; it is limited by the right of employees to combine for purposes which in the eye of the law justify interference with the plaintiff's right to a free flow of labor. A combination which interferes with a plaintiff's right to a free flow of labor is legal if the purpose for which it is made justifies the interference with that right. On the other hand, it is illegal if that purpose does not justify the interference (which ensues from the making and enforcing of the combination in question) with the plaintiff's right to a free flow of labor. So much is settled in this commonwealth. [Cases cited.]

No case has gone further toward supporting the defendant's contention than *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 [Bul. No. 70, p. 747]. But that case does not go so far as to support that contention.

The question we have to decide in the case at bar is whether the doctrine of *Pickett v. Walsh* is to be extended. In *Pickett v. Walsh* a union of masons struck, that is to say, combined to refuse to lay bricks to get the work of pointing the mortar after the bricks were laid. The contractor wished to give the work of pointing to men known as pointers, who had that and that alone as their trade. In that case the complaint was made by the pointers. But that is not material. It was held that the purpose for which the combination was made, namely, to get work for members of the union, was a justification for the interference with the pointers' right to be employed to do the work and as a consequence that the combination was a legal one. But in that case the contractor wanted the pointing done. The peculiarity of the case at bar is that the work which the defendants have combined to force the plaintiff to give to them is work which the plaintiff does not want done; not only that, but it is work which if done at the plaintiff's expense will cause him pecuniary loss. The difference between *Pickett v. Walsh* and the case at bar is that in *Pickett v. Walsh* the defendants combined for the purpose of getting work which the employer wanted done, while in the case at bar the purpose of the defendants' combination is to force the plaintiff to make work for them when he does not wish to have that work done and when that work will result in a pecuniary loss for him.

LABOR ORGANIZATIONS—INJUNCTION—SECONDARY BOYCOTT—APPLICATION OF THE CLAYTON ACT.—*Duplex Printing Press Co. v. Deering et al.*, *United States Circuit Court of Appeals, Second Circuit* (May

25, 1918), 252 *Federal Reporter*, page 722.—The Duplex Printing Press Co. is engaged at Battle Creek, Mich., in making large presses of the kind used by newspapers throughout the United States and in foreign countries. Many years ago a strike was declared at its plant in an effort to unionize the company's shops. The company persisted in maintaining an open shop, however, and because the employees of the company were satisfied as to hours and pay and as most of them were nonunion workers the strike may be said to have failed. The efforts on the part of the unions were therefore transferred to other fields of endeavor, with, however, the same object, the unionizing of the company's shops. The lodges and District Council of New York of the International Association of Machinists attempted a boycott, principally in the City of New York, of the presses manufactured by the Duplex Co. Various methods of attaining this end were resorted to, including threats of injury to person and property; at times, also, assaults were made under at least very suspicious circumstances. The combined efforts of the unions had such effect as to cause this suit to be brought for an injunction to restrain the unions from maintaining their boycott. The whole contention in this case seems to rest upon the question whether or not a secondary boycott may be maintained by a labor union. The district court refused the injunction and the court of appeals affirmed this decision, Judge Rogers dissenting.

However, Judge Hough, who delivered the opinion of the court, pointed out that the very thing that the defendants were attempting had been previously condemned by the Supreme Court.

As plaintiff's business is largely interstate, and the attentions paid by defendants to plaintiff consisted essentially in trying to make it impossible for plaintiff to get its machines from Michigan to New York, or have them used there even if they successfully ran the gauntlet, it seems plain that the defendant associations have agreed to do and have attempted performance of the very thing pronounced unlawful in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622], and 235 U. S. 522, 35 Sup. Ct. 170 [Bul. No. 169, p. 140]. Therefore such interference with interstate commerce should be enjoined, unless the Clayton Act of October 14, 1914, forbids it.

Section 6 of the Clayton Act declares that labor organizations or the members thereof shall not be regarded as illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Section 20 prohibits the issue of restraining orders or injunctions against strikes, peaceful persuasion, or picketing where one may lawfully be "for the purpose of peacefully obtaining or communicating information;" or against ceasing to patronize any party to a labor dispute or "recommending, advising, or persuading others by peaceful and lawful means to do so;" or in case of a "dispute concerning terms or conditions of employment."

"These sections," said Judge Hough, "enumerate as lawful, notwithstanding any earlier statute or decision emanating from national authority, every peaceful and all the really important things the defendant associations have done."

Continuing, he said:

The question becomes this: Is the present litigation one between the employers and employees or an employer and employees, growing out of a dispute concerning terms or conditions of employment? The answer depends on whether the catalogued injuries are to be permitted only in litigations between an employer or employers and the workmen in (or perhaps lately in) their several establishments, or also in cases, however promoted, when the parties are generically the hired and the hirer, and the dispute even an offshoot or by-blow of the endless quarrel over terms of employment?

There is no ruling decision on the subject, and prognosis as to the probable disposition of the matter in a higher court, based on anything as yet published in the United States Reports, would be both unprofitable and improper. It is necessary to form an opinion as upon new matter.

There was a dispute, and one concerning conditions of employment, and at plaintiff's Michigan factory, long before this suit was brought, and before the plan of campaign—the boycott, which is the thing really complained of—was seriously attempted. The machinists' union created the dispute, by calling a strike at plaintiff's place, if it never existed before; that dispute did relate to conditions of employment, in that every striker and every affiliated machinist disputed the right of plaintiff or any other concern similarly situated to employ anyone but a member of the union; and so far as statutory interpretation is concerned it seems immaterial that no more than a trifling proportion of the workers in plaintiff's factory paid any attention to the strike order. The dispute existed, and existed from the beginning, between this plaintiff and the principal defendants, among whom are included by representation the dozen or so obedient union men in the factory. In strict truth this is a dispute between two masters, the union, or social master, and the paymaster; but, unless the words "employers and employees," as ordinarily used, and used in this statute (Clayton Act), are to be given a strained and unusual meaning, they must refer to the business class or clan to which the parties litigant respectively belong.

In so far as courts are permitted to study legislative proceedings and contemporary history for an aid in statutory interpretation, we consider it plain that the designed, announced, and widely known purpose of section 20 (perhaps in conjunction with section 6) [Clayton Act, Bul. 166, pp. 235, 236] was to legalize the secondary boycott, at least in so far as it rests on, or consists of, refusing to work for anyone who deals with the principal offender. We are earnestly told that this rule gives to the workman the choice of being a pariah or a guildslave, and to the employer a doubtful escape from bankruptcy by the path of commercial servitude. If this be true (and the writer is not disposed to question it) the result is imposed by an act of Congress; the remedy is political, not judicial.

The decree of the court below refusing to grant the injunction was therefore affirmed. Judge Learned Hand, concurring in the result of Judge Hough's reasoning, said:

I think that section 20 of the Clayton Act has legalized secondary boycotts in cases between an employer and employees, and that this was such a case, at least after the strike was declared on August 27. I do not think that the section applies only when the employer is plaintiff and his present or former employees are the defendants. Further, I think that the dispute here under any definition included the conditions of employment. I therefore concur in general in Judge Hough's reasoning and in the result, though I do not concur in all the expressions of his opinion.

Judge Rogers offered a lengthy dissenting opinion, from which the following is quoted:

The important fact to be noted is that no one of the defendants is or ever was an employee of the complainant, and that no local lodge or union or officer or member of any union, in the place where the complainant manufactures its presses, has been made a party defendant herein. The parties defendant are residents and citizens of New York, except the defendant Bramley, who is a resident and inhabitant of New Jersey, and the unions with which they are connected are local to New York and vicinity.

It is the duty of courts to protect the life, liberty, and property of all within their jurisdiction. Courts are not respecters of persons, and the rights of employers and those of employees are entitled to equal protection. Liberty of contract is a constitutional right secured to employers and employees alike. It consists in the ability at will to make or abstain from making a binding obligation. The employee has a right to choose his employer. The employer has the like right to choose his employee. The defendants insist that all they have done has been to exercise the right, which they claim for the organizations which they represent, to say that their members shall not work for the complainant or handle the complainant's product; in other words, that it is their right to say for whom their members shall work and upon what they shall work. The complainant denies that that is the sole question which the facts present.

Reference was then made to the decisions of the Supreme Court of the United States in the cases *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, and *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 Sup. Ct. 80 (Bul. 246, pp. 145-153), forbidding efforts to unionize employees under contract not to join a union. Judge Rogers continued:

The above decisions very much restrict the right of labor unions to interfere with employers of labor in the management of their business; and this court must follow the law as laid down by the court in all cases to which it is applicable. But the decision goes upon the common law of West Virginia; there being no statute affecting it and no authoritative decision of the courts of that State.

It may be conceded that the defendants were endeavoring to establish uniform conditions in the industry in which the complainant

was engaged. It follows, therefore, that under the New York law, as expounded by the New York Court of Appeals, the defendants were within their rights, unless there are other circumstances which make the rule laid down in that case [*Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582, Bul. No. 246, p. 129] inapplicable.

It is said that the defendants are not engaged in a peaceful strike, but in an alleged boycott, and that their conduct seeks to coerce complainant's customers, who are in turn to coerce the complainant into unionizing its business against its will.

A strike and a boycott are two quite distinct matters. A strike is an effort on the part of employees to obtain higher wages, or shorter hours, or a closed shop by stopping work at a preconcerted time. It is an attack made by employees upon their employer, by labor upon capital. But a boycott made by union labor against a product manufactured by nonunion labor is an attack upon both labor and capital. It is union employees on the one side and nonunion employees and the open shop employer on the other. The principles applicable to a boycott are not applicable to a strike. The strike in Battle Creek may be lawful, while the boycott of the product in New York may be unlawful. The use of the boycott is very generally held to be the use of unlawful means, and it is not material, where it is resorted to, whether the end which is sought—in this case the unionizing of the shops in Michigan—is lawful or not.

A boycott is a combination formed to injure the trade, or business, or occupation of another, by preventing other persons from doing business with him, by threatening injury to the trade, business, or occupation of those who have business relations with him.

The boycott methods used by the defendants were then recited. These are summarized as follows:

The testimony shows, not simply that the union men have been instructed not to haul or install the complainant's machines as being the product of an unfair shop, but that coercion was resorted to, by threats of taking their cards away (a very serious matter for a union man), and by telling them that they had good reasons to be afraid to look after the work of the Duplex Printing Press, and that they would blacklist the men as scabs and make trouble for them; and men under most suspicious circumstances have been assaulted and felled unconscious to the ground. They have intimidated the complainant's customers by threats to call out men engaged in other trades. The members of the different building trade-unions would be called off on a strike and compelled to quit work on a building not yet completed, and in which it was intended to install a press manufactured by complainant, so that the owner of the building feared the work on the building would be held up two or three weeks. Pickets were employed. No repairs were to be made on machines installed. Threats of putting the machines out of order were likewise indulged in by defendants. The defendants in at least one instance sought to obtain the cancellation of one of complainant's contracts; and they have sought by direct and indirect means to prevent customers from buying any of complainant's machines.

In concluding this phase of the subject it appears that, although the defendants were engaged in an undertaking which the law of

New York recognizes as legitimate, the unionization of complainant's factories, they have resorted to measures in the accomplishment of that end some of which the law does not countenance. The law does not permit either party to a labor dispute to use force, violence, threats of force, intimidation, or coercion; and words or acts which are calculated to cause one to fear injury to his person or to his business are equivalent to threats. Moreover, the law does not permit any attempt to be made to cancel contracts which an employer has made with third persons.

There is, as we have seen, evidence of threats to call out men in the building trades from work on a building under construction for a customer of the complainant, because a press made by the complainant was about to be installed in the building. A strike of that kind is a sympathetic strike; that is, one in which the striking employees have no demands or grievances of their own, but strike for the purpose of indirectly aiding others, having no direct relation to the advancement of the interests of the strikers, and courts have held that such a strike is an unjustifiable invasion of the rights of the employer. *Labatt on Master and Servant*, vol. 7, p. 8346 (Ed. 1913).

But there is, in conclusion, another phase of the matter, and one which is not the least important, which remains to be considered. The complainant is engaged, as we have seen, in the business of manufacturing printing presses in its factories in the State of Michigan. But it is also engaged in interstate commerce, as over 80 per cent of its presses are sold to customers outside of the State. The defendants, not being able to prevent the complainant from manufacturing its presses in its factories in Michigan by nonunion workers, who are contented with their hours and their wages, have sought, it is charged, to restrain its trade and commerce by making its products nonsaleable in other States by the means already set forth in this opinion. The action of defendants is claimed to be contrary to the antitrust legislation of Congress.

In my opinion the things done and threatened to be done by the defendants tend to the destruction of the complainant's interstate trade. Whether an injunction can issue depends upon the construction to be placed upon what is known as the Clayton Act, which was passed by Congress in 1914.

It is my opinion that, if the acts complained of in this case would not have been lawful prior to the passage of the Clayton Act, they are not lawful now. It relates to injunctions in a case between an employer and employees, etc. So far as the purposes of this case are concerned, it would seem to suffice to say that the parties to this suit do not come within the classification therein named. No one of the defendants is now or ever was an employee of the complainant, and the relief prayed for does not contemplate protection from strikes among complainant's employees engaged in the manufacture of its printing presses. If, however, it be contended that the intention of Congress was that the act should apply to any case growing out of a labor dispute, even though none of the parties defendant had ever been in the complainant's employ, it would not prevent the issuance of the injunction, for it is to be noted that the act does not absolutely prohibit the granting of an injunction, even in cases between employer and employees. The injunction may still be granted between an employer and employees, when "necessary to prevent irreparable

injury to property, or to a property right of the party making the application;” and it is so well settled that no citation of authorities is necessary that acts that will cause the destruction of one’s property or business, and acts that interfere with the carrying on of one’s business, destroying his custom or his profits, do an irreparable injury and authorize the issuance of an injunction.

The achievement of the end sought by these defendants is not through an appeal to the purchasing public not to buy nonunion-made machines; and the defendants have not confined themselves to withdrawing union men from complainant’s factories. The course which has been pursued has made the complainant’s presses “a contraband of commerce,” “a kind of commercial leper.” The plan has been to make the complainant’s machines unmarketable by preventing their being hauled, installed, operated, or repaired, or even exhibited to the public. If this can be done under the laws of the United States, then it seems that no manufacturer of printing presses in this country can maintain an “open” shop, and no machinist engaged in the manufacture of such presses can earn his living at his trade, unless he consents to join a union, and be bound by all its rules and regulations, and the channels of interstate commerce are practically closed against the products of an “open” shop. If the truckmen are in the unions and can not handle nonunion goods, of what use is it to ship goods from Michigan to New York? And if the unions have the right to say what goods their members shall handle, or shall not handle, what reason is there for saying that union men employed by the railroads can not refuse to handle any goods not made in an “open” shop? The railroads are common carriers, it is true; but all persons who hold themselves out as willing to carry goods for the public, draymen, carters, truckmen, wagoners, and moving van companies, proprietors of taxicabs, omnibuses, and baggage wagons, are in like manner common carriers. And they may be engaged in interstate commerce, as the goods they carry are being shipped outside the State, or have been shipped into the State to be delivered to the consignees therein.

My associates do not agree with me in the conclusion at which I have arrived. Therefore, in accordance with their opinion, and contrary to my own, the decree is affirmed, with costs.

LABOR ORGANIZATIONS — INJUNCTION — STRIKES — BOYCOTT — UNLAWFUL ACTS—*Thomson Mach. Co. v. Brown, Court of Chancery of New Jersey (July 11, 1918), 104 Atlantic Reporter, page 129.*—Plaintiff brought this action to secure a temporary injunction against the defendant and other strikers and a labor union to restrain them from committing unlawful acts in connection with a strike which was conducted at plaintiff’s plant pending the suit for a permanent injunction. The defendants and the labor union maintained a shanty near plaintiff’s plant. This shanty was placarded with posters declaring plaintiff unfair to labor. There was also a list posted at the shanty called a “black list,” on which was listed the names of the plaintiff’s workmen. The posters also called plaintiff’s workmen scabs. The labor union wrote to other unions whose work required their mem-

bers to use the machines which plaintiff manufactured and induced some of them to refuse to work with those machines unless plaintiff capitulated to the demands of the strikers. Prospective employees of the plaintiff were presented with cards bearing the same matter contained in the posters. In granting the injunction the court said:

No serious argument is made by respondents that the acts heretofore referred to were not illegal. They insist, first, that it does not appear that complainant is being injured. The free flow of labor is being obstructed, the complainant is being harassed in its business. If the threats, open and implied, of the various users of the machinery and the workers thereon are carried out, there will unquestionably be injury. This court does not wait until there is actual injury; it protects against anticipated injury. Second, respondents insist that the unlawful acts are not now being performed. So far as the placards are concerned, even after this court ordered their removal, they were retained until a few days ago. So far as written communications are concerned, there is one as recent as of April of this year. The strike is still on, and I think it is reasonable to assume that unless restrained the unlawful practices will be continued. Third, it is argued that complainant refuses to agree to mediation, and that for that reason this court ought not interfere in its behalf. As previously stated in this case, whatever the personal feelings of the court may be, it has no power to coerce an employer into mediation. If coercion be proper in any event, it is not the function of the court to apply it. There is a sharp line of division between the complainant and the respondents as to the reasons which induced the complainant to refuse to submit to mediation or arbitration. Complainant is operating an open shop, and it charges that the union insisted, before agreeing to mediate, that complainant should agree to unionize its shop. This proposition complainant rejected. Respondents do not in terms deny that this was a condition precedent; but, even if such a denial may be gathered from their papers, there is a question of fact which is not for this court, in dealing with the legal and equitable rights of the parties, to settle. The broad question of public or governmental policy which respondents seek to inject into this issue is one which must be left to some one tribunal.

There will be an injunction against the continuance of the unlawful practices heretofore referred to.

LABOR ORGANIZATIONS—INJUNCTION—STRIKES—CONSPIRACY—INJUNCTION BY FEDERAL COURTS—UNLAWFUL ACTS—FOOD CONSERVATION—*Kroger Grocery & Bakery Co. v. Retail Clerks' International Protective Association, Local No. 424, United States District Court, Eastern District of Missouri (Mar. 22, 1918), 250 Federal Reporter, page 890.*—The employees of the plaintiff formed a union, which is the defendant herein. The union declared a strike because of the failure of the manager of the plaintiff corporation to subscribe immediately to the contract presented to him, wherein it was provided,

among other things, that no person should be employed unless he was a member of the union. In connection with the strike, the employees indulged in various acts which were unlawful. The plaintiff sues in equity for an injunction to restrain said unlawful acts. Other facts of the case appear in the opinion of the court as expressed by District Judge Trieber:

The right of wage earners to organize themselves into unions for the purpose of bettering their conditions is a right which no one can question. There can be no doubt that, but for these organizations, the conditions of wage earners would have been much less endurable than they are at the present time. The law recognizes them, and has never questioned their right to exist. Nor can anyone question the right of any employees to quit their employment, whether they do it singly or collectively, whether it is done for a good reason or without cause, and no court can compel any man to work against his will. But it is a right which may cause great injury, injury to wage earners in the loss of their wages, injury to their employers in the loss of their business, and generally the greatest loss falls upon those who are the least responsible for it, the innocent public. For this reason it is a weapon that should never be used, unless all efforts of conciliation, either by conference or arbitration, have failed.

There are certain acts which have been declared by the courts, from time immemorial, to be unlawful. In the latest case decided by the Supreme Court [*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, Bul. 152, pp. 137-151] it was held that it was unlawful to intentionally do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another person's property or rights, and therefore is actionable.

On October 14, 1914, Congress passed a law, known as the Clayton Act, whereby it restricted the power of the Federal courts to grant injunctions in strike cases and conditions arising thereunder unless the strikers commit unlawful acts or threaten to cause irreparable injury to property, and there is no adequate remedy at law. As to the unlawfulness of the strikers' acts in this case the court said:

It is a mistake to suppose that by these provisions of the act any act or acts, which were unlawful at the time the act was passed, were legalized. The only effect of this act is to prevent United States courts, sitting as courts of equity, from granting injunctions in the cases mentioned therein; but so far as the legality of the acts is concerned, if they are illegal at the time, they are illegal today, and if the plaintiff has been damaged thereby, he may obtain from the courts any remedy which could have been obtained before that time, except an injunction. *Paine Lbr. Co. v. Neal*, 244 U. S. 459-471 [Bul. 169, pp. 164-167].

Now the questions to be determined in this action are whether these defendants did induce or attempt to induce any employees of the plaintiff to leave their employment by force, threats, or intimidation, or did they attempt merely to persuade them peacefully. That is the first question. It is useless for the court to review all the testimony in this case; but the court is satisfied from the great pre-

ponderance of the testimony that these acts of the defendants were not quiet and peaceable—that they used language which would naturally have an intimidating effect on those to whom it was uttered. Whether they meant to carry out these threats is wholly immaterial. The question we are concerned with is: What was the effect on those persons to whom they were applied? Another thing the evidence shows is that harsh terms, opprobrious epithets, were used toward these employees. They were called “scabs.” One man was called “Kaiser,” and while, ordinarily, that could hardly be deemed an insulting term, yet, considering the conditions now prevailing in the minds of the public toward the emperor of Germany, who is generally alluded to as “the Kaiser,” we know it was intended as a term of insult, and not of commendation. The court finds from the evidence that the efforts made to induce the employees of the plaintiff to quit their employment were not made in a peaceful manner, but were by threats, insulting language, and intimidation.

The same finding must be made in relation to the attempted boycott. So far as the distribution of the circulars is concerned, they had a perfect right to distribute them, if it was done peaceably. But the evidence shows that the picketing was not done in that manner; * * * but was done by threats and intimidation, and, practically, I may say, violence.

The next question is: Were the acts of the defendants, unlawful by reason of the fact that by ordering this strike and inducing so many of the employees of the plaintiff to withdraw from employment 85 of the 140 retail stores of this plaintiff had to be closed by reason of the strikes, causing a loss of the value of \$36,000 of perishable food, such an unlawful act as would justify this court, in view of the food conservation act of Congress, to grant the writ of injunction? That act provides:

“That it is unlawful under this act for any person or persons to knowingly commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, or distribution.”

And furthermore it makes it an offense for any person to restrict the distribution of any necessities, or do anything whereby transportation, producing, harvesting, manufacturing, supply, or dealing in any necessities of life is interfered with. If these defendants, by reason of their acts, caused a loss of all this perishable food, they were certainly guilty of the violation of this act, and in the opinion of the court it would be wholly immaterial whether it was done by violence, threats, intimidation, or otherwise. The owner of this perishable food would be entitled to the aid of a court of equity of the United States to restrain them from such acts which will cause still greater destruction of such food.

Now there is one other question which is of considerable importance. The evidence connects only a part of the defendants with these unlawful acts. But there is no question of law better settled than that an agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means, is an unlawful conspiracy, and the act of any one person, who is a party to that agreement, any overt act to carry out its objects, the objects of the un-

lawful agreement, before the object of the conspiracy has been abandoned, is the act of every member thereof. The evidence shows that all of the defendants with the exception of two were members of this union.

The court then commented on various speeches that were made by members of the union and certain advice that was given the strikers.

But, no matter what advice was given, acts of violence were committed by members of the union. They were committed for the purpose of carrying out successfully the object of the union, that is, to secure a successful strike, or otherwise put the plaintiff out of business, and every member of the union, the defendants here, is equally responsible for the acts of the others. * * * The court is of the opinion that the temporary injunction should issue against all the members of the union who are defendants in this case.

We now come to the defendant Cohn and the Meadow Brook Grocery Co. It seems that after the strike had been ordered, Mr. Cohn, although not a member of this union, did aid and encourage them to commit the acts which were committed.

There was also evidence introduced tending to show that some pickets in front of that store (the plaintiff's store which was opposite Cohn's) were advising people who wanted to go to plaintiff's store not to go there, because it was unfair to labor, and advised them to go to Cohn's store, who was fair to labor. He was present at the meetings when the reports were made, and he contributed \$25. So far as this contribution was concerned, there would, ordinarily, be nothing wrong in it. But he attended their meetings, and told them to go ahead, and before that time he had offered the sum of \$100 if they would succeed in closing up the stores of the plaintiff. That moment he made himself an accomplice of those who were engaged in this unlawful action, and is just as liable as they are, and for that reason there is no reason why the injunction should not go against him.

As to the Meadow Brook Grocery Co., there is no evidence that justifies an injunction against it. Perhaps it was not proper, from a moral standpoint, to distribute the boycott circulars; but people will frequently do things from selfishness that are not exactly ethical, yet not a violation of any law. They distributed circulars, which under the Clayton Act may be done, if done peaceably, and therefore does not justify an injunction.

For these reasons the injunction against the Meadow Brook Grocery Co. will be denied, but the temporary injunction against the other parties will be granted, upon execution by the plaintiff of a bond in the sum of \$10,000, conditioned that it will pay to the defendants, or any of them, the damage which they, or either of them, may sustain by reason of the temporary injunction, if on final hearing it shall be held that it was wrongfully granted.

Machinists, District Court, Eastern District of Missouri (June 6, 1918), 252 Federal Reporter, page 597.—The plaintiff company undertook to perform some work for the United States Government in the manufacture of munitions of war. The Government constructed and equipped a large building for the use of the company and supplied it with the needed materials. The company was to be held liable to heavy penalties for any failure to carry out its contracts with the Government. The company also kept on hand a large supply of perishable foodstuffs for the use of its employees. The employees of the company belonged to various labor unions. They conspired together to bring about a strike for the purpose of unionizing the company's plant and to secure an eight-hour working day. To make their strike successful they planned to prevent anyone from working in the company's plant and on the war materials in course of manufacture and to resort to force if necessary. The company secured an injunction at the beginning of the trial. The unions are now attacking the jurisdiction of the Federal courts over the case, both parties being citizens and corporations of the State of Missouri. The following is quoted from the decision of the court:

I am of the opinion that this court does have, and hence must retain, jurisdiction of this cause, and for the following reasons:

First, there can be no question whatever but that, as shown by the petition, plaintiff is engaged in a very large manner, and was at the time the acts done by the defendants of which complaint is made, in interstate commerce, both in its private manufacturing capacity and in the performance of its public duties under contracts with the Government.

Further, that the petition in this case well pleads the joint acts of defendants, in the formation of their unlawful confederation, and the manner in which it was attempted to be carried out, has worked, and unless restrained, will work, special and irreparable injury and damage to the plaintiff and to the Government of the United States, which, in my judgment, by reason of the provisions of the Sherman antitrust law, and in harmony with the common law against unlawful combinations in restraint of trade and monopolies, may be enjoined by plaintiff, for through such course of procedure alone lies any complete or adequate remedy against the unlawful combination and acts of the defendants averred in the bill.

In other words, in my judgment, in so far as the plaintiff in this case is engaged in doing work for the Government, not as an independent contractor with the Government, but through the occupation of property of the Government specially constructed and adapted to the carrying out of the business of the Government in the manufacture of munitions of war from the materials purchased and owned by the Government, all in pursuance of existing laws, it is acting under authority of the laws of the United States to as full an extent as though it had been incorporated under and in pursuance of national laws. In the exercise of rights so granted, and in the per-

formance of duties so enjoined by national laws, a Federal question is involved, which confers jurisdiction on this court at the suit of one specially injured, as plaintiff well pleads it is in this suit.

LABOR ORGANIZATIONS—INJUNCTION—STRIKES—PICKETING—
Truax et al. v. Bisbee Local No. 380, Cooks' and Waiters' Union et al., Supreme Court of Arizona (Mar. 5, 1918), 171 Pacific Reporter, page 121.—William Truax and his partner in the restaurant business brought suit in equity against the union named for an injunction against interference with their business. They employed in their restaurant, called the English Kitchen, 10 waiters who were members of the union named. The employers gave notice of changes in wages and hours, to take effect April 10, 1916. The union contended for a continuance of the previous hours and wages. No agreement was reached, and on April 10 the union members struck. Picketing was at once resorted to, banners being carried along the sidewalk in front of the restaurant, circulars being distributed, and the pickets talking about the matter, often in loud tones, and advising that all friends of organized labor refrain from patronizing the establishment. Truax testified that he did not know of any violence being used in connection with the persuasion exercised. The action was dismissed by the superior court, Cochise County, and the plaintiffs appealed. The decision was, however, affirmed by the supreme court, Judge Cunningham delivering the opinion. He pointed out that the employees had a right to organize to improve their conditions of employment and to strike in case of failure of agreement in regard to such conditions. The irreconcilable conflict between the decisions of various States in regard to boycotts and picketing was referred to. Calling attention to the fact that the alleged means employed to "coerce and intimidate" the plaintiffs consisted only of various forms of publicity, the author of the opinion said in part:

No right of plaintiffs is violated by publishing facts. Certainly, if a dispute between plaintiffs and a labor union exists, and one of the plaintiffs so testifies, plaintiffs have no legal right to enforce the union to keep the facts secret. The extent of the publicity given such dispute is unimportant and violates no right of plaintiffs, either civil or criminal. If the publicity given the existence of the dispute results in a loss of patronage and business to plaintiffs, such loss is attributable to the dispute, and not attributable to the publicity given to the dispute.

In this connection it is well to remember that the defendant union violated no rights of the plaintiffs in causing union members in plaintiffs' service to quit such employment. The workmen had the right to quit separately or in a body, without question, no contract to continue in the service being in existence, and having been forced

to quit the service by the union would give plaintiffs no right to complain.

Likewise, the members of defendant union violated no right of the plaintiffs by refusing to deal with the plaintiffs. The plaintiffs had no vested right in the patronage of union members. As a consequence the union members, singly or as a body, had and have the legal right to refuse to transact any business with the plaintiffs for no cause whatever, and by such refusal no right of the plaintiffs is violated.

Plaintiffs have the legal right to conduct their business as suits them, and any attempt on the part of any one to interfere with the free conduct of that business violates a right. An appeal by one deeming himself injured in some manner by the system adopted by the plaintiffs in conducting their business, to his friends and to members of and sympathizers with a union to which such an one belongs, requesting such friends, members, and the general public to cease from dealing with plaintiffs, cannot fairly be termed an interference with the methods adopted for the conduct of plaintiffs' business.

Citing the terms of Civ. Code 1913, par. 1464, permitting picketing, the court said:

Whether the picketing is peacefully carried on is a question of fact in this jurisdiction and, as is the case in all such matters, when the trial court has determined the question, and substantial evidence in support of the determination reached appears in the record, the appellate court will not interfere.

Under the evidence in this record, the court was justified in finding as a fact that the defendants were engaged in peacefully picketing about the plaintiffs' place of business.

As to certain statements on the banners and circulars, and in the street talk of the pickets, derogatory to the plaintiffs and perhaps libelous, it was said that the remedy was in a civil action rather than a suit for injunction, even though the offenders might be insolvent, and unable to respond in damages if judgment were obtained.

LABOR ORGANIZATIONS—INJUNCTION—STRIKES—PICKETING—INJURY TO BUSINESS—DAMAGES—*Baasch v. Cooks' Union, Local No. 33, et al., Supreme Court of Washington (Jan. 11, 1918), 169 Pacific Reporter, page 843.*—C. F. Baasch conducted a restaurant in Seattle, operated on the open-shop principle. The Cooks' Union named, also the Waiters' Union and the Waitresses' Union of the city, picketed his place of business with "unfair" signs. He brought suit against these bodies and the Central Labor Council, and their officers and members, for an injunction and for damages for alleged loss of business. The complaint alleged the picketing and active annoyance of patrons and threats of secondary boycotts; that the wages, hours of labor, and conditions of employment in the establishment conformed to the union standards; that the defendants had threatened to drive the plaintiff out of business, and that the amount of busi-

ness done had been much reduced. Damages were set at \$1,500. The defendants did not file any pleading, but at the hearing their counsel moved for dismissal of the action, orally assuring the court that the picketing had ceased and would not be resumed. The trial judge thereupon ordered the action dismissed, and the plaintiff appealed. The supreme court held that the dismissal was error, and remanded the case with orders to require the defendants to plead to the complaint. Judge Fullerton delivered the opinion, from which the following is quoted:

The allegations of the complaint unquestionably state a cause of action. The complaint showed that serious damage had been done to plaintiff's business, for which he was entitled not only to relief against its continuance or repetition, but also to damages for the financial loss occasioned by the wrongful acts of the defendants. But the court, with full knowledge of the injuries caused the plaintiff through the illegal conduct of defendants, refused the right of trial on the mere assurance of opposing counsel that his clients would discontinue their acts. Future good behavior has never been recognized as an antidote for past actions which have occasioned substantial prejudice to the complainant. Although the chief object of the action may have been the restraining of the continuance of the illegal acts, yet, conjoined with the demand for relief on that score, was the added demand for compensation for the injury inflicted by the wrongful acts before they were discontinued. The trial judge recognized the weakness of his position by stating at the time of dismissing the action:

"I may not have the right to do it. I think it is the part of wisdom and good citizenship and good morals to do it, and I will take the responsibility. If the supreme court says I have no right, they can say so."

We think the lower court was in error. The guide for its rulings is found in the code of legal obligations rather than in the moral code.

LABOR ORGANIZATIONS—INJUNCTION—STRIKES—PICKETING—INJURY TO BUSINESS—RIGHT TO WORK IN ONE'S OWN BUSINESS—"BANNERING"—*Roraback v. Motion Picture Machine Operators' Union of Minneapolis, Supreme Court of Minnesota (Aug. 2, 1918), 168 Northwestern Reporter, page 766.*—Roraback owned a motion-picture theater in Minneapolis. He was a qualified motion-picture machine operator, but he could not belong to any unions because the unions would not let owners, part owners, or persons interested in a business become members. It had been his custom to hire union laborers of the defendant union, but, as he says, in order to economize, he started to operate his own machines part of the usual time. The union operators refused to work because they would not work with nonunion operators and plaintiff could not belong to their union. The union bannered plaintiff's place by having a person carry a ban-

ner back and forth in front of his theater. The banner had on it the words "This place is unfair to labor." Plaintiff sued for an injunction and applied for an injunction pendente lite, for, as he alleged, his business was being ruined. This was refused in the court below, and an appeal was taken. The supreme court, owing to some doubt in the evidence, did not grant the injunction pendente lite but referred the case back for trial, using in part the following language:

Defendants may use any lawful means to accomplish a lawful purpose, although the means adopted may incidentally cause injury to the plaintiff; but they may not intentionally injure or destroy plaintiff's business to accomplish an unlawful purpose.

If men, either singly or in combination, may lawfully injure or destroy the business of another for the purpose of compelling him not to work in such business himself, it will have far-reaching consequences. Such a doctrine would limit the field of business to those who have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their own account. Such a doctrine means that a machinist who starts a machine shop may lawfully be prevented from working therein as a machinist; that a carpenter who starts a carpenter shop may be required to have all his work done by others; that a barber who opens a barber shop must cease work as a barber. It means that the man in any occupation who starts in business for himself, relying upon his personal skill and ability to attain success, must forego the right to profit by his own skill by the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right guaranteed to him by the Bill of Rights in the Constitution and by the fourteenth amendment to the Federal Constitution, and any attempt to deprive him of that right is necessarily unlawful. * * * The case is presented upon the pleadings and upon affidavits pro and con; it has not yet been tried. If, when the case is tried and findings are made determining the facts, it shall appear that plaintiff's contention is correct, he is entitled to relief, but we can not say that the trial court abused its discretion in refusing to issue an injunction before the facts are ascertained, and the order appealed from is affirmed.

LABOR ORGANIZATIONS — INJUNCTION — STRIKES — PICKETING —
STRIKE TO UNIONIZE CAFÉ—*Local Union No. 313, Hotel and Restaurant Employees' International Alliance v. Stathakis, Supreme Court of Arkansas (July 1, 1918), 205 Southwestern Reporter, page 450.*—Joe Stathakis operated two cafés in the city of Little Rock, and his employees demanded that he unionize his cafés. He refused, whereupon the employees, who were members of the appellant union, declared a strike. The union employed pickets, who bore placards saying, "This café is unfair to union labor" and "Look, Faust Café

is unfair to union labor," up and down the sidewalk immediately in front of the plaintiff's cafés. The pickets also accosted people telling them not to patronize the cafés and threatening some who would not listen to their statements. They also threw stink balls into the cafés. Some persons about to enter the cafés were seized by the arm to restrain them from entering. Stathakis sought an injunction, which was granted, and an appeal was thereupon taken by the union. In upholding the injunction, Judge Smith said in part:

It is recognized, and this court has expressly decided, that laborers have the right to organize into unions for the purpose of bargaining collectively for the betterment of their condition, and, as an incident thereto, to strike collectively. On the other hand, it is equally as well settled and as uniformly held by the courts that the labor unions have no right to resort to force, intimidation, or coercion. Publicity as well as other means of persuasion may be used; but force, coercion, and intimidation may not be used.

The labor union or its representatives and employees had the right to exhibit the placards in question to the public; but it is a far different thing to say that the right to exhibit these placards to the public carried with it the right to so patrol or picket appellee's place of business with these placards as to interfere with his lawful business.

So here the strikers and the union to which they belonged and the employees thereof had the right to give notice to the public that appellee's cafés were open shops, and therefore unfair to union labor; but, in doing this, they had no right to exercise coercion resulting from the conduct herein set forth. They were not using the streets in front of appellee's place of business for the ordinary purposes for which streets and sidewalks are intended, but were using them for the avowed purpose of injuring his business or driving away the patronage which the public might otherwise have given him. Their interference with his business was direct and immediate and was intended so to be.

The decree enjoins picketing at and near appellee's premises, and the operation of the injunction is limited to that immediate vicinity. The reason for the limitation is manifest. A presentation of labor's grievances elsewhere gives the member of the public whose support is thus solicited an opportunity for reflection; but when the picketing is conducted in the small space of the frontage of the business picketed the effect of that conduct is practically immediate. No opportunity for reflection is afforded. One must choose immediately between defying the picket and acceding to his appeal, so that interference necessarily results to the business there being conducted. We conclude, therefore, that the decree of the court enjoining the picketing under the conditions stated is right and proper, and should be affirmed.

LABOR ORGANIZATIONS — INJUNCTION — STRIKES — PICKETING —
 STRIKE TO UNIONIZE RESTAURANT—BOYCOTT—*Webb v. Cooks', Waiters' & Waitresses' Union*, No. 748, Court of Civil Appeals of Texas,

Fort Worth, (Apr. 20, 1918), 205 Southwestern Reporter, page 465.—One Mr. Childs, the business agent or "walking delegate" of the defendant, came to plaintiff and presented him with a contract whereby he would be compelled to unionize his restaurant. He refused to do this. The defendant declared a strike against him and picketed his place. The picketing was done by having persons stand outside of the restaurant and intercept people about to enter it and present them with a card saying "This café is unfair to organized labor." These pickets also verbally attempted to keep people from patronizing the restaurant. The employees of plaintiff were satisfied and were getting more pay than the contract presented by Mr. Childs would have allowed; they continued to work and made no demands of plaintiff. The lower court refused to grant an injunction. In reversing the lower court Chief Justice Conner, in giving the opinion of the court, said in part:

It therefore seems idle to say under circumstances as indicated that the acts complained of and shown are not provocative of violence and bloodshed, and do not amount to intimidation and coercion. We at least can not hide or obscure the truth with the specious contention urged therein that no open threats or violence was proven. We must know what has been frequently declared in adjudicated cases, that restraint of the mind is just as potent as a threat of physical violence.

It is further insisted in behalf of appellees, and its witnesses so testified, that the object was not to injure the appellant, but to promote the legitimate purposes of the union to better the conditions of the laboring man. Such purposes are, of course, worthy of all commendation, and by all lawful means are to be encouraged. But in the accomplishment of such a purpose care must be exercised not to invade the field of the rights of other persons; for it is a fundamental with us that all men have equal rights, that no man, or set of men, is entitled to separate public emoluments or privileges, save for public services, and that all of our citizens are entitled to the equal protection of our laws. The right of the appellant to conduct his business upon terms of equality with all other persons is an essential part of his constitutional rights as an American citizen.

It is immaterial, therefore, that appellees' ultimate object in ordering and carrying on the picketing may have been lawful; for, as said in the case from which we have before quoted at some length:

"The law looks to the immediate, and not the incidental, object of the combination. If the immediate object is unlawful, the combination is unlawful."

And inasmuch as the acts complained of constituted an invasion of appellant's rights and were voluntarily and knowingly done, it must be further held that defendants, in a legal sense, acted maliciously. Malice, in a legal sense, denotes wrongful act intentionally done without just cause or excuse.

But yet for another reason, we think the judgment below is erroneous. We are of the opinion that the acts of the appellees as al-

leged by appellant and as shown by the undisputed evidence fall within the prohibitory effect of our antitrust statutes.

As it seems to us the acts of the appellees plainly come within the meaning of a trust as above defined. [Definition was taken from article 7796, ch. 1, title 130, 4 Vernon's Sayles' Tex. Civ. Stats., p. 4808. It stated that a trust was a combination of persons, associations, etc., to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.] They combined in open meeting and formally initiated and carried into effect the picketing of appellant's premises as shown by the evidence. The direct, the immediate, object in so doing seems just as certainly to have been to create and carry out restrictions in the free pursuit by appellant of his business, which was a lawful one.

We conclude that both by the weight of authority and by virtue of our antitrust statutes the judgment below was wrong, and that it should be reversed, and here rendered for appellant; that writ of injunction forthwith issue as prayed for.

LABOR ORGANIZATIONS—INJUNCTION—STRIKES—RENUNCIATION OF ILLEGAL PURPOSE—*Baush Mach. Tool Co. v. Hill et al.*, *Supreme Judicial Court of Massachusetts (July 16, 1918)*, 120 *Northeastern Reporter*, page 188.—The defendants are two labor unions consisting of about 250 members. The strike was called in August, 1917, for the purpose of unionizing the plaintiff's shop and to limit the number of apprentices to be employed in the shop. An injunction against the maintenance of the strike was issued, and on appeal upheld by the supreme court. Judge Loring in giving the opinion of the court, said:

This is a bill in equity brought against the members of two labor unions to enjoin them "from interfering with the business of the plaintiff * * * by maintaining, carrying on, aiding or abetting in any manner the strike in force against the plaintiff." The case was sent to a master. The master found that the members of the two unions had struck to get an increase of pay, to unionize the plaintiff's shop, and to limit the number of apprentices. The plaintiff and defendants are at issue on the legality of a strike to limit the number of apprentices. But both the plaintiff and the defendants agree that a strike to unionize an employer's shop is an illegal strike and a strike for an increase in wages is a legal strike. Without question a strike for both a legal and illegal purpose is an illegal strike and no contention has been made to the contrary. It is not necessary therefore to consider the legality or illegality of a strike to limit the number of apprentices and we lay that purpose of the strike on one side as a matter of no consequence.

On the coming in of the master's report a temporary injunction against the strikers was issued and later the master's report was confirmed, whereupon 38 of the defendants moved to amend their answer. In this amendment they declared that they renounced and

abandoned the strike for the purpose of unionizing the plaintiff's shop and limiting the number of apprentices. This amendment was allowed. The 38 members, however, still remained in the unions of which they were members. When the final decree was entered the injunction included the 38 members with the rest of the two unions. This inclusion was appealed from. In deciding this point the court said:

The subsequent renunciation made by the 38 defendants "of the closed shop principle and any other unlawful object of" the illegal strike called and then maintained by the union of which they were and were to continue members and to which (illegal strike) by reason of the fact that they elected to continue members of the union they were of necessity parties was nothing more than a statement of their motive in remaining parties to the illegal strike. A party to a strike which is illegal because it is a strike to unionize a shop as well as to get higher wages is a party to an illegal strike although so far as he is concerned he either became or continued a party to it only to get an increase of pay. The 38 wanted a legal strike for an increase in pay only. That is plain. It is plain also that they wanted to get out of the illegal strike then being maintained by the union of which they were members. But they did not want to leave the union. To get out of the strike and to keep in the union they hit upon the novel scheme of renouncing the illegal purpose of the strike. But that was a futile proceeding because it was nothing more than a statement of their motive in continuing members of the union and so of necessity parties to the illegal strike. It had no effect upon their liability as parties to the strike and in the final decree no distinction should have been made between the 38 and the 212 members of the two unions here in question.

As the strike was an illegal one it is not necessary to consider whether the means employed by the defendants were lawful or unlawful.

LABOR ORGANIZATIONS—INJUNCTION—STRIKES—VIOLATION OF INJUNCTION—*Tosh et al. v. West Kentucky Coal Co., United States Circuit Court of Appeals, Sixth District (June 14, 1918), 252 Federal Reporter, page 44.*—The West Kentucky Coal Co. in 1907 brought a suit in equity for an injunction against certain persons and former employees who had declared a strike. The strike was brought on by a union called the United Mine Workers of America. The coal company was granted an injunction enjoining defendants "and all other persons whatsoever who may have acquired notice, information, or knowledge of this judgment" from interfering by threats, violence, or intimidation with complainant's employees. Tosh and his coplaintiff in error, Overby, had been employees of the coal company, but were discharged for joining the aforementioned union. They thereupon, with the aid of others, attempted to cause a strike to unionize the coal company. The coal company served

them with certified copies of the decree of 1907 and later had them prosecuted and fined for criminal contempt of court for the violation of the decree. Tosh and those with him had become members of the union since the decree of 1907. In deciding the various points of the case, and reversing the judgment of the court below, the court said:

We see no merit in the contention that the injunctive decree in the equity suit afforded no basis for contempt proceedings for its violation against parties amenable to it, upon the ground that the decree finally adjudicated the rights of the parties to it, or because of mere lapse of time since its rendition. The purpose of the decree was to restrain—it looked to the future.

Were the plaintiffs in error (Tosh and Overby) amenable to the injunction in the equity suit? The company was within its rights in refusing to employ union men and in discharging those who joined the union, and was entitled to protection against unlawful invasions of such rights. Plaintiffs in error had a right, by peaceful methods, to persuade others not to work in a nonunion mine, but had no right to attempt such result by violence or intimidation.

The inclusion of the words "and all other persons whatsoever; who may have acquired notice, information, or knowledge of this judgment," would not alone operate to make them parties to the litigation and the resulting decree. It is not even claimed that up to the time of the decree they were in privity with the defendants. Nevertheless, had the strike which was the occasion of the decree been still in progress, plaintiffs in error, by committing the acts of which they were found guilty, after actual knowledge of the injunction, would have rendered themselves amenable to it and liable for its violation. But unless the subject matter of the suit in which the injunction was issued still existed, that is to say, unless the condition out of which the alleged contempt grew was in substance the strike condition of nearly 10 years earlier, a mere continuation of it, or unless plaintiffs in error in commission of the acts charged against them in 1917 can be said to have been the associates of or to have represented the defendants in the injunctive decree, we think they can not be held amenable to the old injunction.

In our opinion, the renewed efforts of the United Mine Workers to unionize the mines, and the connection of the plaintiffs in error with such efforts, were not enough to tie the conditions of 1917 to those existing in 1907 as either to make the former but an extension of the strike of 1907 or as to make plaintiffs in error with respect to their acts in 1917 the associates or representatives of the defendants in the decree of 1907.

Under the circumstances shown here, to hold the plaintiffs in error amenable for contempt for violating the injunction made nearly 10 years before would extend the rule of the Lennon case, 64 Fed. 320 [Bul. No. 11, p. 532], as well as of the adjudications generally, far beyond any decision which has come to our attention. To our minds such extension is unwarranted upon principle, as well as unsupported by authority.

Judgment was therefore reversed.

LICENSING OF EMPLOYEES—BARBERS—PERIOD OF PREPARATION—CONSTITUTIONALITY OF STATUTE—*People v. Logan, Supreme Court of Illinois (June 20, 1918), 119 Northeastern Reporter, page 913.*—W. J. Logan was convicted of violation of a statute enacted in 1909 by employing in his barber shop a man not registered according to its provisions. The law referred to provides for an examining board of three persons, who shall give certificates of registration to persons found qualified. Three years' preparation as an apprentice or as a student in a barber school is required as a preliminary unless one has practiced the trade for three years in other States; and the applicants are required to be possessed of the requisite skill to perform properly all the duties of the trade, and to have sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof. Persons actually engaged in the occupation within 90 days after the approval of the act might be registered without examination. The act, it was contended by the respondent, was unconstitutional; but the court held that the regulation of the trade was directly related to the health and safety of the public. The registration of those already in the occupation, though objected to as making them a favored class, was held not unreasonable. As to the requirement of the three years' period of preparation Judge Dunn, who delivered the opinion affirming the conviction, said:

It is argued that the requirement of three years' service as an apprentice or study in a barber school has no direct relation to the public health or safety, but is rather intended to restrict and discourage the public from engaging in this occupation. The intention is to restrict the public from engaging in this occupation to the extent that only those may do so who have learned the trade; know how to prepare, use, and care for the tools; know what sanitary precautions must be taken to avoid the risk of spreading disease; and are acquainted with the sanitary regulations which the board of examiners is authorized by section 11 to adopt. Three years seems a long time to require for learning the trade of a barber, but we can not say that it is so unreasonably long as to constitute an unreasonable restriction upon the right to engage in the trade.

LICENSING OF OCCUPATIONS—CEMENT CONTRACTOR—CONSTITUTIONALITY OF ORDINANCE—*State ex rel. Sampson v. City of Sheridan et al., Supreme Court of Wyoming (Jan. 21, 1918), 170 Pacific Reporter, page 1.*—The State of Wyoming, on the relation of C. W. Sampson, sued in mandamus to compel the city of Sheridan and its officers to issue to Sampson a cement contractor's license. Sheridan is a city of the first class, having a commission form of government. Under the authority of the State laws relating to the subject of licenses, as

was claimed, an ordinance had been enacted by the city for the licensing of cement contractors, requiring the payment of a fee of \$15, and the giving of a bond for \$1,000 that the work done would remain in good condition for five years after its completion. The relator showed that he had been engaged in the business for 10 years, and that all the work he had done had been first class; that he had complied with all the requirements except the filing of the bond, which he was unable to procure from a surety company because he could not make a sufficient showing of his financial standing in the absence of the possession of real estate or a substantial bank account. The court found only one case involving a requirement of a bond guaranteeing the durability of the work done, *Gray v. Omaha*, 80 Neb. 526, 114 N. W. 600. The court, speaking through Judge Blydenburgh, held the ordinance invalid for reasons which are fully discussed after stating the principles applicable to the exercise of the police power, but which are also given in brief form in the following language:

Viewing the ordinance in question in the light of the above principles, we are constrained to hold that it is unconstitutional and void because: First, the vocation of cement contractor is not a proper subject of police regulation not affecting either the health, morals, safety, or welfare of the public generally so as to be a necessary subject of regulation; second, no express power to regulate this vocation is conferred upon the city, and none can necessarily be implied from the powers granted; third, were the power given, the regulations required are unreasonable, especially in requiring a maintenance bond to run five years; fourth, the ordinance is discriminatory and class legislation in that it requires a fee and bond from one laying concrete or cement sidewalks and requires neither from those laying sidewalks composed of asphalt, granite, vitrified brick or any other hard and incombustible material.

PENSIONS—OLD-AGE AND MOTHERS' PENSIONS—CONSTITUTIONALITY OF STATUTE—*State Board of Control v. Buckstegge*, Supreme Court of Arizona (July 1, 1916), 158 Pacific Reporter, page 837.—L. H. Buckstegge was a taxpayer in the State of Arizona, and brought action against the State Board of Control to restrain the payment of certain sums allowed under an initiated act of November 3, 1914 (Acts of 1915, p. 10). Payment was objected to on the ground that the act in question was invalid. Judgment was granted in favor of Buckstegge in the superior court of Maricopa County, whereupon the board appealed, with the result that the judgment of the superior court was affirmed. The title of the act is "An act providing for an old-age and mothers' pension and making appropriation therefor."

The supreme court recited the law and the facts in the case, saying that:

It will readily be seen that the purpose and intent of the act is to introduce into the laws of Arizona a pension system for the benefit of certain citizens and persons designated in the act. While the object of the act is easily determinable from its title and context, the lack of a clear statement of the means and methods of its enforcement, we think, must necessarily result in its defeat.

The first section undertakes to abolish all almshouses in the State; the grounds and buildings are to be sold, and the proceeds to be devoted to the purposes of the act. The second section establishes a pension system "in the absence of almshouses."

Two difficulties were pointed out in these sections, one that the constitution directs the establishment and support of various institutions, such "as the public good may require," and as the language of the act under consideration is broad enough to cover both private institutions and State charitable institutions, it comes into conflict with this provision of the constitution. It is also said that existing statutory provisions regulate the sale and disposal of county property, and that this act is an invalid attempt to provide a different method. Again, as the act is to be effective "in the absence of almshouses," it is ruled that until it is made clear that almshouses no longer exist, the act could not come into effect as providing a pension system.

The provision of the State constitution limiting laws to the subject matter expressed in the title is also found to be violated, since the title contains no intimation of the purpose to abolish almshouses. The result of such abolition would be to leave unprovided for all other needy adults than those specified in the act under consideration, needy men and women, citizens of five years' residence and above 60 years of age, excepting only widows and the wives of inmates of penal institutions and insane asylums who have children under 16 years of age; so also of all needy children, orphans or others, who had not a mother of the foregoing description. Such a result being in no wise indicated in the title of the act is further evidence of its being in contravention of the constitutional limitation noted.

The judgment of the court below was therefore affirmed.

PENSIONS—POLICE PENSION FUND—CONDITIONS ENTITLING TO BENEFITS—*Stiles v. Board of Trustees of Police Pension Fund of West Chicago Park, Supreme Court of Illinois (Dec. 19, 1917), 118 Northeastern Reporter, page 202.*—Arthur A. Stiles brought suit for mandamus to compel the trustees named to pay him a yearly pension of \$900, beginning June 4, 1914. He alleged that he had been a po-

liceman for the park commissioners for more than 18 years previous to June 29, 1911, on which date he was made police captain; that he performed the duties of the latter position until June 4, 1914, when he was suspended, and later discharged; that he had served more than 20 years altogether, and was therefore entitled to the pension under the act of 1913 providing for the fund, and that he had not been guilty of a felony or become a habitual drinker or a nonresident of the United States—these being the exceptions to the allowance of the benefits of the act. The defenses relied on were his discharge under the civil-service act for having entered a saloon in uniform, and at other times using vile, profane, and abusive language; and his institution of another proceeding to compel his reinstatement, the claim being that in doing this he had elected to consider himself as still a member of the force, and therefore could not apply for a pension. The case was decided in the superior court of Cook County on a demurrer to the answer, which procedure admitted all the facts alleged, but denied that they constituted a sufficient defense in law. The court sustained this contention, and granted the writ of mandamus directing the pensions to be paid; this judgment was reversed by the appellate court, but the supreme court affirmed the judgment of the trial court in favor of Stiles. Judge Craig delivered the opinion, saying that the civil-service commissioners had certain duties in connection with the hiring and discharge of policemen, but nothing to do with the pension system. The following is quoted from this opinion:

The legislature has seen fit, in plain and unmistakable terms, to fix as the only condition and prerequisite for a pension 20 years of service and ceasing from such service. The legislature has further seen fit to provide that the only acts for which a pensioner may be deprived of his pension are conviction of felony, becoming an habitual drunkard or a nonresident of the United States. Accordingly, whether the appellant was properly discharged by the civil-service board, or whether he was discharged at all, has nothing to do with his right to a pension under the statute.

It was further said that if he was successful in being reinstated, he could of course draw no pension for his period of active service; otherwise the other proceeding had no effect.

RELIEF ASSOCIATIONS — RAILROADS — ATTEMPTED REPUDIATION OF CONTRACT—STATE AND FEDERAL STATUTES—*Pittsburgh, C. C. & St. L. Ry. Co. v. Miller, Supreme Court of Indiana (June 6, 1918), 120 Northeastern Reporter, page 706.*—The railway company is a member of a relief association together with various other railroads, all of which are engaged in interstate commerce. The law of Indiana ex-

pressly declares that any and all contracts providing for the retention of part of the employee's wages by the employer for payment into relief funds are null and void. There is a Federal statute which, although it does not prohibit relief associations and contracts thereunder, regulates such contracts to the extent that they are not valid to limit the liability of the employer. Otherwise under the Federal statute such contracts are valid. Miller became employed by the defendant railroad and entered into a contract permitting the railroad company to retain part of his salary for the purposes of the relief fund. He was disabled on one occasion and received \$36 as benefits. He now sues for the money retained by the railroad company alleging that the contract was null and void under the statute of Indiana. He recovered in the lower court but this court reversed the decision, rendering a decision which reads in part as follows:

The Constitution of the United States confers upon Congress the power to regulate commerce among the several States and with foreign nations, and the power thus conferred is exclusive. The States, however, possess the power to impose by law on carriers exercising their calling in the State certain restrictions and regulations as to the conduct of their business. Such laws do not in themselves constitute a regulation of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. As to regulations of the character mentioned the power of the State to legislate is concurrent with that of Congress; and, so long as Congress does not legislate on the subject, such legislation by the State is regarded as a valid exercise of the police power of the State for the regulation of the relative rights and duties of all persons and corporations within its limits; but, when Congress acts in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceases, and all laws passed by the State on the subject become inoperative.

If the statute of Indiana was rendered inoperative by the act of Congress quoted, the fifth paragraph of the answer states facts sufficient to constitute a defense. Under the act of Congress the contract was valid in all respects, except as to the provisions by which the interstate commerce common carrier attempted to exempt itself from liability for damages.

SABOTAGE—ADVOCACY BY CIRCULATION OF POSTERS—CONSTITUTIONALITY OF STATUTE—PENALTIES—*State v. Moilen et al.*, *Supreme Court of Minnesota* (Apr. 19, 1918), 167 *Northwestern Reporter*, page 345.—A statute of Minnesota enacted in 1917 prohibits and penalizes the advocacy of criminal syndicalism, which is defined in the following terms:

Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage (this word as used in this bill meaning ma-

licious damage or injury to the property of an employer by an employee), violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

The advocacy or teaching of the things condemned, by word of mouth or the distribution of written or printed matter, is made punishable by imprisonment for not more than five years, or fine not exceeding \$1,000, or both. Voluntary participation in public assemblies for such advocacy may involve a still greater punishment, the statutory penalty being imprisonment for not more than 10 years, or fine not exceeding \$5,000, or both. Matt Moilen and others were indicted for violation of this act. One defendant, Maki, was tried separately and convicted, and before sentence was pronounced he secured the certification to the supreme court of the following questions of law:

(1) Is the statute on which the prosecution is founded a valid constitutional law? and if valid, (2) Do the facts presented by the indictment and certified record constitute a violation thereof?

Both these questions were answered in the affirmative. The question as to constitutionality is stated and discussed in the following language by Judge Brown, who delivered the opinion for the court:

It is contended by defendant that the statute violates the provisions of the fourteenth amendment of the Federal Constitution, wherein it is declared that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to him the equal protection of the law. And, further, that the statute violates the provisions of the State constitution prohibiting special or class legislation, and also the prohibition against excessive fines and cruel and unusual punishments for crimes.

The contention that the statute violates rights granted and secured by the Federal Constitution is without special merit. The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the State, arising from the practice of sabotage and other unlawful methods of terrorism employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like in terrorem methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the legislature is clear. Sabotage as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles embraces among other lesser offensive acts the willful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. The methods of terrorism referred to in the statute have close relation to sabotage, and are practiced for the pur-

is that at the time and place stated therein defendants did wrongfully and feloniously circulate, distribute, and publicly display certain written and printed matter in the form of posters (photographic copies of which were made a part of the indictment), which were posted upon certain buildings in the village of Biwabik, St. Louis County, and which contained printed matter, advocating and teaching that industrial and political ends should be brought about by crime, sabotage, violence, and other unlawful methods of terrorism.

The final question discussed by the court is whether the circulation of the posters, which were put up during the night, constituted the crime denounced by the law. The posters were small, from 1½ to 2 inches in the largest dimension, and printed in red as well as black, the red being a flag in one case and the background of pictures in the three others. Photographic copies are reproduced in the court's opinion; not, however, in colors. The first showed in the center a snarling black cat, with the words "Beware—Good pay or bum work—I. W. W.—One big union—We never forget—Sabotage" appearing above and below the picture (portions appearing on the original on one line being indicated by the dashes as given here). The words "Beware" and "Sabotage" stand out in large letters. The second had a wooden shoe, with "I. W. W." in small type above, and "Sabotage" below in comparatively large letters, with the quotation "Sabotage means to push back, pull out, or break off the fangs of capitalism. W. D. Haywood." The third had the red flag in the center, with the words "Abolition of the wage system" and a wooden shoe upon it; the words "Industrial unionism" above, and "Join the I. W. W. for freedom" below. The last was a picture of a workman with one hand uplifted, underneath which were the words "Join the one big union." The opinion concluded as follows:

The posters which defendant distributed and caused to be publicly displayed do not attempt to limit the sabotage thus advocated under the captions in large black type, "Beware," and "We never forget sabotage," to the innocent variety. And, taking all the posters together, headed by the one with the snarling black cat, we are clear that the jury were justified in finding that the vicious kind of sabotage was intended and that the public display thereof was an advocacy of such doctrine by the defendant. The whole atmosphere given out by the posters is one of intimidation, indicative of a purpose to incite fear in the employers of labor and to compel submission to labor demands. If defendant intended some innocent phase of the doctrine of sabotage he should have made it appear upon the face of the posters, and, not having done so, the jury were justified in finding that he was advocating sabotage in this offensive form.

SABOTAGE—ATTEMPT AT THE DESTRUCTION OF WAR MATERIAL—OFFENSE—*United States v. De Bolt et al., United States District Court, Southern District of Ohio (July 3, 1918), 253 Federal Reporter, page 78.*—The Ralston Steel Car Co. was engaged in the construc-

tion of 4,400 steel cars for the United States for war purposes, 400 of which were to be used in trench warfare in France. Early in June an attempt was made to unionize the company's plant. The company thereupon discharged some 10 or 12 employees. The employees belonging to the union held a meeting which one Fox, a prospective member, attended. They determined that Fox should pour vinegar into the bearings of a 9-foot spindle lathe operated by one Ingraham and also loosen the tailstock of the machine, the purpose being to injure the work on the machine and also the machine itself which was indispensable to the swift prosecution of the company's contract. Fox was suspected and watched. Upon being called to the office of his employer he recanted and confessed, disclosing all the facts. The defendants claimed that it was not possible to indict them for an attempt to commit sabotage, alleging that the law provides only for the commission of the act and moved for directed verdicts in their behalf. The following is quoted from the opinion of the court:

They therefore claim that the indictment is insufficient in law, and that if the evidence offered by the Government be accepted as true, no offense was committed, for the reason that the defendants did nothing more than to advise, solicit, and attempt to influence Fox to pour vinegar into the bearings of the lathe and to loosen its tailstock and screws.

The gravity of the situation produced by the present war is such that Congress in its wisdom was impelled to enact the wise, but somewhat drastic, law on which the indictment was based.

The indictment charges an aggravated offense much more prejudicial to the community than an indictment to steal—an incitement or solicitation to commit an offense which, if committed, would cripple the Nation in the prosecution of the present war, prolong its duration, increase its cost, and multiply the number of killed and wounded Americans. The offense charged is such as tends to aid our country's enemies, and is an attack upon our body politic; i. e., the whole body of people living under our organized political Government, and law-abiding as our citizenship is, is provocative of disorder and breaches of the peace.

The indictment is sufficient, and the evidence such as requires the submission of the case to the jury.

SEAMEN—MEASURE OF RECOVERY FOR INJURIES—*Chelentis v. Luckenbach S. S. Co. (Inc.)*, Supreme Court of the United States (June 3, 1918), 38 Supreme Court Reporter, page 501.—Peter Chelentis brought action for damages for an injury received in December, 1915, which he suffered while employed on the steamship *J. L. Luckenbach*, owned and controlled by the company named. He was performing certain duties on the deck of the vessel during a heavy wind, when a wave came aboard, knocked him down and broke his leg. When the

vessel reached shore he was taken to the marine hospital; he remained there three months, during which time his leg was amputated. He sued the company for damages at common law, waiving the right to recovery for wages, maintenance, and cure given by the maritime law. Judgment for the company was affirmed in the Circuit Court of Appeals for the Second Circuit, and the plaintiff carried the case to the Supreme Court. That court denied the common-law right and affirmed the judgment below, Mr. Justice McReynolds delivering the opinion. That the matter was one governed by the maritime law he stated as follows:

The work about which the petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance, and cure. Under the doctrine approved in *Southern Pacific Co. v. Jensen* [Bul. 246, p. 203] no State has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States."

The plaintiff, however, relied upon two statutes, the first being the judiciary act, with its clause "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." As to the effect of this the court said in part:

The precise effect of the quoted clause of the original judiciary act has not been delimited by this court, and different views have been entertained concerning it. In *Southern Pacific Co. v. Jensen* we definitely ruled that it gave no authority to the several States to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations."

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized by the common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

That the Seaman's Act of 1915, which provided that seamen having command shall not be held to be fellow servants with those under their authority, was also ineffectual to give the plaintiff in the present case, even though a negligent order of the master caused the injury, damages larger than those included in the scope of the maritime law, which provides only for wages, maintenance, and cure, was maintained in the concluding paragraph of the opinion here quoted:

Section 20 of the seaman's act declares "seamen having command shall not be held to be fellow servants with those under their authority," and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of a crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore.

SEAMAN—WAGES—PAYMENT IN PORT—ADVANCES MADE IN A FOREIGN PORT—*Sandberg v. McDonald*, *Supreme Court of the United States* (Dec. 23, 1918), *39 Supreme Court Reporter*, page 84.—Sandberg and other seamen shipped on board the British ship *Talus* in Liverpool, where advances were made to them not in excess of one month's wages. Such advances are valid under the British laws. The seamen, when the vessel arrived at Mobile, Ala., demanded one-half of their wages as provided under the laws of this country. They were paid one-half of the wages earned after deducting the amount of the advances. The seamen claimed that they were entitled to one-half the total wages due them without regard to the advances, alleging that the payment of advances being illegal under the Seaman's Act (Mar. 4, 1915, ch. 153, 38 Stat. 1165), the advances could not properly be reckoned in determining the amount due them. The district court gave judgment in favor of the seamen. On appeal the Circuit Court of Appeals reversed this judgment, whereupon a writ of certiorari was brought to this court. Judgment was rendered affirming the decision of the Circuit Court of Appeals by a divided court. Mr. Justice Day, in expressing the majority opinion, said in part:

The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that such advancements shall in no cases, except as in the act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to foreign vessels? We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels "while in the waters of the United States."

Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. We think there is nothing in this section to show that Congress intended to take over the control of such contracts and payments [of advances] as to foreign vessels except while they are in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

In the same section, which thus applies the law to foreign vessels while in the waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction, a purpose so wholly futile is not to be attributed to Congress. *United States v. Freeman*, 239, U. S. 117, 120, 36 Sup. Ct. 32. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

It is said that the advances in foreign ports are against the policy of the United States, and, therefore, not to be sanctioned here. As we have construed this section of the statute, no such policy as to foreign contracts legal where made, is declared.

Affirmed.

Justices McKenna, Holmes, Brandeis, and Clarke dissented, and Mr. Justice McKenna, in giving the dissenting opinion, spoke, in part, as follows:

It is conceded, yielding to the authority of *Patterson v. the bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821 [Monthly Labor Review, February, 1919, pp. 253-256], that the act applies to American seamen shipping in an American port upon foreign vessels, but it is contended from that case and other cases that it ought "to seem plain on principle and authority that the advancement statute has no effect except upon advancements made to seamen within the territorial jurisdiction of the United States." And, indeed, it is insisted that Congress "ex industria in terms confined the application to the waters of the United States." The conclusions are deduced from the cases which are reviewed and the language of the act.

We can not concede the qualification nor doubt the power of Congress to impose conditions upon foreign vessels entering or remaining in the harbors of the United States. And we think that the case of the *Eudora* declares the grounds of decision. Its principle is broader than its instance and makes the vessel and its locality in the waters of the United States the test of the application of the act and not the nationality of the seamen, nor their place of shipment, nor contravening conventions, and precludes deductions and advances.

Nor is there obstacle in the penal provisions of the act. They may be distributively applied, and such application has many examples

in legislation. It is justified by the rule of *reddendo singula singulis* [referring particular things to particular matters]. By it words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction. The seamen's act especially invokes the application of the rule. The act applies to foreign vessels as explicitly and as circumstantially as it does to domestic vessels. Let the foreign vessel be in the waters of the United States and every provision of the act applies to it as far as it can apply.

We are, therefore, of the opinion that the district court was right in refusing to allow the Liverpool advances and the Circuit Court of Appeals was wrong in reversing the ruling.

This case was immediately followed by the cases of the *Rhine* and the *Windrush* decided together on substantially the same facts. The same decision was handed down by the Supreme Court of the United States as in the case of the *Talus*, the same justices dissenting for the same reasons as above stated.

SUNDAY LABOR—EXCEPTIONS IN LAW—OPERATION OF MOVING-PICTURE THEATER—*Capital Theater Co. v. Commonwealth, Court of Appeals of Kentucky (Jan. 22, 1918), 199 Southwestern Reporter, page 1076.*—The theater company was sought to be subjected to the penalty prescribed for violation of the law relating to Sunday work by the operation of a moving-picture theater on Sunday. The Court of Appeals of Kentucky, in upholding a judgment for the Commonwealth, Chief Justice Settle delivering the opinion, said in part:

The only work or business excepted by the statute is such as appertains to the "ordinary household offices, or other work of necessity or charity or work required in the maintenance of operation of a ferry, skiff, or steamboat, or steam or street railroads." The exceptions enumerated exclude other exceptions.

If the running of a ferry, skiff, steamboat, steam or street railroad on the Sabbath was not regarded by the legislature as a work necessarily coming within the meaning of the words, "or other work of necessity or charity," found in the statute, and, for that reason, was declared permissible, it was equally necessary for the statute to declare permissible the work of maintaining a moving-picture theater on the Sabbath, which is far less a work of necessity or charity than that of operating a ferry, skiff, steamboat, steam or street railroad. So, logically speaking, if the latter work does not, in the absence of a declaration in the statute to that effect, come within the meaning of the words, "work of necessity or charity," how can it be said that the work of operating a moving-picture show on Sunday does come within their meaning?

It was further held that "the inhibition of the statute applies whether the work forbidden to be done on the Sabbath be for profit or amusement," and that the fact that in this instance the theater was run for profit rather aggravated the offense than diminished it.

WAGES—MINIMUM WAGE—CONSTITUTIONALITY OF MASSACHUSETTS STATUTE—DECREE—*Holcombe v. Creamer*, *Supreme Judicial Court of Massachusetts, Suffolk* (Sept. 23, 1918), 120 *Northeastern Reporter*, page 354.—This is a petition by the minimum wage commissioners against owners or officers of laundry concerns to compel them to furnish the commission with information as to the wages paid by the laundry companies to women and children in their employ. In accordance with the provisions of the act establishing a minimum wage commission, an investigation was made into the wages and conditions of employment of women and children in laundries. The wage board, after considering the reports, fixed what it considered a just minimum wage, and a decree was issued by the commission directing all the laundry companies to obey this finding. Later the commission directed an investigation to determine just how far the decree had been obeyed by the laundries. Chief Justice Rugg, in considering the case, rendered a rather lengthy opinion from which the following is quoted:

The question presented by this record is the constitutionality of St. 1912, ch. 706, as amended by St. 1913, chs. 330 and 673, and St. 1914, ch. 368 [Bul. 166, p. 120-130; Bul. 186, p. 184], establishing the minimum wage commission.

It is manifest from the summary of its various provisions that the act is not mandatory as to the rates of wages. It contains no words of compulsion upon either employer or employee. It does not restrain freedom of action by either employer or employee as to the wages to be paid or received. Any woman and her employer may make and enforce any agreement respecting compensation for her labor unhampered by any provision of the act. There is no constraint affecting property or conduct. The act does not purport to exercise any check with respect to liberty of contract, use of property, or management of business. * * * Although in several places in the act occur the words "decree" and "decree of its findings," it is manifest that they signify only advisory suggestions and not authoritative directions. "Decree" is not used in its judicial sense in the statute. It is the equivalent of counsel succinctly stated.

After reviewing various compulsory statutes designed to correct industrial evils, which, although mandatory in nature, were declared constitutional, the court continues:

Reference is made to these authorities solely to indicate the range of the public interest respecting matters of private relations, and not to intimate whether they afford any foundation for a compulsory minimum wage law. These decisions rest at bottom on the proposition that the public welfare in respect to health, morals, and safety bears so close a relation to the subjects dealt with in the several statutes as to justify legislative regulation.

Unless it can be said to bear no relation whatever to legitimate public interest or to be a palpable invasion of private right, liberty, and property without constitutional warrant, the decision of the general court [legislature] as embodied in the statute must stand.

There is no undue invasion of the right of privacy assuming that that is an element of the constitutional right to seek and obtain "safety and happiness."

Since the statute is not compulsory either in form or effect, there is no ground for holding that it is invalid because not affording equal protection of the laws. Whatever might be said about certain provisions of the act in this regard, if it were mandatory, there is no occasion now to discuss that matter.

The analysis of the act already made demonstrates that it is not open to objection as an unconstitutional delegation of legislative power. In this respect the statute is well within the authority of numerous decisions.

There is no criminal element about the act so far as it concerns the employer. The facts which the commission is authorized to ascertain and the evidence which it is empowered to seek from employers can not form the basis of a criminal proceeding, because no crime is created and no prosecution is provided for. Revealing the information or answering the questions required by the statute can not subject the employer to penalty or forfeiture, and does not expose him to imputation of crime. Therefore the constitutional prohibition against a subject being "compelled to accuse or furnish evidence against himself" is not violated.

The act as it has been interpreted does not seem to us to violate any provision of the fourteenth amendment to the United States Constitution.

Writ to issue.

Having upheld the constitutionality of the statute for the foregoing reasons, the court refused to consider its possible unconstitutionality if the act had been a mandatory one. It also refused to make a "prophecy" as to whether such an act would or would not be declared unconstitutional by the United States Supreme Court in construing it in the light of the fourteenth amendment to the United States Constitution.

WAGES—MINIMUM WAGE—CONSTITUTIONALITY OF WASHINGTON STATUTE—NATURE OF EMPLOYMENT—RELEASE—*Larsen v. Rice*, Supreme Court of Washington (Apr. 3, 1918), 171 Pacific Reporter, page 1037.—The workmen's compensation law of Washington was enacted in 1913, and provides for the determination by the industrial welfare commission, after investigation by an advisory conference, of minimum rates of wages to be paid in any industry or line of employment. The employment of a woman or minor at a lower wage than that fixed is punishable as a misdemeanor, and it is also provided that an employee may recover in a civil action the difference between the amount of the legal minimum wage and the amount actually received. The plaintiff in the present case, Lillian Larsen, had been employed by J. D. Rice as a ticket seller in a

moving-picture house at \$3 per week of 39 hours, and had been paid this amount during 56 weeks, in which time she had been absent from duty a total of 7 days. The wage fixed by the commission as a minimum for cashiers, and also for clerical work generally, was \$10 per week of 48 hours. The plaintiff at first based her claim on a flat rate of \$10 per week, but later modified it by claiming \$10 for each 48 hours' work. On this basis the superior court of Lewis County gave her judgment for \$278.87, which was affirmed by the supreme court. The question of the constitutionality of the law was briefly answered by a reference to the decision of the Oregon supreme court, affirmed by the Supreme Court of the United States, sustaining the validity of the similar Oregon law, and by the statement that the reasoning of the Oregon court in the cases before it "appeals to us as sound and conclusive." (*Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743 (Bul. No. 169, p. 173); *Simpson v. O'Hara*, 70 Or. 261, 141 Pac. 158 (Bul. No. 169, p. 172).)

As to the inclusion of the work done by the employee among the employments enumerated by the commission, the court held that, whether or not it was work as a cashier, it was at any rate clerical work. It was noted that the precise employment came to the attention of the conference in its investigations.

The claim had at one time been compromised by the payment of \$40 (by a check which apparently was not cashed) and the making of an agreement that the ticket seller should be employed for three hours each day, from 7 p. m. to 10 p. m., at a wage of \$5 per week. The court said that while it is the general rule that compromises are favored by the law, and will be allowed to stand, in the absence of fraud, this rule should not be followed in the present case. Speaking on this point, Judge Fullerton, who delivered the opinion, said:

But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The State, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage, and by giving to the employee a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not therefore intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a

controversy arising out of a failure to pay the fixed minimum wage in which the State did not participate is voidable, if not void. Especially must this be so, as here, where the contract of settlement is executory, has been repudiated by one of the parties, the parties can be placed in statu quo, and the wage earner, by carrying out the contract, will not receive the wage to which she is justly entitled. One has but to glance at the terms of the proposed settlement in this instance to see that the respondent will not receive thereby any just equivalent for the sum which she agreed to surrender. Our opinion is that it is such a contract as the courts are not required to enforce, and that it would be against the policy of the statute to do so.

WAGES—PAYMENT—PENALTY—CONSTITUTIONALITY OF STATUTE—
Moore v. Indian Spring Channel Gold Mining Co., District Court of Appeal, California (May 28, 1918), 174 Pacific Reporter, page 378.—Moore and his assignors were employed as miners by the defendants. The employment was by one Mushrush who agreed to pay plaintiff \$3.50 per day for an 8-hour day. Plaintiff worked for defendants several months until the end of August, when the mine became flooded and plaintiff was discharged. Mushrush, however, refused to pay plaintiff and his assignors (other miners) their wages for the month of August. Plaintiff brought action under a law of California (ch. 663, Acts of 1911 as amended in 1915, Bul. 186, p. 87) which provides that when discharged an employee's wages become at once due and payable, and further provides that, in case of nonpayment, the wages are to continue for 30 days as a penalty. The only issue in this case is the constitutionality of this law under the Constitutions of the United States and California. In holding this law constitutional, after reviewing various authorities and decisions, the court announced the following conclusion:

It is not to be expected that the laborer upon whose service these industries depend will give his service without assurance of receiving the reward promised for such service, and any law whose object is to give to the laborer some further assurance that he will be promptly paid for his labor, in addition to his employer's promise, would seem to be reasonable, especially as the object is to induce, if not to compel, the employer to keep faith with his employee, and imposes a penalty only when he commits a wrong which not only injures the employee, but is an injury to the public in its tendency to deprive the public of an incidental benefit which comes from the employee's labor. The law imposes no unreasonable burden upon the employer, for, operating as it does in the future, and disturbing no vested right, he must, and it is but fair he should, make provision to pay his employee before hiring him, failing in which he should pay the penalty. Many enterprises require the services of large numbers of men—the numbers shifting from day to day—some being discharged and others taken on the job. It is common knowledge that a refusal to pay discharged men under such circumstances would tend to create breaches

of the peace and disturb the public tranquillity. The intention of the penalty imposed by the act in question is to make it to the interest of the employer to keep faith with his employees and thus avoid injury to them and possible injury to the public at large.

We can discover no ground for holding the act to be violative of any provisions of our constitution, or that it violated the fourteenth amendment of the National Constitution.

WAGES—PAYMENT—TENDER—PENALTY—GROUNDS FOR DISCHARGE
—*Dickinson et al. v. Atkins, Supreme Court of Arkansas (Jan. 28, 1918), 200 Southwestern Reporter, page 817.*—T. E. Atkins brought suit against Jacob M. Dickinson, receiver, and the Chicago, Rock Island & Pacific Railway for wages, interest thereon, and penalty for refusal to pay on demand after discharge; also for damages for alleged unlawful discharge, by way of injury to his reputation for honesty. Atkins had been a station employee at a wage of \$53 per month. He was discharged on January 15, and was not paid the sum of \$25.14 due him at the time of his discharge, although he demanded it. On January 31 a check for that amount was tendered him, and he refused to accept it, claiming under the State statute a penalty, consisting of the amount of his wages until settlement should be made. At that time nothing was said about interest, which would amount to slightly less than 4 cents. The employee contended that since the interest due had not been tendered, the penalty continued to run after the time of the incomplete tender. The court denied this, although on general principles he would be entitled to interest. The amount was so small in this case that it was disregarded under the legal maxim, *De minimis non curat lex*. However, it was held that the interest would continue to run until settlement.

The employee had at times been short in his accounts, but had promptly made adjustment. Inefficiency on his part was claimed. On Friday before his discharge a package containing a pearl valued at \$300 had arrived by express. The employee placed it, as he said, on the desk or in a pigeonhole, but on the owner's agent calling for it it could not be found. He was discharged on Monday, and that night the package was found on the floor under the safe, close to one of the wheels. In one count of his complaint, Atkins claimed damages for wrongful discharge, alleging that the station agent had trumped up a charge of his misappropriation of the package, in order that a relative of the agent might secure the position, and that the accusation of dishonesty had injured his credit with the railroad and the express company, and his standing in the community for integrity. On this count damages were allowed by the jury in the sum of \$500. The court held that the provision of

the statute for the recovery of damages in a suit for wages and penalties did not warrant the inclusion of a separate cause of action for a wrong, but merely, in the case of wrongful discharge of an employee engaged for a definite term, allowed recovery of the amount of his wages for the time between the discharge and the termination of the contract period, minus the amount which he had been able to earn during that time. In the present instance it was held that the circumstances warranted the discharge, therefore the judgment of the trial court was modified by the elimination of the \$500 allowed under this count, leaving the wages due to the 15th, interest thereon, and wages up to the 31st, when the tender was made, as a penalty.

WAGES—PUBLIC EMPLOYMENT—OVERTIME WORK—*Wright v. State, Court of Appeals of New York (Feb. 26, 1918), 119 Northeastern Reporter, page 83.*—George S. Wright was employed by the State as a lock tender on the Erie Canal during the seasons of 1893 and 1894, from May 1 to December 1. The superintendent fixed his compensation at \$42.50 per month, and he received this amount monthly and receipted for it. He worked 7 days per week and 12 hours per day, being relieved by another who completed the 24 hours. In 1895 he filed a claim to compensation for overtime, under the law of 1870, amended in 1894, fixing eight hours as a day's work for mechanics, laborers, and workingmen employed by the State, and, in the amended form, that they shall receive not less than the prevailing rate of wages in the locality in which employed. The court of claims, which found, as a matter of fact, that the prevailing rate of wages for such work in the locality where Wright was employed was \$1.50 per day, gave judgment for overtime pay as claimed for the entire two seasons, holding the original law sufficient to warrant this. The appellate division, however, modified this to allow recovery only from May 10, 1894, when the amendment became effective, since the original law, while it fixed eight hours as a day's work, said nothing about compensation. The latter judgment was affirmed, after being again modified by the allowance of the interest claimed, from the time of filing the claim. The contentions on the part of the State that the claimant was not a mechanic, workingman, or laborer within the meaning of the statute, and that he had waived his claim by signing the monthly pay roll as a receipt for his wages, were overthrown in reaching the conclusion that the plaintiff was entitled to judgment.

WAGES—SECURITY FOR PAYMENT—CONTRACTORS' BONDS—*National Market Co. v. Maryland Casualty Co., Supreme Court of Washington (Feb. 21, 1918), 170 Pacific Reporter, page 1009.*—The city of Seattle contracted with C. W. Coit for a public improvement, and

Coit and the Maryland Casualty Co. executed a bond to secure the payment of claims for labor and materials. In June, 1916, the contractor was indebted to seven laborers in sums aggregating \$221.50, and issued checks to them for the amounts due. The laborers all transferred their checks by indorsement and delivery to the National Market Co., being paid in full either in merchandise or money. The company presented the checks to the bank on which they were drawn, and payment was refused because there were no funds on deposit. They remained unpaid, and the market company filed with the city its claim against the contractor and the surety, and commenced this action against the latter. The court stated that the question involved was whether the transfer of the checks constituted an assignment of the debts, and if so, whether it carried the right to security from the bond. The decision of the same court in the case *Northwestern National Bank v. Guardian, etc., Co.*, 93 Wash. 635, 161 Pac. 473, is referred to as going "a long way toward answering this question in the affirmative." The checks in that case were time checks, or certificates that the laborers had worked a certain length of time and were entitled to the payment of a certain amount, and were transferred by a formal assignment indorsed upon them; while in the present instance ordinary negotiable bank checks had been given, and transferred by indorsement in blank and delivery. It was held that, though the instruments did not exhibit upon their face the nature of the indebtedness, the company succeeded to all the rights of the laborers against the employer and the surety company. The judgment of the trial court dismissing the suit, on the ground that the complaint did not state a cause of action, was reversed, and the case remanded for further proceedings.

WAGES—SECURITY FOR PAYMENT—CONTRACTORS' BONDS—MATERIALS—SUPPLIES FOR WORKMEN—*Brogan v. National Surety Co.*, *Supreme Court of the United States* (Mar. 4, 1918), 38 *Supreme Court Reporter*, page 250.—The Standard Contracting Co. undertook to do some dredging work in St. Mary's River, Mich., and executed the usual bond to which the defendant was surety for "labor and materials for the prosecution of such work." The contracting company, because the place of work was so isolated, was compelled to board and lodge its workmen. This it did in accordance with an agreement with the labor unions, and plaintiff supplied the groceries used to feed the workmen. This was an action to recover the value of the same. A judgment in Brogan's favor had been rendered in the district court, along with other claimants, but the circuit court of appeals threw out Brogan's claim, whereupon the case was brought to the Supreme Court. Here the judgment of the

court of appeals was reversed and that of the district court reinstated. Justice Brandeis, in giving the opinion of the court, said in part:

This court has repeatedly refused to limit the application of the act [act of 1905 providing for bond] to labor and materials directly incorporated into the public work.

The bare fact that the supplies were furnished to the contractor and were consumed by the workmen in its employ would have been immaterial. A boarding house might be conducted by the contractor as an independent enterprise undertaken solely to utilize the opportunity for separate and additional profit afforded by the congregation of many laborers in the locality where the work is being performed. The laborers might resort to such boarding house in the exercise of individual choice in the selection of an eating place. Under such circumstances the furnishing of supplies would clearly be a matter independent of the work provided for in the contract and would not entitle him who had furnished the groceries used in the boarding house to recover on the bond. But here, according to the undisputed facts and the findings of the trial court, the furnishing of board by the contractor was an integral part of the work, and necessarily involved in it. Like the supplying of coal to operate engines on the dredges, it was indispensable to the prosecution of the work, and it was used exclusively in the performance of the work. Groceries furnished to a contractor under such circumstances and consumed by the laborers, are materials supplied and used in the prosecution of the public work.

WORKMEN'S COMPENSATION—ACCIDENT—HEART FAILURE AFTER EXHAUSTING LABOR—*Guthrie v. Detroit Steamship Co., Supreme Court of Michigan (Mar. 27, 1918), 167 Northwestern Reporter, page 37.*—Ada A. Guthrie was awarded compensation by the industrial accident board of Michigan for the death of her husband in the employment of the company named, which occurred April 30, 1916. Heart failure in the form of mitral regurgitation was the direct cause of his death, and this occurred during a moment of rest between periods of lifting over a shaft a metal cover weighing between 150 and 175 pounds, three men being engaged in the work. The temperature of the room was between 75° and 78°, and there was some ventilation. The deceased had worked from 7 a. m. to 3 p. m., and from 5 p. m. up to the time of his death at 11 p. m. The court, following the same line of reasoning as in the Roach case (see p. 153), and the Tackles case (see p. 156), decided at the same time; held that the nature of the work being done, the heat, the long hours, or a possible misstep by the employee did not constitute an unusual or fortuitous happening which made the injury an accidental one. As in the Tackles case, Judges Fellows and Moore concurred only because the principle had been established by a majority ruling in the

Roach case. Quotations are here given from the opinion delivered by Judge Stone, showing the attitude taken with regard to the various features of the case:

It is, as we understand it, the claim of the appellant that there was nothing about the work, or employment, that was accidental or even unexpected, that the work was proceeding in the manner intended, and that there was nothing fortuitous occurred while the work was proceeding.

Upon the subject of the place where the men were working, it may be said that it was not even unusual. The undisputed evidence shows that the temperature was from 75° to 78°, which was about what is termed summer heat. The evidence shows that steam had been off for 20 hours, and the room in which the work was being done was ventilated by two portholes, 12 inches by 14 inches in diameter, one on each side, and two large doors, one open to the dock and the other to the river. Claimant's physician testified that the temperature was not an excessive heat, and would not have produced death from heart disease. So we repeat that it can not be claimed that the temperature in which claimant's decedent was working was unusual or fortuitous.

Upon the subject of strain: Deceased was a machinist, and was employed to do any machine work that the foreman or the superintendent directed him to do. The work that he was doing at the time of his death was ordinary work, the same class of work he was doing before, apparently no more strenuous than his other jobs. We think, therefore, it can not be claimed that there was anything fortuitous in the lifting of the cover; and there was nothing fortuitous about the work.

Upon the subject of long hours, it can not be said that the working day was out of the ordinary. The testimony is undisputed that deceased had worked longer hours before, having worked 31½ hours on April 21 and 22.

The burden certainly is upon claimant to show that there was an accident; and there was nothing fortuitous in the long working day. No claim is made that the place itself was unsafe or insecure. There was no claim or evidence that the deceased slipped, and there was nothing on the platform that would cause one to slip or fall. The undisputed evidence is that they were just dry planks—not even grease spots upon them. There is nothing from which it can be inferred that the deceased slipped or stumbled. It can not be assumed that the man made a misstep, and then again assumed that such misstep caused fright, and then again assumed that the fright caused the heart to stop. This would be not only basing an assumption upon an assumption, but would be taking one into the realms of conjecture.

It is the claim of appellee here that death was due to an accidental injury arising out of the employment of the deceased, and it is said:

"The industrial accident board having found as a fact that the combined circumstances resulted in the death of the deceased, their finding is final and can not be reviewed, provided, however, that there is any legal evidence produced to support such finding."

Was there any evidence to support such finding? We think there was none. An examination of the findings of the board shows that its decision is based upon and sought to be justified by the follow-

ing cases: *La Veck v. Parke, Davis & Co.*, 190 Mich. 604, 157 N. W. 72 [Bul. No. 224, p. 226]; *Schroetke v. Jackson-Church Co.*, 193 Mich. 616, 160 N. W. 383; *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, 158 N. W. 1027 [Bul. No. 224, p. 320].

While the *La Veck* case is a border line case, there was evidence there of overexertion and excessive heat, a condition which was clearly unusual if not fortuitous; and the *Schroetke* case is clearly distinguished from the instant case. We can arrive at no other conclusion than that the claimant has failed to show by any evidence that the death was due to accident. The record is entirely barren of any evidence of an accident.

That an injury received by a workman while engaged in his usual work, without intervention of something unusual or fortuitous, is not an accident, is now so well established by our decisions that the proposition needs no discussion. [Cases cited.]

In our opinion, there was no evidence to support the finding of the industrial accident board, and its award and order are reversed.

WORKMEN'S COMPENSATION — ACCIDENT — HEAT PROSTRATION — WORK IN BOILER ROOM—*Roach v. Kelsey Wheel Co., Supreme Court of Michigan (March 27, 1918), 167 Northwestern Reporter, page 33.*—George Roach met his death through heat prostration while placing new brickwork around a boiler in the plant of the company named, on July 27, 1916. This was the fourth day of his employment on this job, and during the period the temperature, even outside the building, was extremely hot. It was said that at the place of employment the temperature was 136°.

He had suffered ill effects the previous days, and had been laid off a part of the time. He was prostrated at 4 p. m., and died between 6 and 7 o'clock. The majority of the court held that there was no evidence of accidental injury, and reversed an award to Phoebo Roach, widow of the deceased employee, made by the industrial accident board. Judge Brooke delivered the prevailing opinion, and said in part:

The record is absolutely barren of any evidence that anything untoward or unusual happened in the course of his employment during any of the three days or that he exerted himself in any unusual manner or to an unusual degree. He was doing the work which he and his associates were employed to do exactly in the manner they expected to do it. To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler in the performance of his ordinary and accustomed labor succumbs to heat prostration.

The Michigan compensation act provides compensation for accidental injuries only. *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485 [Bul. No. 169, p. 258]. Recovery here is predicated upon the cases of *Schroetke v. Jackson-Church Co.*, 193 Mich. 616, 160 N. W. 383, and *La Veck v. Parke, Davis & Co.*, 190

Mich. 604, 157 N. W. 72 [Bul. No. 224, p. 226.] I am of opinion that neither case is authority for the determination of the board, but that compensation should have been denied under our holdings in *Kutschmar v. Briggs Mfg. Co. et al.*, 163 N. W. 933, and *Johnson v. Mary Charlotte Mining Co.*, 165 N. W. 650.

Judge Fellows delivered the opinion for himself and another dissenting judge, and from this the following is quoted:

That he collapsed on the premises of the defendant while in its employ is admitted; that he was within the ambit of his employment is not questioned; he was in the course of his employment beyond doubt. That he was a man in robust health with no predisposition to disease, and temperate in his habits, the record discloses. The board found that he suffered a heat stroke which was brought upon him by the superheated condition of his place of employment, and the testimony abundantly supports such conclusion. That he fell instantly upon an excessive exertion in shoving the heavy truck loaded with brick and mortar after working in the heat under the boiler appears from the testimony of his fellow employee who was by his side when he fell. This is not a case of a workman being subjected to the ordinary heat of a summer day which is an incident in the life of all, but is a case where to the natural heat of a hot summer day was added in the particular place of his employment so many degrees of artificial heat as to make it well-nigh intolerable, and the men could stand it but a short time, and changed frequently. The case is very much like that of *La Veck v. Parke, Davis & Co.*, 190 Mich. 604, 157 N. W. 72 [see above], and is controlled by it. If anything, it is stronger for the plaintiff than was that case.

WORKMEN'S COMPENSATION — ACCIDENT — HEAT PROSTRATION — WORK IN BOILER ROOM — *Walsh v. River Spinning Co.*, *Supreme Court of Rhode Island* (July 5, 1918), 103 *Atlantic Reporter*, page 1025. — Action was brought by Mary Walsh, under the workmen's compensation act, for the death of her husband from an accident arising out of and in the course of his employment in the service of the River Spinning Co. Walsh was employed by the defendant in its boiler room on September 17, 1915. The temperature out of doors that day was warm; the temperature in the boiler room where three boilers were being operated was excessive. The other fireman employed with Walsh had been compelled to leave his work because of the great heat in the room. In the afternoon of the same day Walsh was overcome by the excessive heat, and was afterwards taken to a hospital, where he died from heat exhaustion on the morning following. The defendant contended that death from heat exhaustion is not death from accident but death from disease, and is to be classed with heat stroke and sun stroke as an inflammatory disease of the brain; and that recovery can not be had under the compensation act. Justice Sweetland, expressing the opinion of the court affirming an award in

the claimant's favor, referred extensively to English and American cases, discussing them at length, and especially the case of *Fenton v. Thorley* (1903) App. Cas. 443, Lord Macnaghten, Justice. The opinion of the court is in part as follows:

From all this discussion, however, covering many pages in the reports, the conclusion of Lord Macnaghten, which in a later case he referred to not as a definition, but merely a decision that the word [accident] was to be taken in its ordinary and popular sense, has been accepted as, on the whole, the best interpretation of the expression. Applying that interpretation to the facts of the case at bar, it appears to us that the unusual and excessive heat in the boiler room, producing the sudden inability of the physical system of John Walsh to longer resist its debilitating effects, constituted a chain of circumstances which may fairly be regarded as an unlooked-for mishap not designed and undoubtedly unexpected. If by reason of the condition of the floor of the boiler room the deceased had slipped and fallen, as a result of which a disease had developed in his brain causing his death, we think no one would have questioned that his injury was produced by accident. Can it be reasonably regarded as otherwise when by reason of the high temperature of the air in said room his physical and mental stability is overthrown, and a physiological derangement is set up which causes his death? The respondent has claimed that the effect of the heat upon said Walsh was not sudden, for he complained of it in the forenoon. That he should have been made uncomfortable by the heat was to be expected; but the collapse of his physical resistance may fairly be said to have been sudden. We think that in thus viewing the occurrence we have not confounded the injury with the accident. The untoward event which in this case produced the disability from which John Walsh died was the aggregate of the circumstances culminating in the breaking down of his physical stamina.

The defendant argued that the accident in this case was in the same class with heat stroke and sun stroke, which the defendant described as inflammatory diseases of the brain. The court after pointing to several cases where recovery was had for sun stroke and heat stroke said:

In all cases of this character, involving injury by accident arising out of the forces of nature, the controlling consideration has been whether or not the situation of the injured workman was such that the injury by accident can properly be said to arise "out of" his employment. When, however, a workman has been injured in the course of his employment by reason of being subjected to certain conditions incident thereto and not common to the neighborhood or the whole community, then without question the injury was received in the course of his employment and arose out of it. Of this nature were the injuries received by John Walsh in the case at bar. The view which we have taken that such injuries may properly be considered as accidental is supported by a number of cases which deal with heat stroke.

WORKMEN'S COMPENSATION — ACCIDENT — HEAT PROSTRATION —
WORK IN LUNCH ROOM—*Lane v. Horn & Hardart Baking Co., Supreme Court of Pennsylvania (May 6, 1918), 104 Atlantic Reporter, page 615.*—Lane was employed by the defendant company at its lunch counter. Lane was overcome by heat while working at this lunch counter on a hot August day in 1917 and died within two hours. His widow brought proceedings under the workmen's compensation act for compensation, and was granted an award. The employer appealed and claimed that the death of Lane was not such an accident as may be compensated for under the act. The opinion of the court upholding the award is in part as follows:

Upon the facts involved Commissioner Scott says:

"* * * There is nothing in the statement to show that [the temperature of] the place where the employee was working was hotter than the outside atmosphere, or that he was affected by different heat conditions than prevailed in the community at large."

In cases such as the one at bar, the character and cause of the injury must be considered, in order to determine whether the results complained of are properly attributable to "accident," within the meaning of that term as used in the act of June 2, 1915 (P. L. 736) [Bul. 203, p. 796]; for wherever death is mentioned in the statute, it means death resulting only from unforeseen violence to the physical structure of the body and its resultant effects, or in other words, death from an "accident" happening in the course of the deceased person's employment, as distinguished from either ordinary or occupational disease developed during the course of such employment.

The commissioner's findings are that the statement of facts contained therein "precludes any other cause of death than that of heat exhaustion or prostration due to the heated condition of the atmosphere"; hence we must take it no organic weakness or occupational disease can be accounted the proximate cause of the death of claimant's husband, but the casualty was attributable solely to the unexpected and violent effect of the heat upon the physical structure of deceased's body, and this was properly held by the compensation board and the court below to be an accidental death within the meaning of the act.

WORKMEN'S COMPENSATION — ACCIDENT — HERNIA —*Tackles v. Bryant & Detwiler Co. et al., Supreme Court of Michigan (Mar. 27, 1918), 167 Northwestern Reporter, page 36.*—Charles E. Tackles developed an inguinal hernia while lifting a heavy timber in the course of his employment with the company named. The question at issue before the supreme court being whether or not this constituted an accidental injury under the Michigan compensation law, the court rendered a decision similar to that in the Roach case, decided at the same time (see p. 153), holding that there was no accidental injury, and setting aside the award of the industrial accident board. Two judges concurred only because they felt bound by the majority deci-

sion in the Roach case, in which their personal views had been overruled. This award was of the difference between his weekly wages before the injury and those which he was able to earn after it, to be determined by the board from time to time in case of failure of the parties to agree upon the amount. From the opinion delivered by Judge Stone the following is quoted:

It will be noted that, while claimant was performing his usual duties connected with his employment as a civil engineer, it became necessary with the assistance of another, to lift a heavy block of timber weighing approximately 200 pounds; also that he felt a severe pain in his right groin while lifting; that he did not slip or fall, nor did the timber which he was lifting strike him. Nothing out of the ordinary happened, because he had lifted such timbers before, when such action was necessary in the performance of his duties; and down to the time of the hearing he had remained at work continuously. It seems to us that these facts conclusively show that claimant did not receive an accidental injury within the meaning of the act.

WORKMEN'S COMPENSATION — ACCIDENT — HERNIA — PREEXISTING DISEASE—*Puritan Bed Spring Co. v. Wolfe, Appellate Court of Indiana (Oct. 18, 1918), 120 Northeastern Reporter, page 417.*—Wolfe was in the employ of the Puritan Bed Spring Co. and had suffered from hernial trouble. While lifting a bale of wire weighing 150 pounds to a rack 4 feet high he strained himself, causing his intestine to protrude into the hernial sac, causing a strangulation and necessitating an operation in order to save his life. The company had actual notice of the injury. The company admits that if the injury would have occurred had there been no disease a recovery could be had, but deny that a recovery can be had where the existence of a disease has made the employee more susceptible to the particular injury which resulted. The court, in affirming the award allowed by the industrial board, said:

Appellant [company] concedes, and correctly so, that where an employee affected with disease received a personal injury under such circumstances that the act in question would entitle him to compensation had there been no disease involved, and such disease is hastened to a final culmination by the injury, there may be an award if it is shown that such injury was the result of the accident; that in such cases the court will not undertake to measure the degree of disability due, respectively, to the disease and to the accident, but the consequence of the disease will be attributed solely to the accident.

The mere fact that the appellee's [Wolfe's] condition made him more susceptible to the particular injury which resulted in his disability furnishes no ground for holding that the disease or condition, rather than the accident, was the proximate cause of the injury upon which the allowance for disability is based. We recognize that there is a line of compensation cases in other jurisdictions which

give to the word "accident," used in the respective compensation acts, a restricted meaning which in a measure justifies appellant's contention; but the weight of authority and the better reason, we think, favors the adoption of the popular meaning of said word, which includes "any unlooked-for mishap or untoward event not expected or designed." This court has given to said word the popular meaning indicated.

WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—ANTHRAX—*McCauley v. Imperial Woolen Co.*, *Supreme Court of Pennsylvania* (May 6, 1918), *104 Atlantic Reporter*, page 617.—McCauley was engaged by the defendant company as a wool sorter. In the course of his work while sorting wool he received a slight abrasion on his neck. To use his words he "got stuck with a sticker." This abrasion became discolored and after three days McCauley died from anthrax. The evidence showed that he had been inoculated with the disease by germs contained in the wool entering the abrasion on his neck. Among some questions of procedure the question as to whether McCauley's death was caused by accidental injury or by an occupational disease also arose. The widow was awarded compensation and the employer appealed. On this appeal the supreme court sustained the award, giving the following opinion, after considering the various provisions of the compensation act referring to accident:

It is plain from these provisions that the act before us contemplates injuries by accident only, and therefore does not cover what are termed "occupational diseases."

It remains but to show that, in this case, the entry of the anthrax germ into the body of the deceased, and the disease or infection which naturally resulted therefrom, can be held properly to constitute an accident within the meaning of the act. If the incident which gives rise to the injurious results complained of can be classed properly as a "mishap," or "fortuitous" happening—an "untoward event, which is not expected or designed"—it is an accident within the meaning of the workmen's compensation act.

When, however, death results from germ infection, to bring a case of this character within the act of 1915 *supra*, the disease in question must be a sudden development from some such abrupt violence to the physical structure of the body as already indicated, and not the mere result of gradual development from long-continued exposure to natural dangers incident to the employment of the deceased person, as in cases of occupational diseases, the risks of which are voluntarily assumed. Here the anthrax germ, a distinguishable entity, came into actual contact with the deceased, thus gaining an entrance into his body, and his neck began to swell and discolor; therefore the complaint from which McCauley died can be traced to a certain time when there was a sudden and violent change in the condition of the physical structure of his body, just as though a serpent, concealed in the material upon which he was working, had unexpectedly and suddenly bitten him.

WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—ARSENICAL POISONING.—*Matthiessen & Hegeler Zinc Co. v. Industrial Board, Supreme Court of Illinois (June 20, 1918), 120 North-eastern Reporter, page 249.*—Proceedings were brought by the administrator of Joseph Adrian for compensation for his death against the Matthiessen & Hegeler Zinc Co. The arbitrator granted an award in favor of Adrian's dependents under the workmen's compensation act. The Industrial Board reviewed and allowed the award. The case was certified to the circuit court and affirmed and again certified to this court. Adrian had been in the employ of the company for 38 years and up to the date of his death. During the last 15 years of his service he was a fireman. It was a part of his duty to devote 45 minutes twice each day to scraping the scum or oxide from the surface of the molten zinc ore in the furnace of the company. This scum was very hot and gave off fumes when it cooled. When scraped out of the furnace it was dropped on a platform. There was a hood over the furnace but not over the platform and as a result the workman breathed the vapors and gases given off by the cooling scum or oxide. These vapors contained lead, zinc, and arsenic fumes. On October 6, 1914, Adrian became ill and, on October 14, he died. The doctors stated that he died from arsenical poisoning; that this poison accumulates in the body over a long period and finally a climax comes and the person dies. The company had never in 50 years had such a case, nor did it have any case of sickness or death from poisoning. The company declared that the workmen's compensation act covers only accidental injuries, and that Adrian's death was caused by an occupational disease. In affirming the award the court said:

The word "accident" is not a technical legal term with a clearly defined meaning, and no legal definition has ever been given which has been found both exact and comprehensive as applied to all circumstances. * * * The meaning of the word as used in the workmen's compensation act is necessarily influenced by various provisions of the act and the purpose of its enactment, and can not be determined, alone, from any definition found in a dictionary. The act was designed as a substitute for previous rights of action of employees against employers and to cover the whole ground of the liabilities of the master, and it has been so regarded by all the courts. * * * It is therefore clear that the words "accident" and "accidental injury," used in the act, were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed; also, to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to limit such compensation.

The words "accident" and "accidental injury" imply, and the provision for notice to the employer within 30 days after the accident and his report to the Industrial Board of accidental injuries

show, that an injury, to be accidental or the result of an accident, must be traceable to a definite time, place, and cause; but if there is such a definite time, place, and cause, and the injury occurs in the course of the employment, the injury is accidental within the meaning of the act and the obligation to provide and pay compensation arises.

The second objection to the judgment is that Adrian died from an occupational disease incident to the business of smelting. A disability caused in that way or from that source is not to be regarded as an accident, because such a disease has its inception in the occupation and develops over a long period of time from the nature of the occupation and not from any unusual or unforeseen cause or event. For the prevention of such diseases there is a statute requiring the employer to use certain precautions for the safety of the employee, and an action may be maintained against the employer for failure to comply with the provision of the act. * * * There is no evidence tending in any degree to prove that the arsenical poisoning of Adrian was a disease incident to the occupation of the plaintiff in error [zinc company].

WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—POISONING FROM PAINT FUMES—*Industrial Commission of Ohio v. Roth, Supreme Court of Ohio (Apr. 2, 1918), 120 Northeastern Reporter, page 172.*—Roth, the plaintiff in this case, was a boy about 18 years of age in the employ of McFeeley Bros. His occupation was that of a common laborer. McFeeley Bros. had accepted and complied with the workmen's compensation act and its requirements. On November 8, 1915, in the course of his employment Roth was ordered to do some painting on a house in the course of construction. The paint would not flow because of the cold. Roth's foreman then ordered him to take the paint to a small building and heat it, which he did. This small building had no ventilation except the door and windows which were closed. This heating had to be repeated several times throughout the day and following days while Roth worked at this task. The heated paint gave off fumes which were poisonous and which were inhaled by Roth. On the evening of the second day Roth became ill and this illness increased until his death on the 26th day of the same month. The Industrial Commission refused to grant an award, which decision on appeal was reversed and error is now brought to this court. The sole question is: Did Roth die from an occupational disease? The opinion of the court sustaining the award as for an accidental injury is in part as follows:

In the construction of the law it is the duty of a court to give to words their usual and ordinary meaning, such meaning as they import to mankind in general, and not a forced or unusual definition, which may in its last analysis be technically correct, but wholly at variance with the common understanding of men. Applying this fair and reasonable rule of interpretation to the term "occupational dis-

ease," it follows that an "occupational disease" is not only a disease incident to a particular occupation, but that it is a disease developed in the usual and ordinary manner by reason of and because of the occupation in which the person suffering therefrom is or was engaged.

An "accident" is some happening that occurs by chance, unexpectedly, and not in the usual course of events. It is something that might possibly be prevented by the exercise of due care and caution. In this particular case, if the young man had understood the deadly nature of the fumes he was breathing, he could easily have escaped all danger by opening the doors and windows of the room in which the paint was being heated, and the fact that the accident might easily have been avoided readily distinguishes it from an occupational disease; for, notwithstanding the fact that more than two centuries ago occupational diseases had become so well known as to justify their treatment in a separate volume in the medical literature of that day, nevertheless science has been unable to discover any positive means and methods of prevention. These diseases are incident to certain employments, yet with full knowledge of that fact human foresight can not defend against them. The fact that this injury resulted in a disease that is incident to diverse occupations does not bring it within the doctrine announced by this court in the case of *Industrial Commission v. Brown*, 170 N. E. 744 [Bul. 224, pp. 305, 306]; for this accident might have happened to any person, regardless of occupation, who had occasion to enter this building at the time this folly was being perpetrated.

We are therefore of the opinion that the term "occupational disease" must be restricted to a disease that is not only incident to an occupation, but the natural, usual, and ordinary result thereof; and held not to include one occasioned by accident or misadventure.

WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—WOOD ALCOHOL POISONING—*Fidelity & Casualty Co. v. Industrial Accident Commission, Supreme Court of California (Feb. 25, 1918), 171 Pacific Reporter, page 429.*—This is a proceeding brought by the employer and the insurance company to review an award granted by the Industrial Accident Commission to one De Witt, an employee of the employer, Jacoby Bros. De Witt was occupied as a show card sign writer. In making colors and applying them he used wood alcohol. During the rush of a very busy period about January 7, 1914, he was compelled to use a far greater quantity of wood alcohol in his work than was his usual custom. On the date above mentioned his eyes suddenly caused him great trouble, and on the 13th he was no longer able to use his eyes for any work. The opinion of the court is in part as follows:

It is the contention of the petitioners herein that the injury suffered by the applicant under the state of facts as found by the commission was not "an injury sustained by accident" within the meaning

of that phrase as used in the foregoing excerpt from the workmen's compensation act.

This court has, however, heretofore held that the phrase "injuries sustained by accident" as used in the workmen's compensation act is to be given the broader interpretation in harmony with the spirit of liberality in which it was conceived, and in which by the terms of the act we are required to construe it so as to make it applicable to injuries to workmen which are unexpected and unintentional, and which thus come within the meaning of the term "accidents" as it is popularly understood. In adopting this interpretation of the terms of the act above referred to we have been mindful of the source from which our statute was evidently derived, viz, the workmen's compensation act of England, enacted by Parliament in the year 1897, under section 1 of which employers are declared to be liable to their employees for "personal injuries by accident arising out of and in the course of the employment." Construing this act of Parliament, Lord Macnaghten, in the leading case of *Fenton v. Thorley, Ltd.* (1903), A. C. 443, said:

"The expression 'accident' is used in the public and ordinary sense of the word as denoting an unlooked for event which is not expected or designed."

Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant as set forth in the findings of fact of the Industrial Accident Commission and for which he was awarded compensation was an "accident" within the meaning of the act.

WORKMEN'S COMPENSATION — ACCIDENT — RUPTURE OF DISEASED AORTA, CAUSED BY EXERTION—*Indian Creek Coal & Mining Co. v. Calvert et al.*, Appellate Court of Indiana (May 22, 1918), 119 *Northeastern Reporter*, page 519.—This was a proceeding by Laura Calvert and others to obtain compensation for the death of Addison Calvert, a miner employed by the company named. He had been considered a strong, healthy man, up to the day of his death, but was addicted to the excessive use of intoxicants. He and his son, who worked together, moved a partly loaded car of coal for a distance, receiving help from two other miners for part of the way, which was up grade. He complained of pain in his side, but went on, and with his son began the loading of the car. Very soon he became worse, and collapsed, dying some two hours afterwards. It proved that the aorta had been ruptured and that it had been in a diseased condition which would have resulted in his death eventually if it had continued, even without severe exertion. The industrial board held that the injury was an accident arising out of his employment, and made an award to his dependents. On appeal, after an examination of the British and American cases, this was affirmed by the court, one judge dissenting.

WORKMEN'S COMPENSATION—AID BUREAU—CONSTITUTIONALITY OF STATUTE—EVIDENCE—*Murphy v. George Brown & Co., Supreme Court of New Jersey (Feb. 18, 1918), 103 Atlantic Reporter, page 28.*—Dennis Murphy, while at work for the concern named, burned his fingers with acid. An infection developed, and he died from the effects. The widow of the deceased did not file any petition for compensation, and the workmen's compensation aid bureau certified a statement of facts to the judge of the Essex County Court of Common Pleas in accordance with chapter 54 of P. L. 1916, the act by which the aid bureau was created. Nora Murphy, the widow, was named by the bureau as petitioner. The judge appointed counsel for the petitioner, heard the cause, and rendered judgment awarding her compensation, including \$150 for legal expenses. The company then sued out a writ of certiorari, bringing the case before the supreme court.

The first point made was that the act did not conform to the constitutional requirement that "Every law shall embrace but one object, and that shall be expressed in the title." The title of the act is, "An act creating a workmen's compensation aid bureau in the department of labor." This was held to state the object of the act, the change made in the procedure in the court of common pleas being merely a cognate matter, which need not be expressed in the title. Taking up the contention that the obligation of contracts was impaired by the provision that no binding agreement may be made by the employer and employee as to the amount of compensation due, without the approval of the aid bureau, the court showed that this would not be true, whether the contract of hiring was made subsequent or previous to the passage of the act. The imposition upon the employer of liability for legal expenses was held not to be a change in the contract of employment, but merely in the remedy and procedure for its enforcement.

The evidence of fellow employees had been admitted as to statements made by the deceased, before and during the time when his fingers were being bandaged, as to the cause of the accident. These statements were held to be a part of the *res gestae*, and therefore admissible.

The judgment of the court below was therefore affirmed.

WORKMEN'S COMPENSATION—ALIEN BENEFICIARIES—*Southwestern Surety Ins. Co. et al. v. Vickstrom et al., Court of Civil Appeals of Texas (Mar. 20, 1918), 203 Southwestern Reporter, page 389.*—Vickstrom suffered accidental injuries while in the course of his employment by C. Flanagan & Sons, at Port Arthur, Tex., from which he

later died. His employers at the time were subscribers and carried an insurance policy for Vickstrom's benefit with the South-western Surety Insurance Co. Compensation up to the time of his death, aggregating \$145.20, was paid Vickstrom. After his death liability to pay any further compensation was denied, primarily on the ground that the claimants were nonresident aliens. These claimants were the present appellees, Gustava and Irene Vickstrom, his mother and sister, and were residents of the Grand Duchy of Finland, Russia. Mr. Justice Graves, expressing the opinion of the court in favor of the claimants, adopted the trial court's statement that "the fact that the plaintiffs in this case are aliens constitutes no bar to their recovery, since neither under the workmen's compensation act, nor under the general law of this State, are they denied right to inherit," as fully stating the plaintiffs' personal rights.

WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—BURNS RESULTING FROM SMOKING—*Whiting-Mead Commercial Co. v. Industrial Accident Commission, Supreme Court of California (July 3, 1918), 173 Pacific Reporter, page 1105.*—Plaintiff was engaged in wrecking some houses and had in its employ one Miguel Duarte. While at work on one of the company's jobs he ran a nail into the palm of his right hand, but the wound was not severe enough to prevent him from working, although it had to be bandaged. Twice during the day the bandage was soaked with turpentine by an agent of the plaintiff in an endeavor to alleviate the pain in the wound. After the second saturation of the bandage, Duarte temporarily ceased his labors and struck a match for the purpose of lighting a cigarette. The saturated bandage became ignited and he was severely burned. Duarte sought and was awarded compensation by the Industrial Accident Commission, and the company brought writ of review. The supreme court in affirming the award adopted the opinion of the district court of appeal from which court this cause was brought, which is in part as follows:

From these cases there is deducible a rule which is thus stated in one of them [*Archibald v. Ott*, 87 S. E. 791, Bul. 224, pp. 293-294]: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents

resulting from the employment." Are we to place the use of tobacco in this list of ministrations to the comfort of the employed? Is its use necessarily contemplated in the course of such an employment as that in which Duarte was engaged? The petitioner in answering these questions in the negative, places great dependence in the argument that tobacco is used to appease a self-created appetite and not a natural appetite. The argument does not appeal to us. In an endeavor to determine what indulgences of human beings are responsive to the demands of natural, what to unnatural, appetites, we should be carried to the depths of biological and physiological research. Such labor is not necessary. We have the tobacco habit with us and must deal with it as it is.

WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—HEAT PROSTRATION—WAGON DRIVER—*Campbell v. Clausen-Flanagan Brewery, Supreme Court of New York, Appellate Division, Third Department (July 1, 1918), 171 New York Supplement, page 522.*—Campbell was employed by the defendant as a driver on one of its brewery wagons. There had been a long period of excessively hot weather. On August 1, 1917, Campbell began work at 7 o'clock and delivered 91 half barrels of beer at 11 places in Flushing, N. Y. About 3 o'clock of that day he was driving the wagon about 5 miles from the city of New York when he stopped the horses, alighted from the wagon, and walked around. About 10 minutes later he dropped dead, apparently from the heat. The State Industrial Commission in refusing an award said that the heat prostration which resulted in death was an accidental injury, which occurred in the course of the employment, but that it did not arise *out of the employment*. In affirming the commission's decision Justice Cochrane said in part:

The question is whether the deceased by reason of his employment was subjected to a special and increased hazard not common to the public in general, but because of the particular circumstances under which he was required to work.

The facts in this case are undisputed. The question as above enunciated depends on inferences to be drawn from such undisputed facts. Whatever answer the commission gives to the question finds support in the evidence and is binding on this court.

It was a question of fact for the commission to determine whether the deceased was specially affected by the severity of the heat by reason of his employment. * * * From all the circumstances the commission was justified in drawing the inference that the heat prostration which caused his death did not arise "out of" his employment, and that conclusion is not reviewable.

WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—INJURY COMMON TO PUBLIC—*Cennell v. Oscar Daniels Co., Supreme Court of Michigan (Sept. 27, 1918), 168 Northwestern Reporter, page 1009.*—Cennell and two other complainants, Boissineau and

Buvia, were in the employ of the defendant. On May 15, 1917, the three men were directed to load 13 iron-mixer wings upon the launch *Ralph T.* and take them to Brady Pier on the water front and unload them. They had proceeded as far as Brady Pier, where they found the United States buoy tender *Clover* moored alongside. Upon inquiry they found that the *Clover* would move in about 10 or 15 minutes, so they moored their launch at the rear of the *Clover* and to Brady Pier and decided to wait until the *Clover* left and made room for them. Brady Pier is under the control of the United States Engineer Department, but the defendant had permission to use it. While waiting the complainants went to an adjoining dock to watch a city scavenger dump his load. There were some dynamite caps in the load and they exploded, killing Cennell and three others and injuring the other two claimants. A committee on arbitration allowed the claimants awards for compensation and the Industrial Accident Board affirmed the awards. Justice Brooke, in setting aside the awards, said:

We have frequently held that, in order to entitle the injured person to compensation under the act, the injury must arise out of the employment as well as in the course of the employment. An injury arises out of an employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between conditions under which the work is required to be performed and the resulting injury. The injury must be the result of one of the risks incident to the employment. Applying these rules to the case under consideration, how can it be said that the employment of Cennell, Boissineau, and Buvia subjected them to the risk of death or injury from which they suffered. Their duties required them to load the mixer wings from defendant's dock on the Fourth Lock at Sault Ste. Marie and transport them to Brady Pier and there unload them. Their duty to their master neither required them to nor warranted them in wandering from the immediate scene of the contemplated operation and gratifying an idle curiosity. The premises where the accident occurred, and where they had no business, were not under the control of their common master. The scavenger, whose possible negligence caused the disaster, was a municipal employee. We feel bound to determine, therefore, that the accident causing the injuries did not arise out of the employment. Assuming, however, that the presence of the claimants in the vicinity of the scavenger's wagon was justified, which can not properly be done, then in suffering death and mutilation from the explosion the claimants were subjected to no greater and different risk than that sustained by every member of the general public within the zone of the blast. Three other persons were killed, one totally unconnected with the operation. An injury resulting from a risk common to the general public may not be compensated.

WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT—SCOPE OF EMPLOYMENT—WILLFUL MISCONDUCT—*Merlino v. Connecticut Quarries Co., Supreme Court of Errors of Connecticut (July 23, 1918), 104 Atlantic Reporter, page 396.*—Merlino was employed by the defendant in its quarry. On the day of the accident he quit work at 5.30 p. m. when the whistle blew and proceeded to the commissary, which was placed near the quarry by the defendant for the convenience of its workmen. Merlino was carrying two empty wooden boxes and at the commissary he met his child, whom he took up in his arms. At the commissary he stopped to talk a few minutes. When about 60 feet from the commissary he was struck by a rock from a blast and killed. It was the custom of the company to blast 10 minutes after work ceased and to give 5 warning whistles, upon which everyone in the vicinity must seek shelter. The whistles were blown by the company on the day of the accident and the blasts were not let off until nearly 10 minutes after work. The opinion of the court is as follows:

The injury arose out of the employment at a place within the danger zone created by the business of the employer. That being so, the only question remaining is whether it was fairly consistent with the performance of the contract of employment that Merlino should be at or about the place at or about that time. In *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 386 [Bul. 224, pp. 310, 311], we pointed out that, where an injury arising from a risk of the business is suffered while the employee, though not doing the work for which he was employed, is still doing something which the employer has expressly or tacitly consented that his employees might do incidentally to their employment, at that time and place, the injured employee is within the scope of his employment. That rule is applicable to this case, and it leads to the inquiry whether the respondent had consented that his employees, on quitting work, might stop at the commissary, and so remain within the danger zone created by the business for the space of 10 minutes after the quitting whistle blew. While there is no explicit finding on this precise point, it is a necessary inference from the findings that the employer had so consented.

Merlino's failure to obey this rule [to take shelter when warning blew] was a careless and perhaps a negligent omission; but it was not such serious and willful misconduct as amounts to a defense under the workmen's compensation act.

The judgment of the lower court vacating the award in favor of Merlino's widow was set aside and an order entered to affirm the award granted by the commissioner.

WORKMEN'S COMPENSATION—AWARDS—CONCURRENT AWARDS—DISFIGUREMENT—*Erickson v. Preuss et al., Court of Appeals of New York (May 7, 1918), 119 Northeastern Reporter, page 555.*—Matilda Erickson was employed by Max Preuss in a laundry when her hair was

caught in a revolving shaft and she received serious injuries, including extensive laceration of the scalp and facial injuries which resulted in a long scar across the face, concerning which the commission found: "This scar draws the skin into large folds at the inner angle of each eye." The commission awarded the claimant compensation in the amount of \$1,000 for the disfigurement, and continued the case for a further hearing on her claim for compensation for impairment of earning capacity, the extent of which impairment could not be ascertained at that time. The provision for compensation for serious facial or head disfigurement was added by chapter 622 of the Acts of 1916, and permits the allowance of such compensation as the commission deems equitable and proper, in view of the disfigurement, not exceeding \$3,000. The court held that concurrent awards may be made for disfigurement and for disability or loss of earning power, provided that it clearly appears that the award for disfigurement does not include anything for the loss of earning power. This clearly appearing to be true of the present award, it was affirmed.

WORKMEN'S COMPENSATION—AWARDS—REVIEW—*Georgia Casualty Co. et al. v. Industrial Accident Commission, Supreme Court of California (Jan. 24, 1918), 170 Pacific Reporter, page 625.*—Laura Sims was awarded compensation for the death of Lewis Hicks, and the award was later increased. The alleged employer, Robert Sherer & Co., and the Georgia Casualty Co., insurer, brought writs of review. In considering the increased award, a construction of sections 25 and 82 of the compensation law was necessary. Section 82 provides that the commission within 245 weeks of any award may review, diminish, or increase any compensation award upon the ground that the disability of the person in whose favor it was made has either increased, diminished, or terminated. Section 25 provides that the commission shall have continuing jurisdiction over all its orders, decisions, and awards, and may at any time, upon notice, rescind, alter, or amend any such order, decision, or award. The court held that, in order to harmonize the provisions of the two sections, section 82 must be construed as limiting the more general terms of section 25, and as permitting review, diminution, or increase of awards only in cases where the occurrence of new facts arising after the date of the original decision requires such change. Since there were in the present instance no such new facts warranting the increase, the increased award was annulled and the original award affirmed.

WORKMEN'S COMPENSATION—AWARDS—SUCCESSIVE AWARDS—INJUNCTION PENDING APPEAL—*Employers' Mutual Insurance Co. v. Industrial Commission of Colorado, Supreme Court of Colorado (June 3, 1918), 176 Pacific Reporter, page 314.*—One Pier was injured severely while in the employ of the Leyden Coal Co. He applied for and was awarded compensation, which was to continue only for 22 weeks, the commission retaining jurisdiction of the case, because the extent of the injuries could not be definitely determined. This award was made in August, 1916. In June, 1917, after application by Pier, the commission made another award granting him the maximum compensation for permanent total disability. The insurance carrier, plaintiff here, appealed to the district court and asked for a temporary injunction, which was refused. When appeal was brought here the same application was made and refused. The court, in holding that the award and proceedings before the commission were correct and proper, said in part:

The insurance company applied in the district court for an injunction against the enforcement of the award of the commission until the court had passed upon the questions involved. That application was denied below and renewed here, where it was again denied.

It is to be noted in this connection that the judgment of the commission in favor of a claimant is prima facie evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the legislature that payment of these weekly allowances should not be stayed. Indeed, to hold that such payments could be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law.

WORKMEN'S COMPENSATION—AWARDS—SUCCESSIVE AWARDS—SUBMISSION TO OPERATION—*Enterprise Fence & Foundry Co. v. Majors, Appellate Court of Indiana (Nov. 26, 1918), 121 Northeastern Reporter, page 6.*—Majors was in the employ of appellant foundry company when he received an injury to his index finger described as a "twist and laceration." He and the foundry company, his employer, entered into an agreement which was ratified by the Compensation Commission by which Majors was to receive \$6.81 per week during permanent disability. The physician wanted to amputate the finger, but Majors declared he wanted him first to try to save it, as it was said that that was possible. Infection set in and the finger was amputated, and Majors and his employer made a supplemental agreement whereby Majors was to receive \$6.81 weekly for 15 weeks. Later the infection spread to the middle and ring fingers and affected the whole hand and Majors applied to the Compensation Commission for a larger award in view of this fact and secured an award of

\$6.81 per week for 22 weeks. The employer declares recovery can not be had as Majors refused to submit to the amputation and because a full settlement had already been made. The opinion of the court is in part as follows:

We will first dispose of the appellant's second contention. The law seems to be well settled that an injured employee seeking compensation must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering, and if as a result of such refusal on his part he suffers a permanent impairment, the employer will not be required to compensate him for the resulting permanent impairment.

After considering the possibility of saving the finger the court continued:

It would therefore seem to follow that appellee's insistence that his finger be saved if possible, when taken with the statement made by the surgeon, was not such unreasonable or willful misconduct as would prejudice the allowance of additional compensation.

We are satisfied that the further contention of the appellant has been determined by this court. In *re Stone*, 117 N. E. 669. In that case it is said:

"Where the Industrial Board has approved an agreement under the workmen's compensation act, it still has jurisdiction of the subject matter, even if the agreement was intended as a compromise settlement of all compensation, and may consider all disputes with reference to compensation to be paid at any time before the case is finally disposed of."

WORKMEN'S COMPENSATION—BENEFICIARIES—RIGHTS OF WIDOW UPON REMARRIAGE—*Hansen v. Brann & Stewart Co.*, *Supreme Court of New Jersey* (June 7, 1917), 103 *Atlantic Reporter*, page 696.—Alf Olsen, while in the employment of the defendant, on September 27, 1911, received injuries by accident during the course of his employment, which resulted in his death a few days later. His only surviving dependent was his widow. The defendant admitted its liability and made payments to the widow of \$5.25 per week up to November 11, 1914, when it ceased making said payments. On November 25, 1914, the widow was married to her present husband, Harold Hansen, with whom she is now living and by whom she is now supported. Plaintiff sues for the remaining payments which she alleges are due her. Of the 300 allowed payments but 139 had been paid. The workman's compensation act of 1911 permitted the remarried widow of a deceased husband to continue to receive compensation. By an amendment passed in 1913 a widow who remarried could no longer receive compensation after her remarriage. The trial court held that the plaintiff could not recover. In the opinion of the appeal court, reversing this judgment, it was said:

In reaching this conclusion the trial judge erred. This case must be dealt with under the provisions of the act of 1911. If, under the act, the petitioner, upon the death of her husband, was entitled to compensation for 300 weeks, she acquired a vested right, which could not be legally abridged by subsequent legislation.

It is obvious, from a plain reading of the act of 1911, that the legislature provides for an award of compensation to a widow without any condition annexed. Therefore, in order to give the construction contended for by the counsel for respondent, we would be forced to read into this act the condition contained in the amendment of 1913, which, as has already been pointed out, is clearly not permissible.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—REPAIRING BUILDING—*Holman Creamery Association v. Industrial Commission of Wisconsin et al., Supreme Court of Wisconsin (May 21, 1918), 167 Northwestern Reporter, page 808.*—William Wallum was injured while making repairs on the creamery of the association named. He had been employed in the construction of the building, and at various times had made repairs, being hired specially on each occasion. The circuit court of Dane County rendered a judgment vacating an award of the Industrial Commission in his favor, because it considered the employment to be only casual; but the supreme court took the opposite view and affirmed the commission's award. The following is from the opinion delivered by Judge Vinje, and at the close of the quotation are citations and brief statements of the facts in two cases decided at the same time, which also involved the question of casual employment and which are not separately noted:

[Repairs] being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time and a usual concomitant thereof. They are foreseen, provided for, and made when necessary or convenient. The fact that one can not exactly foretell just when they will have to be made is immaterial. On the same principle a proprietor of a meat market who has to hire extra help Saturdays or on busy days, though at irregular intervals, and does so, makes such extra help an employee within the meaning of the statute. *Jordan v. Weinman*, 167 N. W. 810, decided herewith. And because the cleaning up after repairs is a part of the repair work, one employed to do that is an employee within the act. *F. C. Gross & Bros. Co. v. Industrial Commission*, 167 N. W. 809, decided herewith.

As in the Illinois statute noted in the following case, the Wisconsin law excluded persons whose employment is but casual or not in the usual course of the employer's business, differing in this respect from

the California act (Walker case, see below). As in Illinois also, the phrase excluding casual employees was stricken out by an amendment of 1917.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—SPECIFIC PIECE OF WORK—*Chicago Great Western R. Co. v. Industrial Commission of Illinois, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 508.*—Anderson, who was a structural-iron worker, was sent from union headquarters, together with three other members, to complete a job for the railroad company requiring only three or four days' work. He was employed for this particular job by the plaintiff, though the work was in line with the company's regular business. While busy at this work he was injured, and was allowed compensation by the Industrial Commission. This court in reversing the award said:

The character of the contract of employment, as to whether it was casual or not, was fixed by the contract of hiring—that is, the contract could have been of such a nature that Anderson would have been a regular employee of the railroad as a structural-iron worker, or it could have been of such a nature that he was only a casual employee for this particular job—and the question to be determined here is which contract was, in fact, made. The burden of proof is upon the claimant to prove the employment and injury, but the burden is on the plaintiff in error [railway company] to prove that the employment is but casual.

In view of the reasoning of this court in the cases already cited and the other decisions mentioned, in our judgment it must be held that Anderson's employment was but casual, and that therefore there can be no recovery under the workmen's compensation act.

The law under which this decision was rendered excluded any person "whose employment is but casual or who is not engaged in the usual course of the trade," etc., of the employer. It was admitted that the employment was in the line of the employer's business, but the conclusion of the court was as above set forth. The injury occurred March 21, 1917, and on May 31, 1917, the law was amended by striking out the words "whose employment is but casual."

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—USUAL COURSE OF BUSINESS—CLEANING IN LODGING HOUSE—*Walker v. Industrial Accident Commission, Supreme Court of California (Mar. 19, 1918), 171 Pacific Reporter, page 954.*—Miss Pearl P. Walker conducted a lodging house in Stockton, Calif. A chambermaid was regularly employed, but, she not being able to do all the cleaning, Louis J. Robinson was employed at times to assist in this work. On one of these occasions he was injured and subsequently applied for compensation.

The compensation act excludes from its benefits those whose employment is casual and not in the usual course of the employer's business. The commission found that the employment was casual, but was in the usual course of business, and made an award to the injured man. On the appeal of the employer this award was affirmed, Judge Sloss, in the opinion delivered by him for the court, saying:

It would not be questioned that the chambermaid, in doing the cleaning which fell within her province, was engaged in normal operations forming part of the employer's ordinary business. There was no essential difference in character between her work and that done by Robinson. One was as necessary in the conduct of the business as the other. The only distinction is that the maid's work was done daily, while that of the man was called for at intervals. But the intermittent character of the employment is not of itself sufficient to exclude it from the purview of the statute. Section 14 does not except employments that are casual simply, but those that are both casual and not in the usual course of the business.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—
CLASS LEGISLATION—SPECIAL PRIVILEGES—*Johnston v. Kennecott Copper Corp., United States Circuit Court of Appeals, Ninth Circuit (Feb. 18, 1918), 248 Federal Reporter, page 407.*—J. W. Johnston, an employee 20 years of age, suffered the loss of his right foot. Through his next friend he sued his employer, the company named. Judgment was rendered in his favor in the sum of \$1,440, under the workmen's compensation act of Alaska, which applies to mining only and under which election to accept its provisions is presumed in the absence of written notice to the contrary. The employers brought a writ of error to the judgment rendered, attacking the constitutionality of the act; but it was upheld and the judgment affirmed. It was stated that the law certainly does not grant special privileges. The objection was raised that there is no provision for industrial insurance or for payment of compensation; but the court held that the security given to claimants by the requirement of a bond or a cash deposit was sufficient. That the limitation of the scope of the act to mining does not make it invalid as class legislation was also held, the court enunciating the principle that such classification must have a reasonable basis, and saying further:

The application of the rule here is simple. Mining is the one great industry of Alaska. It is attended by many hazards and complexities, and it is not strange that the legislature should make of the single industry a classification for adjustment of workmen's compensation. The act is criticized because "mining operations" are to be held to include all work performed on or for the benefit of any mine or mining claim, it being urged that many persons but remotely connected with the working of mines are thereby included. This, again,

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is matter for legislative discretion, and the question whether the workmen are engaged in mining operations is one that can be best disposed of when we come to it.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—COUNTIES—*Nevada Industrial Commission v. Washoe County*, Supreme Court of Nevada (Mar. 15, 1918), 171 Pacific Reporter, page 511.—The Nevada Industrial Commission brought suit against Washoe County for premiums under the Nevada workmen's compensation act, which is compulsory as to public employees. The county demurred to the complaint in the district court of Washoe County, and, after a decision against it, refused to plead further, so that judgment was rendered for the plaintiff. It appealed, continuing to press its contention that the act, as applying to counties without choice on their part, was unconstitutional. The first point made was that the title was not sufficiently comprehensive to embrace the portion relating to public employment, but this position was shown to be untenable. The compulsory feature was claimed to be in conflict with the due process of law provisions of the Federal and State constitutions. The court, speaking through Judge Coleman, called attention to decisions of State courts and the Supreme Court of the United States upholding compulsory compensation laws, and also said:

But we think there is another and very excellent theory upon which the law may be held to be constitutional, namely, that the money required to be paid under the act by the counties of the State goes for a public purpose which is a legitimate charge upon the people and the State and the subdivisions thereof.

The present statute was held to be comparable with that appropriating money for the purchase of seed grain for those unable to obtain it for themselves, held valid by the Supreme Court of North Dakota, both being designed for the relief of the poor or the prevention of numbers of persons becoming public dependents.

As to discriminatory classification claimed to exist, the court stated that it was necessary only that the basis of the classification be reasonable, and said:

Is the classification reasonable? We think it is. It is not only within the power, but, as we have shown, it is the duty of the county and State to provide for its indigent and to care for those who are unable to care for themselves or who are likely to become dependent upon public charity.

If there is any virtue in the old adage that an ounce of prevention is worth a pound of cure, was it not a reasonable exercise of discretion on the part of the legislature to impose upon the counties the duty of contributing to a fund which can be drawn upon to prevent those injured in its employ from becoming paupers? We think it was.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—PRINCIPLES INVOLVED—*Zancanelli v. Central Coal & Coke Co., Supreme Court of Wyoming (July 11, 1918), 173 Pacific Reporter, page 981.*—The plaintiff was employed by the defendant in its mines at Rock Springs, Wyo. While in the defendant's employ, and due to the defendant's negligence, plaintiff was injured and brought this action for damages. Defendant claimed proceedings must be brought under the workmen's compensation act of 1914 as amended. Plaintiff demurred to the answer on the ground that the workmen's compensation act was unconstitutional and therefore the answer setting it up constituted no defense. The court overruled the demurrer and plaintiff refused to plead further and now appeals from a judgment denying all his contentions. The opinion of the court, as expressed by Judge Blydenburgh, sustaining the court below, is in part as follows:

It is incumbent upon courts in declaring an act unconstitutional to point out the specific provisions of the Constitution or the propositions necessarily implied which are violated by the statute stricken down as invalid.

After considering two objections which the plaintiff presented as making the act unconstitutional according to the Federal Constitution, the court dismissed them by referring to the decision rendered in the *Mountain Timber Co. v. Washington*, 37 Supreme Court Reporter 230 (Bul. 224, pp. 252-258); continuing the court said:

The questions coming under the other objection, C, relative to the fourteenth amendment and the deprivation of life, liberty, and property without due process of law, are those most seriously urged not only in the *Mountain Timber* case and in this case, but in other cases attacking the constitutionality of workmen's compensation acts, both as against the Federal Constitution and similar provisions of the constitutions of the various States, and it is particularly urged that the requirement that employers shall be forced to contribute or pay for accidents that were not caused by their own negligence are against these constitutional provisions. Attorneys and courts, in urging this, seem to be unable to grasp the difference between mere doctrine or rules of law which are under legislative control and subject to legislative change and inherent and fundamental rights which are protected by constitutional provisions. The whole common-law doctrine of compensation in damages for negligence, with all its attendant rules and doctrines as to fellow servants, assumption of risks, and the like, are but rules of law of growth through decisions of courts from time to time, and not inherent or vested rights that can not be changed or abolished by legislative enactment, unless prohibited by some constitutional provision.

The right to pass workmen's compensation acts, even without the aid of constitutional amendments, is generally upheld under the police power of the State and thereunder to regulate any industry that in its operation affects any considerable number of people of

the State or that is a matter of public concern as distinguished from mere private interest.

One objection raised was to the effect that "the amounts to be paid according to the scale or schedule fixed by the act are unreasonably low." As to this the court said:

The objectors on this ground do not grasp the scope or province of the new system. It is not intended to give compensation as damages, but is more in the nature of accident insurance. In adopting the new system both employees and employers gave up something that they each might gain something else, and it was in the nature of a compromise; as was said in *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 590, 158 Pac. 256, 258 [Bul. 224, p. 284]:

"Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty; the workmen through the old defenses or exhaustion in wasteful litigations. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it."

Concluding, the court said:

The act in question, in all its general provisions, is in accord with the system of workmen's compensation acts that were in the minds of the people adopting the constitutional amendment, and, as said in *Jensen v. Southern Pac. Co.*, 109 Northeastern 600 [Bul. 189, pp. 221-224]:

"It is plainly justified by the amendment to our own State constitution, and the decisions of the United States Supreme Court."

And any and all provisions of the constitution that might have been construed as preventing the legislature from passing such an act are modified or repealed as far as they would affect such an act. That both the employers and employees of the State are better satisfied with the new system than the old is to be seen from the fact that in this case the attorneys for the employers of the largest number of workmen of any employer contributing to the industrial accident fund, and also an attorney employed and appearing on behalf of the workmen and organized labor of the State appeared, both arguing in favor of the constitutionality of the act and for its validity. Both employers and employees and the people of the State generally being satisfied with the operation and administration of this act, they would be very loath to return to the old system.

We hold that the act passed and considered is justified in all respects by the amendment to the constitution providing therefor, and that it is not in conflict with any provision of either the Constitution of the United States or the constitution of this State.

WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—BURNS RESULTING FROM SMOKING—*Dzikowska v. Superior Steel Co.*, *Supreme Court of Pennsylvania* (Jan. 7, 1918), 103 *Atlantic Reporter*, page

551.—Mary Dzikowska proceeded for compensation for the death of Victor Dzikowska against the steel company named and the insurance company which carried its compensation risks. The workmen's compensation board made an award, and an appeal was taken on the ground that the injury was not one in the course of employment, the Pennsylvania law not requiring that the injury shall also arise out of the employment. The employee was at work with others in the shipping room, loading steel upon a railroad car. Having placed all the steel at hand upon the car, they were waiting for trucks to arrive with more steel. The employee was wearing a burlap apron, and had his arms wrapped with burlap to protect them from the steel. As most of the steel was oiled, his clothing was saturated with oil. He stepped out of the room and into a box car and, in order to smoke, scratched a match upon his trousers. His burlap apron caught fire, and he ran out of the car in flames, receiving burns from which he died a few days later. The court affirmed the award, saying that it is not unreasonable for employees to smoke out of doors during intervals of work when it does not interfere with their duties, and mentioning that the foreman in this case allowed smoking if not done in the building. The oiliness of the clothing increased the peril, and itself resulted from the employment. The employee's negligence in striking a match on his clothing under the circumstances was, of course, under compensation principles, immaterial.

WORKMEN'S COMPENSATION — DEPENDENCY — PRESUMPTION AS TO WIFE LIVING APART—EVIDENCE THAT DEATH RESULTED FROM INJURY—*State ex rel. London & Lancashire Indemnity Co. v. District Court of Hennepin County et al., Supreme Court of Minnesota (Mar. 15, 1918), 166 Northwestern Reporter, page 772.*—The county court named awarded compensation to Lillian Rush for the death of her husband, John Rush, and the insurance company named petitioned for a review. The company admitted that Rush received an injury arising out of and in the course of his employment, but denied that his death resulted from it. On January 25, 1917, he fell and struck his head, and was unconscious for a few minutes. Two or three days later he resumed work, and continued for a week or more, appearing normal except for the accentuation of an impediment in his speech. He was then discharged from his employment. On February 19, he entered a hospital, where he died on March 3. An autopsy disclosed that his death resulted from a hemorrhage on the brain of traumatic origin, and the microscope revealed "repair cells," showing that the injury had been received several weeks before. This evidence was held to justify the finding that the death resulted from the injury of January 25.

Mrs. Rush had been separated from her husband for several years, and had supported herself by her own efforts. The statute provides that a surviving wife "shall be conclusively presumed to be wholly dependent * * * unless it be shown that she was voluntarily living apart from her husband at the time of his injury or death." The court held that this presumption was within the power of the legislature to enact, and that it applied in the present instance. With reference to these matters the court, speaking through Judge Taylor, said:

The legislature can make a presumption conclusive unless such presumption would cut off or impair some right given and protected by the constitution. No provision of the constitution is cited which takes from the legislature the power to define and prescribe the duties of the husband to his wife and children and the rights to which the wife shall be entitled in consequence of the existence of the marriage status, and we are satisfied that the legislature had power to provide that for the purposes of the compensation law the wife "shall be conclusively presumed to be wholly dependent" upon her husband regardless of whether she had or had not been supported by him in his lifetime. The duty to support her rested upon him as a continuing obligation, which could have been enforced at any time.

She had lived apart from her husband for about 12 years, but there is no finding that she did so voluntarily, and the evidence does not require such a finding. According to her testimony, which is the only evidence upon the question, he not only threatened her life, but ordered her to leave and drove her away with a gun, and she left and lived apart from him solely because she was in fear of personal violence. This fails to show that she was voluntarily living apart from him within the meaning of the statute.

WORKMEN'S COMPENSATION—DEPENDENCY—REVIEW OF DECISIONS OF COMMISSIONER—*Poccardi, Royal Consul v. Ott, Compensation Commissioner, Supreme Court of Appeals of West Virginia (Sept. 10, 1918), 96 Southeastern Reporter, page 790.*—This action is brought for compensation by the royal consul of Italy at Philadelphia for Barbera Schipani, widow of an employee of the Davis Colliery Co. at Bower. The employee was killed while in the employ of the colliery company. The widow seeks compensation. Commissioner Ott refused to allow an award, because he claimed the dependency had not been proved. In reversing him Judge Lynch gave the following opinion:

Though not final and conclusive, the findings of the compensation commissioner upon the proof submitted to him to show dependency should be given the same force and effect as the finding of a judge or jury, and generally should not be set aside if supported by any evidence. In that event—support by evidence—dependency is like

any other fact settled by the adjudication, unless the adjudication is apparently against the clear weight and preponderance of the evidence. As an inference from what has been said, where there is no such conflict dependency is not merely a fact finally and conclusively determined by an adjudication either way, but is a question of law to be determined upon the pertinency and applicability of the proof, upon which the ruling was based, to the fact to be proved.

Thus it appears she [the widow] frankly admits that she has the ability to aid herself in part, but was "in greater part dependent on deceased for support." To entitle her to compensation total dependency is not necessary under our statute. Partial reliance for support is sufficient to justify an award to her as a dependent. Such is the plain import and intendment of the statute. Clause "f," section 33, ch. 15P, Code; *Poccardi v. State Compensation Comr.*, 91 S. E. 663.

The intention and design of this statute is to establish a mode for the prompt redress of grievances and secure restitution commensurate with the loss of the services of those upon whom depend for support and maintenance the persons named in the statute as its beneficiaries. Strict rules are not to obtain to the detriment of a claimant in violation of these wholesome purposes. The rejection of this claim seems to us not to accord fully with that spirit and object.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—LOSS OF SIGHT OF EYE—COMPENSATION—*Nelson v. Kentucky River Stone & Sand Co., Court of Appeals of Kentucky (Dec. 3, 1918), 206 Southwestern Reporter, page 473.*—Nelson was in the employ of the defendant company and was engaged in crushing rock. One day while he was passing one of the workers a piece of rock flew into his eye. The injury to the eye was very severe, necessitating the removal of the eye ball and the use of a glass eye. The compensation act provides a specific award for the loss of the sight of an eye, and also provides for compensation for general injuries resulting in disability, adding thereto compensation for disfigurement. The latter, if applied to this case, would make a greater amount than the schedule award.

In reversing the commission's award for the loss of the sight of the eye, and directing an award on the general basis, the court spoke in part as follows:

Looking at our act, we find that it provides compensation at a certain rate for the "loss of a thumb," the "loss of a first finger," the "loss of a hand," the "loss of an arm," the "loss of a foot," the "loss of a leg," etc., thus showing that the compensation therein provided for was confined to the loss of the particular member named. When it deals with the eye, however, it does not provide for compensation for the loss of the eye itself, but solely for the "loss of the sight of the eye." If it be true, and there is no reason to doubt the soundness of the rule, that the purpose of the legislature was to confine the fixed

compensation provided for specific injuries to those injuries and no others, and that the compensation allowed for a specific injury was not payable for a less injury, the rule should work both ways, and the compensation provided for a particular injury should not be held to include a greater injury. Here the employee lost not only the sight of his eye but the eye itself. His injury was therefore greater than the mere loss of the sight of the eye. That being true, his case does not fall within the schedule making compensation solely for the loss of the sight of an eye, but falls within the general provision awarding compensation "in all other cases of permanent partial disability."

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—LOSS OF USE—CORRECTION BY GLASSES—*Frings v. Pierce-Arrow Motor Car Co.*, Supreme Court of New York, Appellate Division (Mar. 6, 1918), 169 New York Supplement, page 309.—Richard Frings claimed compensation from the company named, his employer. He was an assembler, and while chipping a casting he was struck in the right eye with a sharp piece of steel, which penetrated the eye, and the resulting injury necessitated the removal of the lens of the eye. By the use of a correcting glass lens the sight of the eye was rendered normal, but it could not be used in conjunction with the other eye on account of the lack of coordination of images. The other eye was normal, but the man could use only one eye at a time, except that the injured eye would be of some assistance in avoiding objects in crossing a street or the like. He was paid an agreed rate of compensation for the time he was absent from work, and returned to work at wages somewhat higher than he received before the injury. He claimed, however, compensation for permanent partial disability in the loss of use of the eye, which is declared by the statute to be equivalent to the loss of an eye. The industrial commission certified to the court the question whether such loss of use had been suffered and the answer was in the negative, two judges dissenting. In concluding the prevailing opinion delivered by him Judge Lyon said:

Unquestionably, when the lens of the eye was destroyed, the use of the eye, unaided, was lost. It was only by providing an artificial lens outside the eye that the image could be so thrown upon the retina as to restore the sight. The retina was not destroyed, and through the use of an artificial lens the eye, so far as its use alone was concerned, could fulfill the natural function of an eye. The claimant has permanently lost the use of the eye, when so supplemented, to the extent only of using it in conjunction with the other eye, which he can not do, owing to the lack of coordination of images. Should the claimant lose his left eye, he would be able, using the injured eye, aided by a lens, to fully perform his duties.

I think there has not been the loss of an eye within the contemplation of the statute, and that the certified question should be answered in the negative.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—LOSS OF USE—CORRECTION BY GLASSES—*Smith v. F. & B. Const. Co., Supreme Court of New York, Appellate Division (Nov. 18, 1918), 172 New York Supplement, page 581.*—While Smith was in the employ of the defendant company his eye was injured so that, by the aid of glasses, he had only one-third normal vision in the injured eye and then only when he refrained from using his good eye. If he used his good eye (the left) he could not see with the injured one at all. In other words, only one eye could be used at one time. The company employer appeals from an award compensating Smith for the "permanent loss of the use of the right (injured) eye considered as the equivalent of the loss of such eye." Judge Kellogg, in affirming the award, said:

With the use of powerful glasses he has a vision of about one-third with that eye, but in order to obtain it he must close the other eye. In any event he can have only one eye, and if he uses the injured eye he has the vision of but one-third of an eye.

The case differs from *Frings v. Pierce-Arrow Motor Co.*, 169 N. Y. Supp. 309 [this Bul. supra], where by the use of glasses claimant had the normal vision of the injured eye. There, without glasses, he had vision of but one eye, and with the use of glasses had the normal vision of the other eye only. In any event he had the full vision of one eye, and could use either eye at pleasure. But here, to get a third vision from the right eye, he must forego entirely the use of the left eye. I think the rule in the *Frings* case should not be extended beyond the facts there found.

I favor an affirmance of the award. All concur, except Lyon, J., who dissents.

WORKMEN'S COMPENSATION—EMPLOYEE—BUSINESS OF EMPLOYER—INSTALLING ENGINE IN PAPER MILL—*McNally v. Diamond Mills Paper Co., Court of Appeals of New York (Mar. 12, 1918), 119 Northeastern Reporter, page 242.*—Charles McNally was injured during the installation of a new engine for the company named. He had moved the engine from the railroad to the company's plant under a contract, and when that task was completed, he was asked to assist in the work of installation, and did so, being paid by the day, and using his own rigging in doing the work. Two of his men were hired for the same purpose, but he made no profit on their labor. The appellate division of the supreme court had dismissed his claim for compensation, but the court of appeals reversed this, and affirmed an award made by the State industrial commission in his favor. In disposing of the contention that McNally was an independent contractor Judge Cardoza, who delivered the opinion, said:

He was then employed by the day to work as a laborer with others. He was not in control of the job; he had no power of superin-

tendence or direction; he had no other rank than the regular employees of the mill who were with him; he took his orders from the engineer whom the mill had placed in charge. In this situation, the distinctive tokens of the independent contractor are lacking. The claimant for the purposes of this job was an employee, and nothing more. What he may have been at other times and for other purposes does not concern us. It is true that his employment was temporary and casual, but that is not enough to exclude him from the protection of the statute.

WORKMEN'S COMPENSATION—EMPLOYEE—CASUAL EMPLOYMENT—TRYING OUT NEW CHAUFFEUR—*Marshall Field & Co. v. Industrial Commission of Illinois, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 773.*—One Yager was in the employ of the company as the superintendent of its garage. On December 1, 1915, he hired one Rice as a chauffeur to drive the company's cars. The employment was to continue until December 24, provided Rice proved satisfactory. As was the custom, an old employee of the company went with Rice on the first day of his employment to ascertain how well he ran the auto truck. The old employee, Fritz, and Rice made various deliveries and finally went to one firm with a load of blankets. The elevator of this firm was in the sidewalk and after the first load went down the two men stood waiting for it to return. It was a cold day, so Fritz went in front of the truck to stand by the radiator. He heard a noise and upon investigation he found Rice lying at the bottom of the shaft. His administrator brought action for compensation, which was allowed, and the company appealed, declaring that there was no employment, and that if there was it was but casual. The court in sustaining the award said:

Plaintiff in error [company], among other grounds for reversal, insists that the relation of employer and employee did not exist at the time of the accident; that if there was any employment of Rice, it was but casual; and that there is no evidence that the accident arose out of and in the course of the employment. An "employee" is defined in our workmen's compensation act as "every person in the service of another under any contract of hire, express or implied, oral or written." Section 5, subd. 2. This provision of definition is to be construed broadly. In our judgment Rice must be held to have been an employee. His continued employment depended upon his ability to drive a car, and he was put to work with the understanding that, if he was competent, he would be continued in that employment.

The evidence was sufficient to sustain the conclusion of the board that the accident arose out of and in the course of the employment of Rice.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—*Litts v. Risley Lumber Co., Court of Appeals of New York (Oct. 29, 1918), 120 Northeastern Reporter, page 730.*—Litts agreed

with the lumber company to paint three smokestacks of the latter for the sum of \$50. Litts was to supply all necessary ropes, scaffolding, and tackle, and the company was to supply the paint and a helper. While at work on one of the stacks the rope supporting him broke and Litts fell, sustaining injuries from which he died. The widow brought suit under the workmen's compensation act and recovered an award which the appellate division affirmed. The lumber company claimed that Litts was an independent contractor. This court in reversing the award said:

In the instant case Litts was an independent contractor. He agreed to do a specific piece of work for the company. In doing it he had absolute control of himself and his helper. He was independent as to when, within a reasonable time after the agreement was made between him and the company, and as to where he should commence the work. He was free to proceed in the execution of it entirely in accordance with his own ideas. He was not to any extent subject to the directions of the company in respect of the method, means, or procedure in the accomplishment. He was not subject to a discharge by the company because he did the painting in one way rather than in another. Those facts, considered by themselves, would constitute him an independent contractor.

In the relation of employer and employee the employer has control and direction, not only of the work or performance and its result, but of its detail and method, and may discharge the employee disobeying such control and direction.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—SKILLED WORKER—*Rosedale Cemetery Association v. Industrial Accident Commission of California, District Court of Appeal, Second District of California (July 1, 1918) 174 Pacific Reporter, page 351.*—The plaintiff brings this action against the defendant to have an award in favor of one Armstrong, who was employed by plaintiff, set aside. Armstrong was especially skilled in the use of dynamite and was employed by plaintiff to remove some concrete foundation from its premises and while doing this Armstrong was injured. Armstrong had been called before the superintendent and treasurer of the plaintiff and was asked how long it would take to do the blasting job and how much it would cost. Armstrong said it would take one week to complete but he could not state the cost. No written agreement was made. Armstrong went to work for \$5 per day. He was not supervised or directed, because his employers knew very little about the handling of the work, although there was nothing to prevent them from assuming full charge of the work. Plaintiff says Armstrong was an independent contractor. Judge Works, expressing the opinion of the court that he was within the act, said in part:

In support of its contention that Armstrong was an independent contractor, the petitioner [plaintiff] cites many authorities to the

general effect that, to quote from *Green v. Soule*, 145 Cal. 96, 99, 78 Pac. 337, 339:

"The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for."

Whether, however, the employer has or has not such right of control is necessarily to be determined from the contract of employment. The fact that there was no right of control can not be predicated upon an absence of the exercise of it, in practice, if the contract in fact allows the right. The employer would be very likely to refrain from exercising a direction or control over an employee as to whom he had the undoubted right of control, merely because the employee had a greater knowledge concerning the nature of the work to be done than did the employer himself.

According to the superintendent of the petitioner, the business in which it was engaged was cemetery work. That expression may be properly defined, we believe, in the statement that it consists in platting, grading, planting, beautifying, and maintaining a tract of land in such a manner as to render it an appropriate place for the sepulture of the dead, and to preserve it as such. It can make no difference whether "cemetery work" is done by means of blasting or through the use of the wheelbarrow, the spade, or the spirit level. All these and other instrumentalities may be required to reduce a given tract, necessarily variable to some extent in character, to a proper condition for cemetery uses and to so maintain it. The employment of Armstrong was in the ordinary course of the business of the petitioner.

We are satisfied that the finding that Armstrong was an employee of the petitioner is supported by the evidence.

WORKMEN'S COMPENSATION—EMPLOYEE—MEMBER OF FIRM PERFORMING SERVICES—*Cooper v. Industrial Commission of California, Supreme Court of California (Mar. 6, 1916), 171 Pacific Reporter, page 684.*—W. L. Cooper was a member of a firm formed to operate certain mining claims. He was a practical mining engineer, and was sent to the mine to take samples of the ore and make or verify reports as to conditions. His expenses were to be paid by the partnership, also a stated per diem allowance for his services. He was killed, while on this trip, through the operation of a bucket tram operated by the firm. His widow, Eva L. Cooper, applied for compensation for his death, but the industrial commission denied it, agreeing with the view of the employer and the insurer that Cooper was not an employee of the partnership. The supreme court took the same position and dismissed the claim. Judge Richards delivered the opinion and said in part:

We are constrained to hold that the industrial accident commission was correct in its conclusion upon this subject. Ordinarily the relation between a partnership and its members performing services for it is not the relation of employer and employees. The definition of

the term "partnership" as "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them implies that each of its members shall render such services to the firm as he is able, and without compensation, in the absence of special agreements to the contrary. In the rendition of such services the partner is acting in no sense in the capacity of a servant or employee subject to the direction, or it may be the discharge, of his firm acting as his master or employer.

The workmen's compensation act clearly does not contemplate such a mixed relation as that existing between partners, wherein each member of the partnership is at the same time principal and agent, master and servant, employer and employee; and wherein each, in any services he may render, whether under his general duty as a partner, or under a special agreement for some particular service, is working for himself as much as for his associates in carrying on the business of the firm.

WORKMEN'S COMPENSATION—EXTRATERRITORIAL EFFECT—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Industrial Commission of Colorado v. Aetna Life Ins. Co., Supreme Court of Colorado (July 1, 1918), 174 Pacific Reporter, page 589.*—This action is brought by Cora Lynch, the widow of Charles Lynch, for compensation under the Colorado compensation statute. She was granted an award by the industrial commission, which the district court annulled. This petition was brought to have the case reviewed. The supreme court granted the widow the award. Lynch was employed by the C. E. Walker Contracting Co. in Colorado as a foreman. Both parties were residents of Colorado, the contract was made there, and some of the work was to be done there. Lynch had completed a job in Afton, Wyo., and set out for Montpelier, Idaho, to work at another but he missed the stage from Afton. A friend voluntarily took him in his automobile and started from Afton, and while on the way the machine overturned and Lynch was killed. Defendant says that the accident did not arise out of and in the course of the employment and that the workmen's compensation act of Colorado did not have extraterritorial effect. Justice Scott, giving the opinion of the court which sustained the award, said in part:

In the case at bar it was an essential part of his employment that the deceased should travel from the place where he installed one plant to the place where he was to install another. It is also clear that he adopted a reasonable and apparently the only facility for such travel under the circumstances, and as safe as any other that may have been available. No case is cited that adopts a different rule, and we know of none, as applied to workmen's compensation statutes.

In the case at bar, if we are to determine, in the absence of any provision of the statute to the contrary, that the doctrine of *lex loci contractus* [law of place of contract] does not govern, it will be to

destroy the very spirit and purpose of the law as it affects the employer, the employee, and the public welfare. If we assume that there are no workmen's compensation laws in the States where deceased was to perform his services outside of Colorado, then there can be no recovery of compensation, notwithstanding all premiums sufficient to maintain the workers' accident insurance had been fully paid. On the other hand, if we are to assume that a workmen's compensation law prevails in each of the seven States of Colorado, Wyoming, Idaho, Montana, Utah, Arizona, and New Mexico, then the employer must be compelled to comply with each statute and to pay the premiums required by the law of each State for the protection of the one employee, or approximately seven times the amount otherwise required. If this were legally permissible, the expense would make it prohibitive. The result in this case must be that: The employer has paid the full premium demanded by the State to insure his employee against accident; the employee has relied on the pledge of his State for the protection of himself and his dependents; his widow and children discover the whole arrangement to be a delusion and a snare and find themselves without protection. Thus the employer and employee, his dependents, and the public have all been deceived and cheated, because forsooth the accident occurred beyond the imaginary line that marks the boundary of the Commonwealth, though it happened within the line of employment. We can not assume that the legislature ever intended such an injustice and absurdity in the absence of some clear and express provision in the statute to that effect, which we do not find.

WORKMEN'S COMPENSATION ACT—EXTRATERRITORIAL EFFECT—EMPLOYEE INJURED IN ANOTHER STATE—*State ex rel. Chambers v. District Court, Hennepin County, Supreme Court of Minnesota (Jan. 11, 1918), 166 Northwestern Reporter, page 185.*—This action is brought by the widow of Chambers to review a judgment denying her compensation under the workmen's compensation act for the death of her husband. Chambers was a resident of North Dakota and was employed by C. C. Wyman & Co., a Minnesota corporation doing a general grain brokerage business in Minneapolis. It does not appear that it had a business situs elsewhere. The contract for employment was made in Minneapolis and contemplated the rendition of services by the deceased in soliciting business in Minnesota, North Dakota, and elsewhere. The firm furnished him with an automobile with which he performed such services. While he was in North Dakota on May 5, 1917, the automobile was accidentally overturned and he was killed. The accident arose out of and in the course of the employment. The opinion of the Supreme Court, granting compensation as claimed, is in part as follows:

Liability would be conceded had the accident happened in Minnesota. The claim of the employer is that compensation can not be awarded for an accident occurring outside the State.

In the case before us the business of the employer was localized in the State. What the employee did, if done in Minnesota, was a contribution to the business involving an expense and presumably resulting in a profit. It was not different because done across the border in North Dakota. It was referable to the business centralized in Minnesota. Sometimes the construction which we adopt will result to the immediate advantage of the employee, and against the employer, and sometimes the result will be the reverse. Whatever view is adopted, perplexing situations may arise. Business has scant respect for State boundaries. An industry may be located a part in one State and a part in another State, or it may have separate business situs in two or more, and its employees may from time to time work in each and may reside in one or another at their convenience. Situations may arise where it is difficult to say whether the employment is referable by the act of the parties or by intendment of law to a business conducted in one State or another and whether the governing law, applicable to an injury coming from the employment is that of the one or the other, or whether there may be a recovery of the employer under the compensation act of one State and of a third person under the common law of the State of the injury. They are safely left for determination as they arise. Here, if the facts stated in the complaint are true, the employment was referable to the business conducted in Minnesota, and its compensation act is the governing law between employer and employee.

This case was referred to, and its decision adopted by, the court in the case of the State ex rel. Maryland Casualty Co. v. District Court, Rice County, 166 Northwestern Reporter, page 177, where the facts were substantially as they are here.

WORKMEN'S COMPENSATION—FARM LABOR—THRASHING-MACHINE OPERATOR—*State ex rel. Bykle v. District Court of Watonwan County et al., Supreme Court of Minnesota (June 28, 1918), 168 Northwestern Reporter, page 130.*—John Bykle was a separator man on a thrashing machine which went about from farm to farm thrashing grain for the farmers. He asserted a claim for compensation for an injury suffered when he made a misstep and fell from the deck of the separator after making some repairs, which he apparently might reasonably make, as he was in charge during the temporary absence of the owner's brother, who operated the thrasher. It was held that the injury was one arising out of the employment, but compensation was denied on the ground that the employee was a "farm laborer," and as such excepted from the operation of the compensation law. This is in direct opposition to the decision of an Indiana court in the case *In re Boyer*, 117 N. E. 507 (Bul. No. 246, p. 233).

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—CONDUCTING HOSPITAL CONTAINING APPARATUS REGULATED BY ORDINANCES—INTOXICATION AS CAUSE OF INJURY—*Hahnemann Hospital v. Industrial Board of Illinois et al.*, *Supreme Court of Illinois* (Feb. 20, 1918), 118 *Northeastern Reporter*, page 767.—William H. Delscamp, chief engineer of the hospital named, was killed in the hospital on December 16, 1913, under circumstances which left little doubt that his death was caused by a fall down the basement stairs to the concrete floor. His duties of supervision often called him down these stairs to the basement. The industrial board made an award to his widow, and the hospital appealed. The appellate court reversed the award, whereupon the claimant appealed to the supreme court. One question was as to whether the hospital was engaged in conducting an extrahazardous business. Hospitals are not themselves enumerated as extrahazardous, but class 8 of section 3 of the compensation act enumerates one class of the enterprises included as follows:

In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use, or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein.

It appeared that ordinances of the city of Chicago affected the building as to the inclosure of at least one elevator in a fireproof shaft, the equipment with fire escapes and the inspection of the building, the number and width of stairways, the methods of installation of electric wires and apparatus, and the inspection of the boilers and steam transmission apparatus. Judge Duncan, who delivered the opinion, stated the views of the court as to certain general principles relating to the classification of extrahazardous occupations and their application to the present instance.

He said that the court agreed with the contention of the hospital that no occupation, even if enumerated in the earlier clauses of section 3, should be deemed extrahazardous unless it is so in fact, as already asserted by the court in *Uphoff v. Industrial Board*, 271 Ill. 812, 111 N. E. 128 (Bul. No. 224, p. 274), and illustrated by the "construction" of a chicken coop or the "excavation" of a posthole. If the circumstances of the height of the building and its equipment with dangerous machinery and power, however, are such that its safety is regulated by ordinances, and make it actually extrahazardous, it is not necessary that the variety of business should itself be mentioned in the lists of enterprises. Continuing the discussion of this point, Judge Duncan said:

Under the evidence in this case we think it clearly appears that the hospital of appellee—i. e., the business or enterprise of conducting a hospital by it in the building, with the machinery, appliances, and equipment therein used—is, in fact, extrahazardous within the mean-

ing of the statute. Many of its employees are engaged in handling, repairing, and operating the dangerous machinery, equipment, and appliances, and are exposed to the dangerous agency or power which drives or makes serviceable such equipment and appliances. Not only are those employees exposed to such dangers, but all other employees therein are more or less exposed to them. Extraordinary care and skill are required in the handling and management of said equipment and appliances to prevent serious accidents.

Another contention that was held untenable was that the hospital was not an "enterprise" under the definition in the Uphoff case, *supra*. The court finally held that it could not be said that the employee's intoxication, rather than his employment, was the cause of his death. Drunkenness to be a bar to compensation, it is said, must be such that the court can say as a matter of law that it was the cause of death, and this would only be true if the person were unable to fulfill the duties of the employment. The judgment of the appellate court was reversed, and the award of the Industrial Board to the widow affirmed.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—CONSTRUCTION OF TELEGRAPH LINES—CONSTITUTIONALITY OF STATUTE—INTERSTATE COMMERCE—*State v. Postal Telegraph-Cable Co. of Washington*, Supreme Court of Washington (Apr. 29, 1918), 172 *Pacific Reporter*, page 902.—Action was brought by the State of Washington against the company named to recover the amounts of premium on its pay roll, due to the State fund under the provisions of the workmen's compensation law, usually known as the industrial insurance law. The premiums sued for included in separate items those based on the pay roll of workmen engaged in the construction of railroad lines, and of workmen engaged in operating the telegraph systems within the State. The superior court of King County entered judgment dismissing the action. The defense consisted of a denial that the workmen were employed or that the company was engaged in a hazardous occupation under the law, and of an attack upon the constitutionality of the law as interfering with interstate commerce, and as violative of personal property and contract rights. In passing upon the extrahazardous classification of the occupation Judge Mount, who delivered the opinion for the supreme court, said in part:

We are of the opinion that, unless the courts may take notice of the fact that an occupation is not hazardous, it is within the power of the legislature to classify the same as hazardous. The construction of telegraph lines has been declared by the legislature of this State to be an extrahazardous occupation. We are of the opinion, therefore, that the denial of the respondent that it was engaged in an extrahazardous occupation is of no effect, because it is a denial of a legislative declaration.

As to the paragraphs of the company's answer relating to interstate commerce the court said :

The first, second, and third affirmative defenses are to the effect that the respondent, during the times mentioned in the complaint, was engaged in interstate commerce as an agent of the Government, and that the tax here sought to be collected is an unlawful attempt to regulate interstate commerce by placing a burden upon the business, and that the intrastate business is not clearly separable from the interstate business.

Conceding for the present that the employees engaged in sending and receiving messages and in operating the telegraph system were engaged in interstate commerce, it is plain that the other class of employees engaged in construction work was not engaged in interstate commerce. These employees, according to the complaint, were engaged in original construction of lines of telegraph.

In the case of *Raymond v. Chicago, Milwaukee & St. Paul Railway Co.*, 243 U. S. 43, 37 Sup. Ct. 268, where an employee was engaged in shortening the main line of a railway within this State, and was injured by an explosion of a charge of dynamite while he was working in a tunnel, it was held that such employee was not engaged in interstate commerce at the time of his injury, and that he was relegated for relief to the workmen's compensation act above referred to. For the same reason it necessarily follows that, even though the telegraph company, the respondent here, is engaged in interstate commerce, its employees engaged in construction work come under the terms of the employers' liability act.

Conceding that the telegraph company is an agent of the United States, it does not follow that the provision made for injured employees in the construction of a telegraph system within this State is either a tax or an attempt to regulate the business of the telegraph company.

It is further alleged that the employees of the respondent became members of the Postal Telegraph Employees Association, and that there was a contract and agreement between the respondent and its employees by which the respondent agreed to pay its employees for any incapacity happening during the time of their employment at a rate as set forth in the complaint; that the majority of the employees who worked during the years 1911 and 1912 entered the employment of the respondent before the passage of the workmen's compensation act; that the said act illegally interferes with the rights of the respondent and attempts to destroy vested interests under the contract.

Matter is then quoted to the effect that the proper exercise of the police power of the State can not be abridged nor delayed by reason of existing contracts; and as the compensation law is such an exercise, such an interference as is claimed does not invalidate it. (*State ex rel. Pratt v. Seattle*, 73 Wash. 396, 132 Pac. 45.)

We are of the opinion, therefore, that, as to the employees of the respondent engaged in construction work, the State was entitled to a judgment for the amount alleged in the complaint. As to the employees engaged in the operation of the lines of the respondent, we are of the opinion that the act does not apply to them under the

allegations of the answer to the effect that the respondent is engaged in interstate commerce; that such employees are engaged in operating the system for handling interstate messages; that a large percentage of the business actually done for the years mentioned in the complaint consisted in interstate messages; and that it is impossible to segregate or separate the time when the employees were engaged in interstate commerce from the time that they were engaged in intrastate commerce.

The employees who are engaged in operating the telegraph lines and in handling interstate and intrastate messages are, no doubt, engaged in interstate commerce. It is clear that the Congress of the United States may establish a rule of liability and a method of compensation for such employees. This act, therefore, by its terms, applies to such persons only to the extent of their mutual connection with intrastate work, which shall be clearly separable and distinguishable from interstate or foreign commerce. Under the allegation of the answer, this work is not clearly separable and distinguishable as to those employees. If this is true, the act does not apply.

General questions of constitutionality were disposed of by reference to decided cases. The judgment of dismissal was reversed, with instruction to enter judgment in favor of the State for the premiums due for the construction employees, with leave to make a suitable answer as to the inseparability of the time of the employees engaged in operation, into those engaged in interstate and intrastate commerce.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT ON ONE EMPLOYEE BY ANOTHER—*Pekin Cooperage Co. v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 530.*—The plaintiff cooperage company had in its employ, among others, two men, Rasor and Miller, who acted as cullers for their respective barrel raisers. They each selected from their respective racks staves to be used for the raisers. When one's rack became empty it was customary to draw on a neighbor's rack. Miller had first been placed on this work on the day of the injury and had been drinking to a certain extent. He left his work for a period and when he returned he took a number of staves from Rasor's rack. Rasor protested in rather violent language, whereupon Miller assaulted him and injured him. Rasor applied for compensation which was granted by the Industrial Board. The employer attacked this award, and in affirming it the court said:

Rasor clearly suffered an accidental injury in the course of his employment. It was a sudden and unexpected mishap, occurring outside the usual course of events, without any design on his part, while he was engaged at his work. The compensation to be provided and to be paid by the employer under the workmen's compensation act is

not, however, for all accidental injuries which may be sustained by his employees in the course of their employment, but only for such as may also arise out of the employment. There must be some causal relation between the employment and the injury. It is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment.

Where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT ON ONE EMPLOYEE BY ANOTHER—QUARREL OVER POSSESSION OF TOOL.—*Jacquemin et al. v. Seymour Manufacturing Co., Supreme Court of Errors of Connecticut (Mar. 12, 1918), 103 Atlantic Reporter, page 115.*—The company named is engaged in the manufacture of iron castings, the casters leaving their work for the day when they have poured the molten metal into the molds. In order not to have too many casters at one time about the cupola where the molten metal is drawn out, and not to have the casters get through and leave earlier than was desirable, the company limited the number of ladles supplied to the men. One O'Shaugnessy and his helper were using one ladle, which they had secured permission to use from another who had just been using it, and Jacquemin had another ladle in front of his working place, placed there by him. When he and his helper started to pick this up he was told by O'Shaugnessy to desist or he would get into trouble. After angry words had passed between them O'Shaugnessy started for Jacquemin, and they scuffled, rolling on the floor, until O'Shaugnessy let his opponent up because they were endangering one of the molds. Jacquemin then started for O'Shaugnessy again, and the latter dealt him a blow over the heart which resulted in his death. The question contested was whether the injury arose out of the employment. The commissioner and the trial court, which passed upon the parents' claim for compensation, took the view that it did, holding that the quarreling was a natural consequence of the conditions of the business and the manner of conducting it. The supreme court held that the fight was a purely personal affair, and, calling attention, among other things, to the fact that Jacquemin renewed it when it might have been terminated, denied compensation. In the course of the opinion it was said:

The fact that employees sometimes quarrel and fight while at work does not make the injury which may result one which arises out of their employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT ON ONE EMPLOYEE BY ANOTHER—SKYLARKING—*Mountain Ice Co. v. McNeil et al., Court of Errors and Appeals of New Jersey (Mar. 7, 1918), 103 Atlantic Reporter, page 184.*—Albert McNeil, 19 years of age, and Edward Toomey, 15, worked together in the icehouse of the company named. On January 28, 1914, the two boys had been skylarking together, and finally had a scuffle, during which the president and the foreman of the company came in and ordered them back to work. Later on, while McNeil was at work, Toomey struck him over the head with an ice pick, rendering him unconscious and fracturing his skull. Jennie McNeil petitioned for compensation as his guardian. Judgment in her favor was rendered in the court of common pleas of Morris County and was affirmed by the supreme court. The court of errors and appeals reversed the decision, the same court having held in *Hulley v. Moosbrugger*, 88 N. J. Law 161, 95 Atl. 1007 (Bul. No. 189, p. 279), that an employer was not responsible for assaults by one employee upon another. In the present case the distinction was attempted to be made that the company had knowledge of the matter, and that therefore what happened was a risk incidental to the employment. The court held that such an occurrence as a violent assault could not be anticipated from what had been previously seen, Judge Walker saying, in part, as to this:

We think that because of the skylarking which came under the observation of the president and superintendent of the ice company's plant, namely, skylarking between these boys, charged the president and superintendent with contemplating no more than that the same thing might occur again, that is, skylarking or horseplay, not that one boy might thereafter commit an atrocious assault upon the other.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—BURNS FROM FALLING ASLEEP WHILE WAITING FOR ELEVATOR—*Richards v. Indianapolis Abattoir Co., Supreme Court of Errors of Connecticut (Dec. 15, 1917), 102 Atlantic Reporter, page 604.*—Joseph Richards, a driver for the company named, came in from his route after working hard handling meat on a cold day, from 6 a. m. to 12 noon. His next duty was to take by elevator some beef to an upper floor. Learning that the elevator was in use, and would be so for 15 minutes, he sat down upon a nail keg a few feet from the elevator shaft and near the fire box of a boiler. No one else was about that part of the premises. He dozed off, on account, as the compensation commissioner found, of his weariness and chilled condition and the heat, and awoke to find himself afire.

His greasy apron, the commissioner found, had caught fire from the heat or from a flying bit of coal. An award in his favor for the resulting injuries was affirmed by the superior court of New Haven County, and the supreme court of errors also found that the injury was one arising out of and in course of employment, Judge Roraback for the court saying:

The controlling question here presented is whether Richards, the claimant, when injured, was actually doing the work he was employed to do or whether he was doing something substantially different. He was injured while on duty, in his working hours, when waiting for an opportunity to continue his service of employment.

The accident occurred when the claimant was at a place where he might reasonably be. There was no turning aside upon his part—no attempt to serve ends of his own. The fact that he fell asleep, under the circumstances set forth in the finding, was not decisive of his claim. This, at the most, was negligence, and our compensation act of 1913 expressly provides that in an action to recover damages for injuries sustained by an employee arising out of and in course of his employment it shall not be a defense that the injured employee was negligent.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—CHAMBERMAID CLEANING OUT LIGHT WELL IN ABSENCE OF JANITOR—*Williamson v. Industrial Accident Commission, Supreme Court of California (Mar. 12, 1918), 171 Pacific Reporter, page 797.*—Mrs. Harriet A. Prosser was an employee of a small hotel in Oakland, Calif., which was kept in order by the proprietress, Mrs. Prosser, and the janitor. Mrs. Prosser's duties were largely confined to keeping the chambers in order; she sometimes attended the telephone and assisted the clerk. The janitor was ill for some time, and rubbish collected in the bottom of a light well upon which the windows of some of the rooms opened, and which he was accustomed to clean out. At the suggestion of the owner of the building, whom she saw in the absence of the proprietress, Mrs. Prosser went, without her employer's consent and against the advice of the clerk whom she told where she was going, to clean out the well. This necessitated climbing about 9 feet down a ladder after climbing out the window and getting a footing on a narrow ledge below; and it was said that it was suitable work only for a young and active man. In attempting to do this she fell and received injuries which resulted in her death. An award was made to her sister for the benefit of a young girl whom she, Mrs. Prosser, and her husband had informally adopted. The court held that she had gone outside the scope of her employment in the attempt in which she was injured, and annulled the award of compensation.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DRINKING ACID BY MISTAKE FOR WATER—*In re Osterbrink, Supreme Judicial Court of Massachusetts (Feb. 27, 1918), 118 Northeastern Reporter, page 657.*—Henry Osterbrink, a man 72 years of age, was employed by John P. Squires & Co. as door tender, to stand outside the cooling room of the plant and open the door when any of the men wanted to pass in with a truck. The temperature where he stood being, during the summer, the same as outdoors, he had for some time kept in the cooler a bottle of water for his use. There was no definite provision for drinking water on that floor, but some of the men drank from a rubber hose attached to a faucet in the cooling room. A bubbling fountain was on the floor below. The practice of putting bottles of coffee and tea in the cooler was known to and permitted by the management, but they did not know of this employee's placing water there. On July 7, 1916, he took a bottle from under the sink where he kept his water and drank from it. It was muriatic acid which the evidence warranted the industrial accident board in finding had been left by employees engaged in soldering, and it caused his death. The award of compensation by the board to the claimants, daughters of the deceased, was affirmed, Judge Pierce saying:

We are of opinion that there was a causal connection between the employment and the accident. The placing of bottles of coffee or tea in the cooler had the sanction and approval of the subscriber. There is no evidence that it disapproved the cooling of water in bottles in the refrigerator, and it would be a natural and reasonable expectation that employees would place water in bottles in the cooler in summer time to relieve the thirst of the employees or to be drunk by them with their meals, in preference to their drinking from the end of a rubber tube or from a bubble fountain after going to the floor below. We are also of opinion that the risk of drinking acid from a bottle which had been exchanged or substituted for a bottle of like appearance containing drinking water by an employee, whose work required the use of such a substance, was not too remote a danger to be found to be an incident of that employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—FROSTBITE—COMPENSABLE INJURY—*Ellingson Lumber Company v. Industrial Commission of Wisconsin, Supreme Court of Wisconsin (Dec. 3, 1918), 169 Northwestern Reporter, page 568.*—This action was brought by the lumber company in an effort to have an award made by the commission in favor of one Beaulieu set aside and vacated. Beaulieu was employed by the lumber company as a woodsman. By a mix up of orders he went one afternoon to the wrong place to work. When the mistake was discovered he was sent

to the right place. In order to make up for the time thus lost he exerted himself to accomplish a great amount of work, and in doing so his feet became wet from perspiration. On his way back to the camp his feet froze, and he then sought compensation for this injury. In affirming the award of the commission the court said:

The facts being undisputed, the question is: Has the employee, Beaulieu, brought himself within the provision of the act under the doctrine approved by this court in the case of *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N. W. 996 [Bul. 189, pp. 276, 277]? Injuries to employees for which compensation is to be paid under the workmen's compensation act are such as are incidental to and grow out of the employment. Compensation is not given for an injury resulting from exposure to a hazard which is not peculiar to the industry or substantially increased by reason of the nature of the services which the employee is required to perform.

Injury by freezing is certainly not peculiar to the industry in which defendant, Beaulieu, was engaged. Did the nature of Beaulieu's employment expose him to a hazard from freezing which was substantially increased by reason of the services which he was required to perform? It has been said that the causative danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

It is clear that the exposure of Beaulieu to the injury by freezing was substantially increased by reason of the nature of the services which he was obliged to render. We think it must be held that the injury for which compensation was awarded was proximately caused by accident within the meaning of the compensation statute.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—*State ex rel. McCarthy Bros. Co. v. District Court, Supreme Court of Minnesota (Nov. 1, 1918)*, 169 *Northwestern Reporter*, page 274.—The McCarthy Bros. Co., a Minnesota corporation doing a general grain brokerage business in Minneapolis, employed one Von Hagen, who lived in Bismarck, N. Dak., as its traveling salesman. It was Von Hagen's custom to cover his territory in North Dakota during the week and return to his home on Sunday. At the time of the accident the Missouri River had inundated the tracks of the railroad and in an effort to cross the river to return to his home Von Hagen and some others entered a rowboat and attempted to row across the river. They were unsuccessful, and their boat, striking a submerged fence post, overturned and Von Hagen was drowned. His dependents were allowed compensation. This action opposes the award. The opinion of the supreme court affirming the award is in part as follows:

Decedent's duties required his traveling from place to place in his territory, which was several hundred miles from his employers' place

of business. It was proper that he should have some regular or fixed place for communicating with his employers. His home was near his field of labor. He made it his headquarters, as well as his retreat for over Sunday, as he properly would, and as his employers must naturally have expected and intended he should do. Indeed, all the correspondence between them so indicates. We see no reason why he might not properly, and without stepping outside the scope of his employment, return to his home from his field of labor on the Sabbath day. We think the trial court was justified in finding from the evidence that decedent came to his death by reason of an accident arising out of and in course of his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—EXTRAHAZARDOUS WORK—CASUAL EMPLOYMENT—*Scully v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 492.*—Scully was a sewer builder, who usually worked as a subcontractor under general contractors. He "usually employed from two to five men for such work." De Vito had been in the employ of Scully for about five months as a laborer, his chief work being to dig ditches and to carry material to and from the place of work. On the day of the accident De Vito was met while on his way to work by Scully, who was driving a Ford motor truck. Scully instructed De Vito to get on the truck and go with him to get some material and to bring it to the place where the work was to be done that day. After having loaded the material on the truck and while on their way to the place of work the machine was run into by a street car, and De Vito was injured. De Vito sued for compensation, and an award was granted him by the Industrial Commission. Scully now brings proceedings to have this award set aside, claiming De Vito's occupation was not extrahazardous and therefore not under the workmen's compensation act, that De Vito's injury did not arise out of and in the course of his employment, and that his employment was casual. The court affirmed the award, saying in part:

The trenches dug by De Vito necessarily had to be as deep as the sewers and water mains laid in the streets, and it requires no stretch of the imagination to see and understand at once that his occupation was more dangerous than an ordinary occupation and therefore extrahazardous.

An injury may occur within the course of the employment, and arise out of it, even though it happen while the employee is on his way to or from his usual place of employment, or while engaged in the doing of an act that is necessary to, or an incident of, the employment.

De Vito's employment was not casual, as argued by the plaintiff in error. His employment can not be said to have been uncertain, hap-

hazard, irregular, or incidental, as distinguished from stated or regular. The word "casual," in the statute, has reference to the contract for service, and not to the particular item of work being done at the time of the injury.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—PARTIES PLAINTIFF—*Coster v. Thompson Hotel Co., Supreme Court of Nebraska (June 15, 1918), 168 Northwestern Reporter, page 191.*—The widow of Coster brought this action for compensation for the death of her husband. Coster had been employed by defendant as a general foreman of mechanical work for a hotel owned by defendant. On the morning of the accident Coster telephoned to the hotel and gave instructions to his subordinates as to some plumbing work to be done. Some supplies were needed. Coster then telephoned to the plumbing company and ordered what he needed and then, as was his custom, set out on his motorcycle to get the supplies from the plumbing company. On his way he collided with a street car and was injured and later died. Two contentions are made: First, that such an action as this should be brought by the dependents of deceased and not by his administrator, and second, that the death was not caused by an accident "arising out of and in the course" of deceased's employment. After quoting two sections of the statute referring to the first point, the court said:

These sections, construed together, seem to authorize recovery to be had by the dependent or dependents themselves, their legal guardian or trustees, the executors or administrator of the deceased, and if no such representative be qualified, the payment may be made "to such persons as would be appointed administrator of such decedent." The statute is confusing upon its face and inconsistent, but it should be liberally construed, and, if it is borne in mind that its object is to furnish compensation to those dependent on the deceased for support, it does not seem very important in whose name the action is brought so long as the relief is sure to reach the proper party.

The next point argued by the defendant is that the death "was not caused by accident arising out of and in the course of employment." We can not take this view. It was a part of Coster's duty to obtain materials. He was his own master as to his hours and place where he might engage in his master's service. When he ordered material by telephone from his house he was in the course of his employment, and when he was accidentally struck and killed upon the street while on the way to procure materials, the accident arose out of the employment. Both the order for the goods and the going to procure them were strictly within his duties. The fact that he rode upon a motorcycle which he commonly used in performing errands and in going to and from his home, does not alter the case. He had a right to use such instrumentalities as were best fitted to perform his master's work.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—INCIDENTAL DUTY—PLACE OF WORK—INJURY TO SALESMAN—*Bachman v. Waterman*, Appellate Court of Indiana (Nov. 26, 1918), 121 *Northeastern Reporter*, page 8.—This action for compensation was brought by the widow of Lee F. Waterman who, when he was killed, was a salesman in the employ of Bachman. Bachman operated a flour mill, and Waterman sold the flour to grocery stores in and about the city. It was Waterman's custom and duty to call on the customers and prospective customers of Bachman's products, and before 6 o'clock of each day to telephone from his home the orders received during the day. On the day of the accident he had just called on a customer and was crossing the street when he was struck by an automobile. It was not known whether he was crossing the street to catch a car to return home or to see another groceryman. The Industrial Board allowed compensation and the employer appealed. The opinion of the court affirming the award is in part as follows:

This court is committed to the following doctrine: That an injury is received in the course of the employment when it is suffered while the workman is doing what he was hired to do; that it arises out of the employment when it appears that there is a causal connection between the environments of the employment and the resulting injury; that such causal connection is not indicated by the mere fact that a workman's employment required him to be at a certain place at a certain time, and while there was injured, but it must appear also that the nature of his employment subjected him at such place to a certain danger, although not foreseen, and that by reason of being subjected to such danger he was injured; that under the workmen's compensation act an employee's place of employment is sufficiently comprehensive to include all territory that he is required to visit in performing the duties of his employment; that where the duties of his employment require him to travel public streets, the perils and hazards incident to travel thereon, such as the danger of coming in contact with moving vehicles, becomes a part of the environment in which he is required to work.

Under the facts this case is not governed by those decisions wherein it appears that a workman was injured while returning from or going to his place of employment, the day's duties being completed or not yet commenced, but rather by that other line, wherein the day's service in its general scope being completed, there yet remains some other incidental duty, the workman being injured while performing it. In such cases it is held that the injury arises out of and in the course of the employment.

The duty or custom of Waterman to telephone his orders from his home is such incidental duty as mentioned in the last paragraph of the above opinion.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—RETURNING FROM ERRAND—*N. K. Fairbanks Co. v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 457.*—This was a proceeding to have an award made by the Industrial Commission to the widow of McGuire for compensation for his death set aside. The lower court affirmed the award and appeal was taken to this court. McGuire was employed by the plaintiff and was sent to the plant of Darling & Co. to inspect and get samples of some fats. This he did, but did not complete his inspection before 7.15 p. m. The plaintiff's plant closed at 6 p. m. McGuire therefore decided to take the samples home with him and bring them to plaintiff the following morning. On leaving Darling & Co.'s plant and while on his way home he was struck and killed by a street car. In reversing the award for compensation the court said:

At the time deceased was injured his duties for the day had ceased and he was on his way to his home. He was not doing anything incidental to his employment, and the applicant was not entitled to compensation for his death.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO OR FROM WORK—WEEK-END TRIP—*International Harvester Co. of New Jersey v. Industrial Board of Illinois et al., Supreme Court of Illinois (Feb. 20, 1918), 118 Northeastern Reporter, page 711.*—William C. Sain was an employee of the company named at its plant in Chicago, but was detailed to the International Harvester Co. of America at Detroit, and sent out to places within a radius of 75 miles to assemble farm machinery which was sent knocked down to local dealers. On Saturday, November 11, 1915, he was in Grand Blanc, and at 3 p. m. announced that he was going to Detroit to spend Sunday and would return and finish the work Monday. He took a jitney bus to go to Flint, expecting to take the train there; but on the way the jitney was struck by a train and he was killed. The question at issue was whether the injury was one arising out of and in course of employment of the deceased, and the Industrial Board held that it was, and made an award to the beneficiaries, who had received a payment from an employees' benefit fund, whose plan was to pay benefits only for accidents not so arising. The board found as facts that it was the custom for employees to go into the city and remain for Sunday, and that the expenses in such cases were paid by the company; also that the deceased had charged his railroad fare and supper the evening of the accident in his expense account, and that the charge had been allowed. The court emphasized evidence that the employees tried to complete work

so as to report between jobs on Saturday night, when expenses would of course be paid, but that they were expected to remain until a piece of work was done. It also called attention to testimony that the expense account had been allowed under a misapprehension, and, holding that the board's conclusion was not supported by competent evidence, reversed the judgment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HEATING WATER FOR WASHING—*In re Ayers, Appellate Court of Indiana (Jan. 18, 1918), 118 Northeastern Reporter, page 386.*—Omer Ayers claimed compensation from his employer, the Ansted Spring & Axle Co., and the Industrial Board of Indiana submitted to the court for decision the question whether, under the facts as found by it, he was injured by an accident arising out of and in the course of employment. It appeared that the employees had been in the habit, after finishing work, in order to heat water for washing, of heating an iron in the furnace and dropping it into a bucket of water. On November 23, 1916, the fire in the furnace had gone out when Ayres and another employee completed their work. They went into an adjacent room, which was in another department of the factory, and observing a tank of hot liquid, which appeared to be water, proceeded to set their bucket therein. It was in fact an explosive acid, and when they placed in it the bucket of cold water it exploded, and injured Ayres so that he was totally disabled until May 7, 1917, and thereafter partially incapacitated for a length of time which could not be determined at the time of the trial. The tank was not labeled in any way to indicate its contents, but afterwards the employer labeled it to show this and also that it was dangerous. The court held that the injury arose out of the employment and was compensable. The opinion was delivered by Judge Ibach, who also called attention to the acquiescence of the employer in the custom of washing before leaving the premises, and stated that the deviation from the usual plan of accomplishing this was not unnatural. In the course of the opinion he said:

Where an employee is injured while on duty, or while doing something incident to his employment, and reasonably necessary to his personal health or comfort, though not strictly necessary to his employment, such injury will ordinarily be held to arise out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LEAVING WORK TO TALK TO FRIEND—BURDEN OF PROOF—*Robinson v. State, Supreme Court of Errors of Connecticut (July 23, 1918), 104 Atlantic Reporter, page 491.*—Robinson

was employed by the highway department of the State as a working foreman of a gang of workmen who were repairing the State highway. While he was at work a friend drove up and stopped on the other side of the road from the one on which Robinson was working and called out to him. Robinson proceeded to cross the road to speak to his friend and while doing so a touring car ran into him and killed him. These proceedings were brought by Robinson's mother for compensation under the workmen's compensation act. The commissioner and the lower court denied an award. In reversing the lower court and directing that an award be granted the court said:

Upon the findings of the commissioner the case turns on the question whether one employed as a foreman of a repair gang on a much-traveled State highway does or does not step outside of his employment as a matter of law, because he starts to cross the road, in response to a friendly salutation, for the purpose of conversation, when there is no evidence as to how long he intended to talk, and no evidence that his starting to cross the road did interfere, or that his intended conversation would have interfered, with the due performance of his work as foreman. We think the question must be answered in the negative.

The burden of proof was, of course, on the claimant to show that Robinson's injury arose out of and in the course of his employment. That it arose out of his employment is not denied.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH-HOUR ACCIDENTS—BENEFICIARIES—*Humphrey v. Industrial Commission, Supreme Court of Illinois (Oct. 21, 1918), 120 Northeastern Reporter, page 816.*—Humphrey, as a member of the partnership of Humphrey & Co., brought this action to review an award by the Industrial Board in favor of the father of Leo Riordan, deceased. Leo was employed by the company in its three-story factory. There was an elevator in the factory which it was the custom and privilege of the employees to use and which Leo had been instructed how to operate. During the lunch hour on the day of the accident Leo was eating his lunch on the second floor. One of the employees ran the elevator to the first floor, leaving it there. Shortly after the elevator was heard running and then was heard to stop and a scream was heard. Leo was found wedged between the gate on the second floor and the floor of the elevator, fatally injured. Leo during the past four years had contributed to the support of his parents, although they were not dependent upon him. The company claims that the accident did not arise out of and in the course of the employment and that the father was not entitled to compensation. The opinion of the court sustaining the award is, in part, as follows:

The deceased was required to take his lunch to the plant with him and was permitted and expected to eat it on the premises. No particular place was assigned to any of the employees to eat their lunch, but each man was permitted to eat wherever he desired about the plant. All the employees used the elevator during the lunch hour as they had occasion to, just as they used it during the hours the plant was in operation. Whether the deceased was negligent in his operation of the elevator, or in attempting to get off while it was in motion, was immaterial. He was permitted to use this elevator as an incident of his employment, and was so using it. Unless it could be shown that he deliberately placed himself in this position of danger for the purpose of taking his life, the plaintiffs in error are liable under the workmen's compensation act. There is nothing here to indicate that this was anything but an accident. The proof amply sustains the finding that the accident arose out of and in the course of the employment.

The statute does not require that the parents of lineal heirs shall be dependent upon deceased, but it is sufficient if the deceased employee leave parents to whose support he had contributed within four years prior to the time of the injury.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH-HOUR ACCIDENTS—DEVIATION FROM ROUTE OF TRAVEL—*Moore & Scott Iron Works et al. v. Industrial Accident Commission et al., District Court of Appeal, First District, California (Mar. 25, 1918), 172 Pacific Reporter, page 1114.*—An award was granted Minerva Higgins by the Industrial Accident Commission for compensation for the death of Michael Higgins, deceased employee, against Moore & Scott Iron Works, employer. The award of the Industrial Accident Commission was annulled, upon the petition of the plaintiff, because the act which caused the death of Michael Higgins was held not to have been in the course of his employment. The considerations of the court were:

Michael Higgins, employed as a bolter-up within the hull of a ship in the course of construction at the Moore & Scott Iron Works, left his employment for the purpose of going to his lunch; he went by an unusual route, and undertook to go down a scaffolding and ladder on the outside of the ship, a means not intended for his use in leaving the ship at any time, another and perfectly safe method of exit having been provided by his employers. In doing so he lost his hold and fell and was killed. Upon these facts it must be held that the death of Higgins did not take place in the course of his employment; nor was he at the time of the accident performing any service growing out of or incidental to his employment, nor acting within the course thereof.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—PUBLIC HAZARDS—*In re Betts et al., Appellate Court of Indiana (Jan. 18, 1918), 118 Northeastern Reporter, page 551.*—Howell T. Betts, an employee of Ebenezer Crompton, who was in the business of tinning and furnace repairing, was killed on October 6, 1916. Betts, with another employee, returned with the employer's horse and wagon from the job to the place of business for lunch, as was his custom, and the employer advanced him a small sum of money for the purchase of tobacco. They started back to their work, and when the other man, who was driving, stopped to water the horse, Betts stepped off to go across the street to a drug store to buy the tobacco, and was struck by an automobile and killed. The Industrial Board referred to the court the question whether the accident arose out of the employment, and this was decided in the negative, one judge dissenting. The following is quoted from the opinion delivered by Judge Hottel:

Of course, it can not be said that Betts, while on an errand for himself, was doing any service required by his employment, and we are unable to see wherein his employment exposed him to the hazard or danger which resulted in his death. To illustrate our meaning, if the employment of the injured party had been of the kind to take him on a roof, and in going for his tobacco he had slipped, or for any other cause had fallen from the roof and been injured, we can see a connection between the employment and the injury, in that his employment placed him where the hazard of indulging in his tobacco was increased. In the instant case the employment did not keep deceased on the street as a pedestrian. If it could be said to expose him to any dangers of the street, other than that to which the public generally are exposed, it was the danger of traveling in a vehicle to and from his work. In other words, as a pedestrian on the street going for his tobacco, his employment exposed him to no danger that would not have been incurred by any other pedestrian on a like errand, nor was he exposed to any hazard different from or in excess of the hazard to which he would have been exposed when on such errand, though he had not been engaged in the employment indicated.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—WATCHMAN SHOT BY TRESPASSER—DEPENDENCE OF DAUGHTER—*Mechanics' Furniture Co. v. Industrial Board of Illinois et al., Supreme Court of Illinois (Dec. 19, 1917), 117 Northeastern Reporter, page 936.*—The Industrial Board of Illinois awarded compensation of \$16.25 semimonthly from October 18, 1914, until 192 payments had been made, to the administrator of August Anderson, deceased, for the use of his daughter, Margaret Anderson. The deceased was a night watchman for the furniture company named. On the morning of October 18, 1914, his body was found

on the premises near the boiler room, he having been instantly killed by a .32-caliber bullet. His revolver of that caliber was missing from the boiler room, and was found the following March under a board about 60 feet away. Anderson's wife was dead, but he left two daughters, both of age. One was married and lived with her husband, and made no claim. The other was 22 years of age and worked as a domestic, receiving \$5 or \$6 per week. During 1911 this daughter had lived with her father for seven weeks during an illness, and he had cared for her and furnished her board. In the summer of 1914 she went to a hospital for an operation, and on her return went to her father's house, taking some of her meals with him and some with her married sister, who was at that time living in the other part of a two-apartment house owned by the father. The award to this daughter was affirmed, Judge Farmer delivering the opinion. It was held that the evidence tended to show that the employee was killed by some marauder, not because of personal enmity but because he was a watchman. The other question in dispute was whether or not the daughter Margaret was entitled to compensation. The law of Illinois of 1913 included as beneficiaries relatives of certain classes to whose support the deceased had contributed within four years of the injury, and it was held that the daughter fulfilled these conditions. That the Illinois law in this provision differed from most of the compensation laws is noted in another case decided by the same court, *Peabody Coal Co. v. Industrial Board of Illinois*, 117 N. E. 988; but the law was amended in 1917 so as to require actual dependence. In the case last mentioned compensation was awarded to two married daughters, each of whom had six children, and who were not dependent upon their father, but to whom he had made contributions of assistance regularly.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—AMOUNT OF RECOVERY BY EMPLOYER—*Albert A. Albrecht Co. v. Whitehead & Kales Iron Works, Supreme Court of Michigan (Mar. 27, 1918), 166 Northwestern Reporter, page 855.*—Both the plaintiff and the defendant in this case were contractors in the construction of a building, the former for masonry and the latter for structural steel. John Debinski, an employee of the Albrecht Co., was injured, as was claimed, by the negligence of the employees of the iron works. He elected to take compensation from his employer rather than to sue the company causing the injury, and payments were made to him, amounting to \$1,408.33 at the time of the commencement of the suit by the Albrecht Co., and to \$2,215 at the time of the trial in the circuit court of Wayne County. This court allowed the company to recover from the iron works the sum which the employee would

have been entitled to recover from the latter if he had elected to pursue that remedy, which, according to the jury's verdict, was \$10,000. Appealing, the iron works contended that such a basis for recovery by the employer was wrong, and that the amount should be limited to the sum paid by the employer to the injured man as compensation. The supreme court agreed with this view, holding that the recovery of the excess was not permissible either for the benefit of the employer or the employee. It held, further, that recovery might be had only after payment made to the employee, since the industrial accident board might at any time reduce the amount of the payments or order them discontinued, thus causing confusion. In the present instance the case was remanded to the trial court for ascertainment of the amount already paid to the employee, with a provision for further suits for future payments. Judge Bird, who delivered the opinion, said, in part, in regard to the main question at issue:

To hold that the employer might recover the same amount the injured party might have recovered would permit the employer to speculate on the misfortunes of his employees.

But counsel reply to this that a trust should be impressed on the excess recovered in favor of the injured party. If this were so, would not the injured party then have two remedies, when the statute says he shall have but one? If the injured party is willing to waive the excess by accepting the more certain award of the compensation board, why should the act permit a disinterested person to recover it? We are persuaded that the language should be construed to mean that the employer may enforce the liability of such other person to the extent that he has paid compensation to the injured party and no further. This construction is not only consistent with the letter of the law but is in accord with the spirit of it.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF REMEDIES—*Swader v. Kansas Flour Mills Co., Supreme Court of Kansas (July 6, 1918, and Nov. 9, 1918), 176 Pacific Reporter, page 143.*—This action was brought for damages for the wrongful death of the husband of the plaintiff. The husband was in the employ of the defendant company when he met his death. The statute of Kansas allows recovery from the employer in the form of compensation or a recovery from the wrongdoer in the form of damages, but both compensation and damages can not be had. The company paid the compensation to the clerk of the industrial commission, but plaintiff did not receive or accept it. The company successfully demurred to plaintiff's action in the trial court. In setting aside this demurrer the supreme court said:

The time will probably come in the course of the present lawsuit when plaintiff must elect whether she will accept the compensation

provided for her or accept the damages which she may recover against Hoffman [the negligent third party], provided she successfully maintains her cause of action against him, but there is nothing in the statute which says or infers that she need choose between the damages and the compensation until she knows definitely which is the more to her advantage. In this respect the Kansas statute differs from some other State laws.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTIES—ELECTION OF REMEDIES—ACTIONS BY DEPENDENTS—*Vereeke v. City of Grand Rapids, Supreme Court of Michigan (Sept. 27, 1918), 168 Northwestern Reporter, page 1019.*—David Vereeke was killed while in the employ of the city of Grand Rapids. His mother claimed compensation, and the Industrial Accident Board granted her an award. His father started proceedings to have himself appointed administrator. The mother opposed this action. They compromised and sued the Grand Rapids-Muskegon Power Co., whose negligence caused the son's death, and recovered damages. They then divided the damages according to the compromise. The city of Grand Rapids now wants the amount thus acquired by the mother accredited to its favor on the amount of compensation it must pay her. Their contention is under section 15, part 3, which prevents an employee from taking both compensation and damages. The court, in ruling that this section did not apply to dependents, gave the following opinion:

Neither the section under consideration [sec. 15, supra], however, nor section 1 of part 6, contains any limitation upon the right of dependents except that under section 1 of part 6 a dependent who accepts compensation from an employer releases the said employer from all claims or demands at law, if any, arising from such injury.

We think it can not be contended that Kate Vereeke, by accepting compensation from the city of Grand Rapids, thereby released the Grand Rapids-Muskegon Power Co., the alleged wrongdoer, from liability in an action for the benefit of heirs at law or creditors of David Vereeke. By making a claim for compensation against the employer, the defendant city, she clothed that employer under the terms of section 15, part 3, with a right of action against the wrongdoer. Had that right of action been prosecuted by the city, recovery thereupon would certainly have been taken into consideration in awarding damages in a suit instituted by the administrator of the estate against the alleged wrongdoer. Having failed to protect its rights in the manner pointed out by the statute, we are of the opinion that the appellant city can not now by petition to the Industrial Accident Board have credited upon the award against it any sums received by Kate Vereeke as a result of the suit against the power company.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION OF REMEDIES—"PLANT"—*Carlson v. Mock, Supreme Court of Washington (June 15, 1918), 173 Pacific Reporter, page 637.*—Carlson was employed as a track oiler by the Puget Sound Traction, Light & Power Co., and while engaged in the duties of his employment was struck by an automobile negligently driven by the defendant, Mock, and injured. This action was brought to recover for the injuries received. Mock was a third party and was not in the employ of the company. There is a proviso in the workmen's compensation act permitting an injured employee to choose whether to proceed under the act or to sue the third party when he is injured away from the employer's plant by the negligent act of said third party. The lower court said the railway tracks were part of the company's plant and granted defendant a nonsuit, whereupon the plaintiff appealed. In reversing the lower court Justice Tolman said:

If one were to lose sight of the purposes of the act, and construe the word "plant" strictly, he might, under some definitions, and possibly under this definition, say that it included the street railway tracks as a part of the plant of the operating company. But a liberal construction, having in mind the purposes of the act, and the necessity of giving full force to the proviso, leads to the conclusion that the legislature never intended that the term "plant" should include more than that part of the employer's fixed property over which he has exclusive control, and can not be applied to a public street or highway, though occupied by the employer for certain purposes, over which the general traveling public have at least equal rights with the employer, and over which the employer has no oversight, or method of protecting the employee from the negligent or wrongful acts of third persons. To hold otherwise would deny the right of election to all workmen whose regular duties take them upon the public highways.

WORKMEN'S COMPENSATION—INJURY DUE TO ACCIDENT—LATENT DISEASE—PROXIMATE CAUSE—*Behan v. John B. Honor Co., Limited, Supreme Court of Louisiana (June 30, 1917), 78 Southern Reporter, page 589.*—Behan was working as a longshoreman for the defendant company. While attempting to remove a skid from the ship to the wharf he slipped and fell into the river. He fell upon some wooden piling or stringers and hurt his head and spine. He sued for compensation at the rate of \$10 per week for 400 weeks and was allowed \$6.50 for 400 weeks. The defendant appealed on the ground that the plaintiff had been suffering from a latent case of locomotor ataxia. This disease had in no way manifested itself in the plaintiff prior to his injury and he was not aware that he had it. Judge O'Niell, giving the opinion of the court, said:

The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not

been diseased at the time of the accident. But the accident was, none the less, the proximate cause of the present disability. We are not aware of a decision of this court on the subject, but it is well settled in jurisprudence elsewhere that the fact that a person was already afflicted with a dormant disease that might some day produce physical disability is no reason why he should not be allowed damages or compensation for a personal injury that causes the disease to become active or virulent and superinduces physical disability.

WORKMEN'S COMPENSATION—INSURANCE—DUTY OF EMPLOYERS—POWERS OF INDUSTRIAL COMMISSIONS—*Industrial Commission of Utah v. Daly Mining Co., Supreme Court of Utah (Apr. 3, 1918), 172 Pacific Reporter, page 301.*—This was an original action by the plaintiff commission for a writ of mandamus to be issued to the defendant mining company requiring the latter to take out insurance or otherwise comply with the workmen's compensation law of 1917 of the State of Utah. The counsel for the plaintiff claim that the law is compulsory and requires defendant to take out insurance or give security under it, while, on the other hand, counsel for the defendant allege that the law is elective only at the will of the employer. The case was contested by defendant by interposing a demurrer. Chief Justice Frick, expressing the opinion of the court, upholding the commission, said, in part:

The application in this case is more particularly based upon subdivision 3, of section 53, *supra*. That section provides that all employers of labor, except municipalities, "shall secure compensation to their employees in one of the following ways": (1) By insuring payment of compensation in the "State insurance fund"; (2) by insuring payment by insuring with some company engaged in the indemnity insurance business; or (3) by furnishing satisfactory proof to the commission of the financial ability of the employer to pay such compensation direct to his employees. If, however, the employer desires to pay direct without obtaining insurance as provided in subdivisions 1 and 2 aforesaid, the commission may, in its discretion, nevertheless, require security in the manner provided in the act so that in case any employee shall become entitled to compensation the same will be paid without delay. It is alleged in the application that on the 1st day of July, 1917, the defendant made application to the commission pursuant to the subdivision 3 aforesaid for the privilege of paying the compensation provided by the act to its employees direct; that the commission granted the privilege, upon the express condition, however, that the defendant "file with the commission its surety bond or liquid collateral in the sum of \$25,000." A formal order to that effect was made by the commission, and the defendant has failed and refused to comply with such order or to otherwise secure payment of compensation to its employees as provided by the act. All of the foregoing facts are admitted by the demurrer. The commission therefore prayed that the defendants be "commanded to file with the commis-

sion its bond in the sum of \$25,000, or liquid security in that amount as required by said commission's order, or, in lieu thereof, file its policy with said commission as evidence of its having insured its employees either in the State insurance fund or in some stock corporation," as provided by the act.

Counsel for the defendant, however, vigorously contend that the provisions of the act relating to the insuring of the payment of compensation are merely elective, or, as they put it, are at most coercive in view of the severe penalties that are imposed and by reason of other provisions contained in the act. In order to give counsel full benefit of their contention, we have felt constrained to set forth various sections upon which they more especially rely in full. While we freely concede that there are quite a number of provisions and expressions contained in those sections which, if considered by themselves, would more or less strongly indicate the insurance feature to be elective, yet, when the act is considered as a whole, and when the manifest purpose thereof is kept in mind, it is quite clear, to our minds at least, that the legislature intended the insuring of compensation in advance to be compulsory. That is, in adopting the act it was the manifest purpose and intention of the legislature to require all employers coming within its provisions to secure the payment of compensation to their employees in advance by either one of the three methods stated in section 53, *supra*. True it is there are a number of provisions contained in the act that are merely elective, but those provisions are merely incidental.

The defendant further contended that the plaintiff had an adequate remedy at law by bringing action for the tax, as counsel designated it, which defendant would have to pay under the act, and hence this action for mandamus would not lie. On this point the court said:

The duty that is imposed by the act, upon employers, is to comply with its provisions relating to the insuring of the payment of the compensation provided for by it. As we read the act, the commission is empowered to enforce obedience to its provision in that regard and to enforce payment of the compensation when it becomes payable in accordance with the terms of the act; but no power is conferred upon the commission to sue to recover the amount employers are required to pay for insurance unless and until they have obligated themselves to pay. The only remedy that the commission has in a case like the one at bar, therefore, as we view it, is to compel the delinquent employer to comply with the provisions of the act relating to the insuring of the payment of the compensation provided by the act.

The final point discussed was the objection of the company to the requirement of the commission in the matter of the security or insurance to be furnished, it contending that the workmen were well secured without such insurance. As to this the court said:

The commission upon whom was conferred the power to decide the question, however, decided otherwise. It decided and ordered that the defendant secure the payment of the compensation as the act provides and as it, in its discretion, may do. Insurance is, therefore,

not forced upon defendant "contrary to law," but it is merely required to do what the law enjoins.

In conclusion, we desire to state that, if it be held that the provisions of the act are merely elective, then very little, if anything, is gained by its enactment. While such a reason may not be conclusive—may not even be controlling—yet it is one the court should not overlook. It is always important in construing and applying the provisions of any comprehensive act, such as the one under consideration, to keep in mind the purpose the legislature had in view in adopting it. If, therefore, an act is subject to two constructions, one of which in a large measure would make it useless and of no material benefit to anyone, while the other construction would make it effective and beneficial, and moreover, would subserve the public welfare, the court should be slow to adopt the first construction, but should adopt the second if such may be done according to sound principles and rules of construction.

WORKMEN'S COMPENSATION—INSURANCE—RATES—FIXING BY INDUSTRIAL COMMISSION—CONSTITUTIONALITY—*Scranton Leasing Co. v. Industrial Commission of Utah*, Supreme Court of Utah (Jan. 29, 1918), 170 Pacific Reporter, page 976.—The Interstate Casualty Co. of Birmingham, Ala., doing an insurance business in Utah under the workmen's compensation act, entered into a contract with the Scranton Leasing Co. for insurance against liability under the terms of that act. The policy was presented to the industrial commission for acceptance and filing, but the commission refused to accept it for the reason that the rate for ore mining was \$5 per \$100 of pay roll instead of \$5.59, the rate fixed by the commission, and because the policy was made a participating one. The company contended against the right of the commission to make rates except for State insurance, claiming (1) that the legislature had no constitutional power to interfere with the making of the insurance contract; (2) that it had no power to delegate such power to the commission; and (3) that the act did not warrant the assumption of power to fix rates of private companies. The court held that the case, *German Alliance Insurance Co. v. Kansas*, 233 U. S. 409, 34 Sup. Ct. 618, involving the question of rate making for fire insurance, and sustaining a similar provision, was controlling. Referring to the strong dissenting opinion of three justices, it remarked that this opinion at the very beginning stated that the case did not deal with a statute affecting the safety or morals of the public. Since the matter of compensation insurance is clearly affected with a public interest, it would appear that even in the view of these justices the law involved in the present case would be sustained. It was pointed out that the commission, in fixing the rates for State insurance, must fix the premiums at the lowest possible rate consistent with the maintenance of the fund in a sound condition; and the approval of policies written by private cor-

porations at a lower rate was plainly either a failure properly to protect policyholders or an admission that the private companies could carry the risks at a lower rate than the State fund. On the other hand, it was said that the allowance of a higher rate would be permitting an imposition upon the public. It was shown that the provision authorizing the fixing of rates for the State fund was positive, and for the reasons given it extended by implication to the rights of other insurers. Finally the provision of the policy for participation was held to be a method of avoiding the prescribed rates and therefore this also was ground for the rejection of the policy by the commission.

WORKMEN'S COMPENSATION — MARITIME JURISDICTION — INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT — ACT OF GOD — ENGINEER ATTEMPTING TO SAVE DREDGE BOAT FROM WRECK IN STORM — *Southern Surety Co. v. Stubbs et al.*, *Court of Civil Appeals of Texas* (Dec. 20, 1917), 199 *Southwestern Reporter*, page 343. — E. J. Stubbs was drowned by the capsizing of the dredge boat *Houston* in the severe storm of August 16 and 17, 1915, and his wife and minor son were awarded compensation at the rate of \$15 per week for 369 weeks, or \$5,400, against the company named, the insurer of his employer. The first contention of the company on its appeal that is discussed in the opinion is that the State courts did not have jurisdiction over the case, the claim being that under the ruling of the United States Supreme Court in the *Jensen* case it was a question of admiralty. It was held that neither the *Jensen* case nor any other cited had maintained that the United States court had exclusive jurisdiction over suits in personam, simply because the cause of action was of maritime origin, and that this was not a matter under the Federal employers' liability act, since the dredge was not engaged in interstate commerce.

Stubbs was the assistant engineer and had been off duty, as far as dredging operations were concerned, for 14 hours. Presumably he was, at the time the boat capsized, engaged in assisting in the attempt to keep her afloat; it was held that this made the injury one in the course of employment and also one arising out of the employment, though the latter is not required by the Texas statute. And since the contract of insurance was voluntary and not one into which the company was obliged to enter, and no question of negligence was involved, it was held that the fact that the drowning was the result of the act of God did not absolve the company from responsibility. It was, however, held that in the present action only the payments overdue at the time of bringing action should be recovered, but that another action might be maintained at any time for further installments. Judgment was therefore given for \$815 and interest thereon.

WORKMEN'S COMPENSATION—MARITIME JURISDICTION—WORK ON VESSEL PRIOR TO LAUNCHING—FALSE STATEMENT IN APPLICATION FOR INSURANCE—*Employers' Liability Assurance Corporation (Ltd.), v. Industrial Accident Commission, Supreme Court of California (Apr. 16, 1918), 171 Pacific Reporter, page 935.*—Charles F. Mann was killed in the employ of J. A. Johnson, and his widow applied for compensation. An award was made to her by the industrial accident commission, running against the employer and against the company named, his insurer. At the beginning of the proceedings certain facts were stipulated, among others that the employment was such as to subject the employer and employee to the provisions of the workmen's compensation act. At a later stage the insurer raised the contention that the claim was maritime in character and that the commission had no jurisdiction over the matter, this contention being based upon the decision of the Supreme Court of the United States in *Southern Pacific Co. v. Jensen* (244 U. S. 205, 37 Sup. Ct. 524), which held such matters to be under the control of the Federal laws to the exclusion of State compensation laws. The court pointed out, in the opinion delivered by Judge Sloss, that the facts as stipulated were consistent with the view that the employment was in the construction of a ship before launching, and, since a definite stipulation had been made that the commission had jurisdiction, other facts must be taken to be such as would agree with the truth of this stipulation.

The insurance company set up the defense that Johnson had, in his application for the policy, made misstatements and that it had canceled the policy on learning the truth. He had stated that no insurance had been issued in connection with the risk during the preceding three years except that by the Hartford company, and none had been canceled, while as a matter of fact another company had written a policy and had canceled it. The court held that the insurer is in the same situation as the employer, and can not avoid the jurisdiction of the commission by a mere denial of the validity of the policy, but that the commission has power to decide the question of validity like the others. There being no provision in the policy that the statements in the application are warranties, the breach of which will avoid the policy, and the materiality of the truth of this answer not having been proved, the court held that the award should be affirmed.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—INJURY—*In re McKenna, Supreme Judicial Court of Maine (Mar. 14, 1918), 103 Atlantic Reporter, page 69.*—In a proceeding by Corinna McKenna to secure compensation from her employer, the Bates Manufacturing Co., or from the insurance company carrying its compensation risk, the

question arose as to a rule adopted by the industrial accident commission. This rule fixed the date of the development of disability as the time from which the waiting time for compensation should begin, and also as the starting point of the two weeks during which the employer is to furnish medical services. In the case under consideration the injury was received September 11, and disability began, as the commission found, on September 18. It therefore awarded her the expenses of medical services for two weeks from the latter date. The court held that the part of the rule relating to medical services is inconsistent with the provision of the statute which makes such services compensable for two weeks from the injury. In other words, the injury is held to be contemporaneous with the accident rather than with the beginning of the disability, if this develops at a later time. This view agrees with that taken in some other States, but is contrary to that announced in Indiana (*In re McCaskey*, 117 N. E. 268; Bul. No. 246, p. 271).

WORKMEN'S COMPENSATION—MEDICAL SERVICES—INJURY—PERIOD OF CARE—INTERMITTENT DISABILITY—*John A. Shumaker Co. v. Kendrew*, Appellate Court of Indiana (Nov. 20, 1918), 120 *Northeastern Reporter*, page 722.—Kendrew, an employee of the company named, received a bruise on his left leg, which injury arose out of and in the course of his employment. When the injury was first inflicted Kendrew went to the company's physician and was treated for a bruise on his leg which was at the time the only injury that could be detected. Seven months later, as a result of the same injury, a tumor developed on the leg. Kendrew told his foreman about it, but the company did not provide any medical service, so he, at his own expense, had the tumor treated, the cost being \$100. The compensation commission allowed him a special order for this sum. The company appealed, alleging that, inasmuch as the law provides only that the employee must be provided medical attention for the first 30 days after the injury, he was not entitled to more medical aid than was provided in the first instance. This court, in holding to this view and reversing the commission, said:

We deem it unnecessary to enter into a lengthy discussion of the question here presented or of the cases cited by appellants in support of their contention, since we are of the opinion that their position is sustained by the language of the workmen's compensation act.

The act specifically limits the liability for medical treatment to a period covered by the first 30 days after the injury. We find nothing in the act under consideration, or in the authorities construing that act or similar acts in other jurisdictions, which can be said to warrant a holding that, in order to cover the different phases of a progressive injury, the period of medical treatment at the expense of the employer

may be divided into parts, some of which may reach into a period beyond the first 30 days following the injury. This court has given to the section under consideration an interpretation which impliedly, if not expressly, holds to the contrary.

The effect of this holding is to say that the word "injury," as used in section 25, means an injury which results in a disability contemplated by the compensation act, and that so long as such injury is one which both the employer and the employee regard and treat as not requiring the services of a physician, and therefore not contemplated or covered by the provisions of section 25, it should likewise be so treated by the industrial board; that in such a case the period during which an attending physician must be provided begins to run when an actual disability to the employee, within the meaning of the act, develops from such injury.

This case was differentiated from the McCaskey case (117 N. E. 268, Bul. No. 247, p. 271), in which medical aid was directed to be paid where the disability first manifested itself some 30 days after the accident. It was held that the rule there laid down did not apply here, where there had been aid rendered immediately following the accident.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—DANGEROUS MACHINERY—*Waterman Lumber Co. v. Beatty*, Court of Civil Appeals of Texas (June 19, 1918), 204 Southwestern Reporter, page 448.—Beatty was employed by the defendant company. His duties were to fasten a cable to the harness of a mule and ride the animal to a place in the woods where men fastened the cable to a log, the log then being pulled to the train by a steam drum. Plaintiff was at the time of his employment and injury under the age of 15 years. One day, while riding to work on a locomotive of the defendant, the plaintiff was told to get on the front of the locomotive and spread sand on the rails of the track. While doing this he slipped and fell, sustaining severe injuries to his leg for which he now brings this action for damages. The defendant declares that it accepted the employers' liability act and the plaintiff must bring action under that act. The compensation act says minors must not be employed in hazardous work, and a penal statute says that anyone employing a minor under 15 years to labor about dangerous machinery shall be guilty of misdemeanor. Justice Levy, in delivering the opinion of the court, said:

And the circumstances of this case show, it is thought, a violation of the statute. The boy, Dave Beatty, was under the age of 15 years, and was employed to labor about an establishment or mill using dangerous machinery. A log-loading machine, a track-laying outfit, or a locomotive engine propelled by steam is a "dangerous machine." And a conveyor of any kind operated by steam power and used to carry logs from the forest to the mill to be made into lumber can be

said to be, in point of fact, a necessary part of the manufacturing "establishment." While the criminal law only punishes the "agent" or "employee" of a person or corporation for violation of the child-labor law, the effect is to directly forbid persons or corporations employing children under 15 years of age in certain occupations. For the words "agent" and "employee" are of a representative relation. And the provisions of the workmen's compensation act apply only, it is believed, to valid employment contracts. The insurance policy in evidence provides, "This policy shall cover all employees of the employer legally employed." And persons employed in violation of law as to age will not be within its terms. It is believed that the appellant's contention should be overruled.

As it must be said it is thought that the boy was employed by the lumber company, the employment in violation of the statute gives rise to a cause of action in behalf of the boy, being injured, as he was, as it is concluded, while in the employment. And it is, as held, negligence per se to violate the statute. And the plaintiff may recover although at the time the boy was not engaged at the very piece of work he was primarily employed to do. The unlawful employment is deemed as the proximate cause of the injury.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ELEVATOR OPERATOR—*Robilotto v. Bartholdi Realty Co., Supreme Court of New York, Special Term (September, 1918), 172 New York Supplement, page 328.*—Michael Robilotto, a minor under 16 years of age, was killed, while in the employ of the defendant company, while operating an elevator in violation of the law of the State. The compensation law provides the exclusive remedy for injuries received in employment, but the application of this act to persons unlawfully employed was said by the trial court not to have been decided by the State court of last resort at the time of this action. The administrator sued for damages in behalf of the father of the deceased infant, but the employer contended that the compensation law offered the only remedy available. Judge McAvoy, in rendering a decision in favor of the employer, referred to the fact of the illegal employment of the boy, and cited the judgment of the appellate division in the case, *Ide v. Faul & Timmins*, 179 App. Div. 567, 166 N. Y. Supp. 858, in which it was held that the law applied to a boy 14 years old, injured while unlawfully employed. The reasoning of the court was that the employment was one within the act, and that minors are not excluded, either by the compensation law or the labor law. Judge McAvoy followed this ruling against his personal judgment, citing cases in support of his views.

He then concluded:

It is almost manifest that it will be found that the policy of conserving child life from injury or destruction does not ask that infants protected by this legislation enacted in the labor law be confined to

the exclusive remedy of the compensation act. The evils attendant upon the pleas of contributory negligence, assumption of risk, and the construction of the follow-servant doctrine are not to be feared in an infant's action, or that of his representative, upon an allegation of unlawful employment in a hazardous occupation.

It would seem surely to be a better policy to negative the right of compensation in employments prohibited as unlawful as a salutary restraint both on parents tending toward their fulfillment of their obligation to keep their children from the proscribed work and on employers as exposing them to the risk of common-law damages for injuries, if sustained by such infants, as to whose engagements the law has interposed a barrier. Notwithstanding individual judgment that remedy is not to be found within the compensation act, and an action at common law still survives in these circumstances, I will follow the decision of the third department and overrule plaintiff's demurrer to the defense.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—STAMPING MACHINE ATTENDANT—*Acklin Stamping Co. v. Kutz, Supreme Court of Ohio (April 2, 1918), 120 Northeastern Reporter, page 229.*—Louis Kutz was a minor 15 years of age, employed by the defendant stamping company as a helper to a stamper; it was his duty to supply small pieces of steel or yoke ends to the stamper to be used in the stamping machine. His hours of service were from 5.45 o'clock in the evening to 5.15 o'clock in the morning. The defendant installed in its shop where plaintiff worked a large fan which was made to revolve at a great speed by machinery. There was no guard on the fan. The jury found that, while playing about the fan and after being warned to keep away from it, plaintiff in some way had his hand drawn into the fan and so mutilated that it was necessary to amputate it. The court of common pleas took the view that the plaintiff, Kutz, had exercised his option not to proceed under the compensation law and refused to let plaintiff prove his age and hours of service, and gave judgment for the defendant. The court of appeals reversed this judgment and remanded the case to the lower court for new trial. On petition of defendant the case was referred to the supreme court. The supreme court, in affirming the decision of the court of appeals, said:

But was the court of common pleas correct in assuming that the case was controlled by the provision of the workmen's compensation act?

This act was enacted for the purpose of providing a State insurance fund for the benefit of injured and dependents of killed employees and requiring contribution thereto by employers. If the relation of employer and employee does not exist its provisions have no application. It becomes necessary, therefore, to determine who is an "employee" within the meaning of the term as used in the workmen's compensation act. The term is defined by section 14 of the act (sec. 1465—61, General Code). It includes minors "who are legally

permitted to work for hire under the laws of the State." We think that it was intended by this clause to exclude from the operation of the provisions of the act minors whose employment is illegal. * * * The test is: Was the employment of the minor in a given case illegal? If there has been on the part of the employer a violation of the statutes of this State enacted for the protection of children, the employer can not avail himself of the provisions of the workmen's compensation act.

A law of Ohio, section 12996, General Code, prohibits the employment of children under the age of 16 years before the hour of 7 o'clock a. m. or after the hour of 6 o'clock p. m.; another law, section 13001, General Code, prohibits the employment of such children to assist in operating a stamping machine. At the close of all the evidence the court of common pleas sustained a motion of the defendant to strike out all evidence relating to plaintiff's age and hours of service. As to this action the supreme court said:

We think this evidence was competent and should have been allowed to go to the jury. If plaintiff had been employed to work in or about or in connection with the factory before the hour of 7 o'clock in the morning and after the hour of 6 o'clock in the evening, or had been employed to assist in operating a stamping machine used in sheet-metal and tinware manufacturing—and these were questions of fact for determination by the jury—then the employment was illegal, and the plaintiff would not be an employee within the meaning of that term as used in the workmen's compensation act. Its provisions would have no application, and the case would be one as though the act had not been enacted.

WORKMEN'S COMPENSATION ACT—NOTICE—ACTUAL KNOWLEDGE OF INJURY BY EMPLOYER—*Vandalia Coal Co. v. Holtz, Appellate Court of Indiana (Oct. 11, 1918), 120 Northeastern Reporter, page 386.*—Holtz was in the employ of the coal company as a foreman under the direction of a pit boss. It was his duty to operate an electrical machine. While at this work his eye was injured by a flying particle. The coal company's chief electrician or machine foreman had actual knowledge of Holtz's injury a few minutes after it occurred. Holtz, in accordance with the company's rules, went to the mine physician and had his eye examined. The physician said the injury was only temporary and would soon get well. Holtz returned to work but some time later consulted an oculist and learned that he had lost the sight of the injured eye. Holtz, relying on the statement of the mine physician, had not given any notice in writing of his injury, and when he visited the oculist the time for giving a formal notice had expired. The court in affirming an award in favor of Holtz by the industrial board said:

The board having found the facts showing actual knowledge of the injury by appellant's agent and representatives at the time it occurred,

and also reasonable excuse for the failure to give the statutory notice, such findings are binding and conclusive on this court if there is any evidence tending to sustain either of such findings.

Furthermore, as already stated, appellant's pit boss or general foreman had actual knowledge of the injury suffered by the appellee at the time the disability therefrom was definitely ascertained to have resulted from such injury, and this has been held to be sufficient under our statute.

WORKMEN'S COMPENSATION—NOTICE—CLAIM—DATE OF INJURY—DISABILITY, AND NECESSITY FOR MEDICAL TREATMENT, BECOMING EVIDENT AFTER EXPIRATION OF LIMIT FOR FILING CLAIM—*Cooke v. Holland Furnace Co.*, *Supreme Court of Michigan (Mar. 27, 1918)*, 168 *Northwestern Reporter*, page 1013.—Fred H. Cooke was an employee for several years in the factory of the Holland Furnace Co. On October 6, 1915, a bolt fell from an overhead track and struck him on the head. The foreman gave him first-aid treatment, and washed the wound with peroxide. Commencing in the following December he had headaches, sleepiness, and dizziness, and a lump appeared on his head where the bolt had struck. During August, 1916, he was obliged to lay off from work for two weeks, but resumed on September 14. A few days later he had an X-ray examination made, and about October 1 an operation was performed, which showed a fracture of the skull and a softening of the bone, with an accumulation of pus underneath. The removal of the bone and trepanning of the skull were necessary. He made claim for compensation on October 9, and resumed work November 14. The industrial accident board awarded compensation for 8½ weeks, and for medical and hospital services, and the company contested this award on the ground of failure of notice and claim within the statutory limits of three and six months, respectively. The court stated that four other cases were before it, involving the same question as presented here, as to whether the running of the limitation for filing notice and claim, which under the terms of the act begins with the "happening of the injury," starts with the accident or with the development of such results that the disability occurs, or the injured person becomes definitely satisfied that the disability is the result of the accident. The court emphasizes its duty to take the law as it finds it rather than to resort to judicial legislation, and discusses somewhat the matter of limitations in general. Continuing, Judge Fellows, who delivered the opinion, said:

At the time of the enactment of this legislation the word "injury" had acquired in the law a well-defined and well-understood meaning; indeed, counsel for plaintiff in the instant case frankly states:

"There must necessarily be a new definition of the word 'injury' to embrace the circumstances that arise under the workmen's compensation law."

But the difficulty with this suggestion lies in the fact that the legislature did not use this word in the act in question with the view of some new definition which this court or an administrative body might later see fit to coin. It was used in the act as it was commonly understood at the time. Our legislature did not see fit to give it a special definition, as did the Legislature of Nebraska, as we shall presently see.

The Nebraska case relied upon by the plaintiff in the present case, *Johansen v. Union Stockyards Co.*, 99 Nebr. 328, 156 N. W. 511 (see Bul. No. 224, p. 340), is discussed, and distinguished from the present case because the Nebraska statute contains the following language:

The terms "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom.

Other decisions are discussed, and the conclusion is reached that the award to the injured man must be vacated and reversed. In concluding the opinion, the court says:

Upon principle we are persuaded that the defendant must prevail in its contention. When the bolt fell, striking the plaintiff on the head, it fractured his skull. That was the injury. The formation of an abscess, the accumulation of pus, the softening of the bone, were the results of that fracture—of the injury received; while these results rendered the injury more severe, the injury was there from the first and subsequent want of care but aggravated it. Had the plaintiff then made his claim for compensation and had proper medical treatment, which his employer was bound to pay for under the provisions of section 4, it is highly probable he would have been saved much pain, and a serious and expensive operation would have been obviated. This would have been beneficial alike to him and his employer.

While the words "accident" and "injury" are not synonymous, the accident produced the injury, and in point of time they were concurrent. We are compelled to hold, must hold, unless we resort to judicial legislation, that the legislature by these two sections fixed the date of the injury at the date of the accident, and not some remote date thereafter, when the injured employee became definitely satisfied that he was disabled as a result of the accident.

WORKMEN'S COMPENSATION—NOTICE—KNOWLEDGE—AGENT OF EMPLOYER—*In re Simmons*, Supreme Judicial Court of Maine (Mar. 13, 1918), 103 *Atlantic Reporter*, page 68.—Bertha B. Simmons was petitioner, in proceedings to obtain compensation for injury received by her, against the Commonwealth Shoe & Leather Co., her employer, and its insurer. One defense was her failure to give written notice. The petition, which alleged that injury to her thumb had occurred in the course of her employment in the stitching room of the com-

pany, and that the wound became infected and the thumb became useless in consequence, also alleged that the company had knowledge or notice of the injury. The commission found from the evidence that the foreman of the room was informed of the accident during the day on which it occurred. One section of the law states definitely upon what officers of a corporation written notice may be served, and a foreman is not one of such officers. In the following section it is declared that "want of notice shall not be a bar to proceedings under this act, if it be shown that the employer or his agent had knowledge of the injury." The court held that the agent whose knowledge would be considered that of the company need not be one of the officers referred to in the provision for written notice, but held that the knowledge of the foreman, whose duty it was to report accidents to the company, was sufficient. Massachusetts decisions and some others are cited in support of this position. The evidence having been sufficient to sustain the finding of the commission as to disability, the appeal of the company was dismissed.

WORKMEN'S COMPENSATION—RAILROAD COMPANIES—INTERSTATE OR INTRASTATE COMMERCE—WORK ON POWER LINE SUPPLYING ELECTRICITY TO INTERSTATE TRAINS—*Southern Pacific Co. v. Industrial Accident Commission, Supreme Court of California (Apr. 24, 1918), 171 Pacific Reporter, page 1071.*—William T. Butler was killed while working as an electric lineman in the employ of the Southern Pacific Co. The company operates a system of electric railway lines in Alameda County, Calif., cars of the company being used on these lines for both interstate and intrastate commerce. The company generates electric power, which passes through a main line to substations where, by the agency of converters and transformers, it is changed from alternate to direct current and reduced to a voltage suitable for use on the trolley wires. The employee was working on the main line which carried the high-power current when he was killed by electric shock. The court examined the principles of the decided cases to determine whether an award of compensation to Butler's dependents by the industrial accident commission could stand, or whether the employment was in interstate commerce, and therefore governed by the Federal employers' liability act. The court held that the nearest analogy to the present case was that of the switching of cars of coal to be used in railroad locomotives to a chute, in which circumstances the Supreme Court of the United States had decided that the relation of the work to interstate commerce was too remote to be considered as employment in interstate commerce. The award of compensation was therefore affirmed. Two of the six judges sitting in the case

dissented on the ground that the power line was in effect an extension of the trolley wires, work upon which had been held in an earlier case to be in interstate commerce.

WORKMEN'S COMPENSATION—RELEASE—FRAUD—TRIAL BY JURY—*Vogler v. Bowersock, Supreme Court of Kansas (Feb. 9, 1918), 170 Pacific Reporter, page 805.*—A. J. Vogler brought action against J. D. Bowersock, employer, to enforce the payment of compensation for an injury consisting of the loss of his left hand, except the thumb, as the result of its being crushed in the rollers of a corrugating machine. The defense was based upon the execution of a release in consideration of the payment to the plaintiff of \$500. In reply it was stated that an arrangement had been entered into for collective insurance under which 5 cents had been deducted from the pay of employees for each \$5 or major portion thereof earned; that the agent of the insurance company had obtained the release without disclosing that he represented Mr. Bowersock; and that the employee accepted the \$500 in settlement of his claim for insurance, and not as compensation. The release on its face absolved the employer from further liability for damages, and made no reference to insurance. Correspondence between the plaintiff's attorney and the company, however, showed that the company claimed that it was intended to cover also a settlement of the insurance matter. Evidence of the discussion between the agent and the employee as to the amount to which he was entitled under the policy tended to prove that a settlement of the insurance claim was contemplated. When the case had come on for trial the plaintiff had demanded a trial by jury, while the employer insisted that the compensation law provided for trial by the court only. A jury trial was granted, and the verdict and judgment were in the plaintiff's favor. The supreme court, construing together various sections of the act relating to settlement by agreement, determination of disputes, and waiver of jury trial, held that the demand at the time of hearing before the court constituted sufficient notice, and that the procedure had been correct. The evidence was reviewed, and it was decided that the verdict setting aside the release was justified, as was the instruction to the jury that they might find for the plaintiff without finding that the agent of the insurance company intentionally practiced fraud. The judgment for the employee was affirmed.

WORKMEN'S COMPENSATION—REPORTS OF INJURIES—EMPLOYERS ELECTING NOT TO BE GOVERNED BY ACT—*In re Burk, Appellate Court of Indiana (Jan. 17, 1918), 118 Northeastern Reporter, page 540.*—The Industrial Board of Indiana referred to the court in this case

questions as to the scope of section 67 of the compensation law of that State, which requires reports from employers as to injuries suffered by their employees in the course of their employment. The first was as to whether employers who have availed themselves of the exemption features of sections 2 and 3 are required to make such reports. The court answered in the affirmative, calling attention to the fact that such reports are required of employers of casual laborers, farm laborers, and domestic servants, although they are excepted from the operation of the act in other respects, so that it is evident that the intention was to require reports from others than those operating under the compensation provisions. In answering the other questions the court held that an action for penalties for noncompliance with section 67 might be brought either in the name of the State or by the industrial board, and that the venue of the action is in the county of the employer's residence and business (he being required to deposit the reports in the mails), rather than that in which the State capital is located.

WORKMEN'S COMPENSATION—SPECIAL FUND FROM CONTRIBUTIONS BY INSURERS WHERE NO BENEFICIARY SURVIVES—CONSTITUTIONALITY—*State Industrial Commission v. Newman, Court of Appeals of New York (Jan. 29, 1918), 118 Northeastern Reporter, page 794.*—Julia De Hart died from injuries which made the workmen's compensation act applicable, and, there being no person entitled to compensation under the act, the commission awarded to the State treasurer the sum of \$100. An appeal was taken, the contention being made that this provision was unconstitutional. It was claimed that the amendment to the constitution providing for the enactment of a compensation law did not authorize the payment of compensation to others than employees or their dependents. The compensation law as enacted in 1914 was construed, in case of a second injury to one already partially disabled, bringing about total disability (as by the loss of a second eye or a second hand), as making the employer at the time of the second injury responsible for compensation for total disability. This naturally created a handicap to partially disabled persons, preventing their ready employment, and the legislature in 1915 passed an amendment to the effect that compensation to previously disabled persons should not be greater than the amount allowed for the latter injury considered by itself. In 1916 another amendment, subdivision 7 of section 15, the one in question in the present case, provided that such disabled persons, after the cessation of the payments for permanent partial disability, should receive for the remainder of their lives 66½ per cent of their wages, payable from a special fund accumulated by the payment of \$100 by the insurer in

every case of fatal injury where there is no person entitled to benefits. This provision was held valid, Judge Collin delivering the opinion and saying in part:

The evident and clear purpose of the subdivision was to remove a condition, as between employers and partially disabled employees, inconsonant with the spirit of the act and, perhaps, unjust, through the creation of a State fund contributed to by the insurance carriers and, as the permanent disability arose, accessible to any member of the entire prescribed class of employees so disabled. Its provisions are within the letter and spirit of the constitution.

All employers contribute under identical conditions to the special fund of said subdivision 7, those utilizing the State fund or the stock or mutual associations through the insurance premiums contributed to the fund or association, and the self-insurers by payments directly. The special fund is exclusively distributed among the employees of those who contribute. Its creation and use are not different in principle from those of the State fund or the funds of the associations constituted of the premiums received. In the last analysis all compensation to the employees of the employers paying those premiums is not paid by the employer to his employees, but from the aggregated and indiscriminate funds. From those funds the awarded compensation is paid directly to the employees or dependents, or reimbursement for payments by employers is made to them. In matter of *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600 [Bul. No. 189, p. 221], we expressed the conclusions that the scheme of the act is essentially and fundamentally the creation of a State fund from premiums paid by employers to insure or effect the payment of a prescribed compensation for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments, and that the act was amply sustained by the constitution. Subdivision 7 is well within the scheme.

It was further held that an undertaker to whom an award of \$100 had been made for funeral expenses of the deceased employee was not a "person entitled to compensation" out of the contributions to the special fund.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL AND PERMANENT PARTIAL DISABILITY—AWARDS—LOSS—*Franko v. William Shollhorn Co.*, *Supreme Court of Errors of Connecticut* (July 23, 1918), 104 *Atlantic Reporter*, page 485.—Franko while in the employ of the defendant suffered a laceration of the first finger of his right hand, which injury arose out of and in the course of his employment, and was totally incapacitated from February 18 to May 21, 1917. On May 21 two phalanges of the index finger were removed. The commissioner awarded claimant, Franko, as compensation for total incapacity on account of said injury \$5.50 a week from February 18 to May 21, 1917, and at a like rate for the two phalanges of the index finger beginning May 21 and extending for a period of 25½ weeks. Defendant contends that compensation can only be had for 25½ weeks

for the loss of the phalanges. The opinion of the court, as expressed by Judge Wheeler, confirming the two separate awards, is in part as follows:

Our act in its original form and in its amended forms of 1915 and 1917 provides compensation for both total and partial incapacity resulting from injuries which do not prove fatal. Section 11 relates to total incapacity. * * * Section 12 provides that, in case of injury resulting in partial incapacity, there shall be paid the injured employee, etc. * * *.

We can not agree with appellant that since the loss from February 18 to May 21 was of the use of the two phalanges, and from May 21 of the loss of the two phalanges, the injury was a single one. These two sections provide for compensation in the case of certain named injuries resulting in the loss of a member of function.

The word "loss" is used in the sense of deprivation. It designates the handicap under which the employee will suffer in the future. Compensation is based on this loss. It is not measured, as are other injuries resulting in partial incapacity, by impairment of earning power. Each class of injuries results in partial incapacity. There is no reason why an injury under each class should not be compensated, and, if the injuries in question be, as the respondent insists, the loss of the use of the two phalanges and the loss of the two phalanges, these are two independent injuries for each of which compensation is provided measured as to amount and duration. The loss of two phalanges carries a named compensation and the loss of the use of two phalanges also carries a similar compensation. There is nothing in the act which prevents compensation for any number of the several injuries specifically provided for. Payment for one does not pay for any but the one injury.

The argument of the respondent relies, to a large extent, upon that part of section 11 which provides that the compensation for the named injuries shall be "in lieu of all other payments." This refers to payments for the named injuries. As to these the compensation designated is exclusive. But this does not limit the award to any one of the compensations provided for the named injuries; nor does it purport to be in lieu of payments made for injuries resulting in partial incapacity not among these named injuries. And since these are a distinct class of injuries resulting in partial incapacity the compensation provided for these specific injuries can not and does not cover them. It is exclusive of any other payment by way of compensation for the injuries specifically designated.

The handicap determines the loss. But when the loss of the member is preceded by a long incapacity while efforts are made to heal and cure the injury, the injured employee has suffered far more than the mere loss of the member.

The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—LOSS OF PHALANX—AWARDS—*Kramer v. Sargent & Co., Supreme Court of Errors of Connecticut (July 23, 1918), 104 Atlantic Reporter, page*

490.—Kramer, on December 4, 1917, suffered an injury to the terminal phalanx of the index finger of his left hand, which resulted on the same day in the loss of this phalanx by amputation and in total incapacity for all labor from the date of the injury to February 8, 1918, and such incapacity seemed likely on the latter date to continue for some time. Kramer claimed and the commissioner allowed awards for the loss of the phalanx and for the total incapacity resulting from such loss. Judge Wheeler, in giving the decision of the court, distinguished this from the *Franko v. Schollhorn* case, and limited the award to the loss of the member. The opinion is in part as follows:

In *Franko v. Schollhorn Co.*, 104 Atl. 485, above, just decided, there was a total incapacity preceding the loss and resulting from an injury and continuing during the period of the attempt to cure the injury to the finger. In *Olmstead v. Lamphier*, 104 Atl. 488, [next case below], just decided, the loss of the leg and the total incapacity resulting from the injury to the shoulder were independent injuries arising out of the one accident. In this case there is one injury and the incapacity follows immediately the loss of the phalanx and results from it. We reached the conclusion in *Franko v. Schollhorn Co.*, supra, that under our act there may be a total incapacity and a partial incapacity growing out of the same injury, for each of which compensation may be awarded. But such an award is not, as we think, contemplated by our act in the case of a loss of a member.

All of the specified injuries in section 12, for which a specially named award is made, will ordinarily involve a period of incapacity of varying duration. And this is the reason the rate of the award in these cases is made the same as in the cases of total incapacity under section 11. The award was made larger because of the extent of the injury. In section 12, the rate of compensation for cases of partial incapacity resulting from injuries not specifically described is "half the difference between his average weekly earnings before the injury and the amount he is able to earn thereafter;" while, in the cases of partial incapacity resulting from injuries specifically described, the rate of compensation is half of the average weekly earnings of the injured employee. This increased scale of compensation is no doubt intended to cover the loss of the member and the handicap of the future through this loss, but it was also intended to cover all the injuries resulting from the loss of the member. This compensation is made "in lieu of all other payments;" that is, it is exclusive of all other payments for this particular injury which is the loss of the member. This language is used in its ordinary significance.

For the reasons stated in the above opinion the award for the loss of the phalanx was allowed but the award for the total incapacity on account of the injury was vacated.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—PARTIAL DISABILITY—MULTIPLE INJURIES—SURGICAL AID—ARTIFICIAL LEG—*Olmstead v. Lamphier*, Supreme Court of Errors of Connecticut

(July 23, 1918), 104 *Atlantic Reporter*, page 488.—Olmstead was in the employ of the defendant on September 26, 1916, when he was thrown from a horse, sustaining an injury to his shoulder, causing partial incapacity equal to one-half total incapacity, and also sustaining injuries to his left leg of such a nature that they necessitated its amputation above the knee. Olmstead was supplied with an artificial leg. He brought proceedings under the workmen's compensation act, and was granted an award of \$7.50 per week for 182 weeks for the loss of the leg and \$3.75 per week during the period of partial incapacity resulting from the injury to the shoulder, and \$115 for the artificial leg. Defendant claims that under the provisions of section 7B and other sections of the workmen's compensation act he should not be compelled to pay for the artificial leg or for compensation for the partial incapacity. Judge Wheeler, in giving the opinion of the court sustaining the award, said:

In *Franko v. Schollhorn Co.*, 104 Atl. 485 [p. 224], just decided, we construed section 11 of our act as providing one form of compensation during total incapacity and another for the permanent loss of a member of the body. The injury to the shoulder was a distinct injury, resulting in total incapacity; the loss of the leg was also a distinct injury, resulting in partial incapacity. For each injury, under our construction of this section, the injured employee was entitled to compensation. The fact that each injury resulted from one accident did not make of these a single injury. Nor did the act intend that compensation for the loss of a member should be in lieu of all compensation for other injuries resulting from one accident. Our act does not permit double compensation, and hence the trial court was correct in making these awards consecutive, the award for the total incapacity to precede in payment that for the partial incapacity.

We are left with the bald question whether surgical aid or service includes the furnishing of an artificial leg.

There is no specific provision for the furnishing of medicines or any material or apparatus required by the physician. Yet it is clear that all these are included in the term "medical aid or service." It must also be clear that all necessary bandages, materials, splints, and apparatus required by the surgeon in effecting cure are included under the term "surgical aid or service." * * * Why give the patient splints to hold the bones in place or crutches with which to walk, and regard these as used in surgery? Why supply a glass eye? Because it is the everyday duty of the surgeon to order these things for his patient, and they are included as, of course, under "surgical aid." There is no difference in principle between supplying these and the artificial limb. That pertains to surgery and is used in surgery.

Our act contemplates the furnishing of all the medical and surgical aid that is reasonable and necessary. The purpose of this provision is to restore the injured employee to a place in our industrial life as soon as possible by the use of all medical and surgical aid and hospital service which the ordinary usages of modern science of medicine and surgery furnish.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—LOSS OF SIGHT—SECOND INJURY—*In re J. & P. Coats (R. I.), Inc., et al., Supreme Court of Rhode Island (June 7, 1918), 103 Atlantic Reporter, page 833.*—Joseph Spence was engaged by the company named as a card stripper. Previous to this employment he had lost the sight of his right eye while serving in the Spanish-American War. On June 8, 1917, while still in the employ of the company, he was struck upon the head by a falling ladder and suffered as a result thereof the total and irrecoverable loss of the sight of his left eye. Prior to this accident Spence had waived his common-law rights to recover for injury occurring during this employment, and the corporation had elected to become subject to the provisions of the workmen's compensation act. These facts being agreed to by both parties, the case was submitted on petition asking for the construction of sections 10, 11, and 12 of article 2 of the workmen's compensation act. Section 10 provided for compensation of one-half of the employee's pay, but not less than \$4 nor more than \$10 per week for a period of 500 weeks for total and permanent disability. Section 11 is very much the same, providing, however, for partial disability. Section 12 provides additional compensation in case of (a) loss of both eyes and (b) loss of one eye, to the amount, in the former case, of half pay for 100 weeks and in the latter case for 50 weeks.

The questions before the court were: (1) Could Spence have suffered more than partial disability under the act by the loss of his remaining eye? (2) Conceding that Spence suffered permanent disability, does a conclusive presumption arise under the act that it was total disability? (3) Under section 12 is Spence entitled to half pay for 50 or 100 weeks?

The court, after reviewing the case of *In re Braconnier*, 223 Mass. 273, 111 N. E. 792 [Bul. No. 224, p. 228], in which the employee lost his remaining eye and the court held that, under the provisions of the statute, he had suffered total incapacity, gave the following opinion:

In the present case we are of the opinion that a condition of total incapacity resulted to the employee from the injury to his left eye, and we adopt * * * the opinion in *Braconnier's* case, *supra*, as a clear and succinct statement of the grounds of our own opinion. We accordingly answer question 1 in the affirmative.

We also are of the opinion that question 2 should have an affirmative reply. It is so closely akin to question 1 that the same line of reasoning is applicable.

In answering question 3 the court said:

The purpose of section 12 is plainly to provide compensation for specified injuries in addition to the compensation otherwise provided for in the act. There is and can be no question that the specified in-

jury in this case is "the entire and irrevocable loss of the sight of" one eye, and not of both, and accordingly the employee is entitled to compensation therefor for 50 weeks and not for 100 weeks.

The law of Rhode Island makes specific awards for certain maimings, etc., these awards to be in addition to other benefits paid. It follows that in the present instance there was an award for the loss of the eye in addition to that for the permanent total disability due to complete loss of sight.

WORKMEN'S COMPENSATION—USUAL COURSE OF EMPLOYER'S BUSINESS—INJURY TO EMPLOYEE WHILE BUILDING AN ADDITION TO PREMISES—*State ex rel. Lundgren v. District Court, Supreme Court of Minnesota (Nov. 15, 1918), 169 Northwestern Reporter, page 488.*—The defendant corporation was engaged in the retail lumber business and decided to sell also coal and other fuel. It employed one Lundgren to do a specific part in the construction of a shed in which to keep the coal. While constructing this shed plaintiff was injured. The district court refused him compensation on the ground that the work he was doing was not in the usual course of the employer's business. In reversing this decision the court said:

While the defendant was not a building contractor nor engaged in specific work of that kind, the construction of the shed in question was in furtherance of its established business, a necessary part thereof, and we discover no sufficient reason for holding that it was outside of and beyond what is customary and usual in a situation of the kind. That should be the test in construing the statute. The construction of the shed should therefore be held within the usual course of the defendant's business within the meaning and contemplation of the statute. We so hold.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—*Baltimore Car Foundry Co. v. Ruzicka, Court of Appeals of Maryland (Apr. 3, 1918), 104 Atlantic Reporter, page 167.*—Ruzicka was crushed and killed while attempting to pass between two cars on a track in the car-erecting shop of the Baltimore Car Foundry Co., in which he was employed as a maker of decks or platforms for the cars there in the course of construction. The accident occurred in the evening as the day's work was closing and Ruzicka was starting to leave the shop on his way home. He had been notified that the cars were going to be coupled and moved. There was a board walk over the tracks, which he might have taken, although there was no rule requiring him to do so. Another workman warned him not to pass between the cars, but he stated that he had plenty of time. But he stopped and talked with

another worker for five minutes before he continued on his way and was killed. The company claims Ruzicka was guilty of "willful misconduct," and that the accident did not arise "out of and in the course of his employment." The trial court approved the award made by the commission, and its judgment was affirmed by the court of appeals. The opinion says, in part:

It is, of course, perfectly clear that the fatal accident we have described was the result of Ruzicka's own negligence. But we agree with the court below and the State industrial commission in the opinion that the highly imprudent act which caused the unfortunate man's death is not properly to be characterized as willful misconduct. It lacked the element of intentional impropriety which those words imply. It was a thoughtless and heedless act but not a willful breach of a positive rule of conduct or duty.

But in thus neglecting to have proper regard to his safety he was not, in our opinion, guilty of willful misconduct within the purview of the workmen's compensation law, which, except in cases of injury produced by such misconduct, or self-inflicted, or due to intoxication, provides compensation for the disability or death of employees resulting from accidental personal injury arising out of and in the course of the employment "without regard to fault as a cause of the injury."

We think that the accident which resulted in Ruzicka's death, and which occurred while he was on the employer's premises and immediately at the close of the day's work, should be regarded as arising out of and in the course of the employment.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE BEST SAFETY DEVICES—*Haskell & Barker Car Co. v. Kay*, Appellate Court of Indiana (May 29, 1918), 119 *Northeastern Reporter*, page 811.—On September 8, 1916, Charles Kay was struck by a car lever in which he was drilling a hole and died from the effects of the blow. His widow applied for compensation, and an award was made to her by the industrial board, from which the employing company appealed. Admitting that the employee suffered a personal injury by accident arising out of and in the course of his employment and resulting in his death, it contended that the employee was guilty of willful misconduct, consisting of failure or refusal to use a safety device, which under the compensation law bars compensation. It appeared that there was danger of pieces of the iron being drilled whirling with the bit, and also of their climbing the stem and then whirling. A device called a clamp was provided, which prevented both whirling and climbing; but the employees often used a "plug," which could be attached more quickly and prevented whirling except in the case of climbing, and which, as appeared by much of the evidence given, was equally good for some

kinds of work. Kay had been doing heavy work and using the plug, and when four car levers were given him to drill he did not change to the use of the clamp as a guard and was killed as indicated. The court held that his failure to use the more efficient guard was negligence rather than willfulness. The following is from the opinion delivered by Judge Caldwell:

The evidence being uncertain, as indicated, and decedent shortly prior to his injury having been engaged in drilling where a clamp was not required, and being directed by the foreman to do a small job that did require a clamp according to appellant's view of the matter, we can not say as a matter of law that his conduct amounted to anything more than thoughtlessness. We do not feel that the situation justifies us in going any further than this, even on the assumption that decedent knew that the use of the plug was attended by a degree of danger. As we have said, however, the evidence does not compel a deduction any stronger than that the choice of appliances in any situation was committed to decedent's discretion. At any event we can not say as a matter of law that his conduct was anything more reprehensible than mere negligence.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE GUARD—*Bay Shore Laundry Co. v. Industrial Accident Commission of California et al., District Court of Appeal, Third District, California (Mar. 20, 1918) 172 Pacific Reporter, page 1128.*—An award for compensation was granted to Paul Verdier by the industrial accident commission against the Bay Shore Laundry Co. Verdier was an experienced laundry workman, having been in that line of work for 20 years, and was at the time of his injury in the employ of the plaintiff. While operating a wringing machine he removed a safety device or guard for the sole purpose of gaining time and because he had seen other employees doing likewise. While the guard was removed his foot slipped from the brake causing him to lose his balance and his hand to be injured by coming in contact with the unguarded portion of the machine.

Plaintiff petitioned to have the award annulled, and the petition was granted on the ground that Verdier's action constituted "willful misconduct" within the meaning of the Workmen's Compensation, Insurance, and Safety Act of 1913 and was in violation of the safety orders of the industrial accident commission. Regarding the latter the court said:

Section 62 of said act [workmen's compensation, etc., act] provides that every employee shall obey and comply with the requirements of the safety orders of the commission. Hence it can not be disputed that Verdier was guilty of a crime when he removed the guard, and that he knew that his act was likely to result in injury to himself.

On the question of the willful misconduct of Verdier the court expressed the following opinion:

Moreover, there can be no doubt that the misconduct of Verdier was willful within the meaning of the statute. The definition of the term is found in the code, and it must be presumed that in said compensation act the legislature had in view that definition. Section 7 of the Penal Code provides:

"The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or injure another, or to acquire any advantage."

That Verdier had a willingness and purpose to commit that act of removing the guard is beyond question. From the act itself such presumption would follow, but he makes it certain by his testimony as to why he performed the act. It is not required to show that the injured person committed the wrongful act maliciously to prevent his recovery. If the legislature had so intended it would, of course, have so provided. It was deemed proper to exclude one who was guilty of intentional or willful wrongdoing, and if we are to regard the fact in this case and the plain ordinary significance of the terms employed by the legislature it must be held that the applicant herein is in the excluded class.

In substantiation of this decision concerning what constitutes willful misconduct the court quoted from a decision of the supreme court in the case of *Great Western Power Co. v. Pillsbury*, 149 Pac. 35 (Bul. No. 189, p. 292).

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—FAILURE TO USE GUARD—*Wick et al. v. Gunn et al.*, *Supreme Court of Oklahoma* (Dec. 11, 1917), 169 *Pacific Reporter*, page 1087.—Charles D. Gunn was granted compensation against his employer, S. J. Wick, and the insurer of the latter, for injuries sustained during the course of his employment by Wick. The employer and insurer appealed from the award of the industrial commission because, as they alleged, the injury was caused by the employee's willful failure to use a safety appliance provided for his protection, which failure, under the terms of the compensation law of the State, barred him from benefits. He was injured while operating a combination edger and planer, and the court stated that the evidence showed that the injury would not have occurred if the guard had been adjusted, but that doing the work without the guard was not unusually or necessarily dangerous; that the employee evidently had no idea of violation of law or wrongdoing in adopting the method he did; that the work took but a moment without the use of the guard, while the guard provided was out of date, complicated, and not automatic, and took considerable time to

adjust and use, and the labor commissioner had recommended one that was automatic, simple, and inexpensive. The court affirmed the judgment for the award, holding that mere careless failure was not willful, and that it was not made by the statute the employee's duty to use such a guard as the one provided. The following quotations from the opinion by Judge Stewart indicate the views of the court:

We hold that the mere intentional and voluntary failure on the part of a workman to use a proper safety appliance does not necessarily make the act willful as contemplated by the exception under consideration. The willfulness contemplated amounts to more than a mere act of the will and carries with it the idea of premeditation, obstinacy, and intentional wrongdoing. The mere voluntary failure to use the same would constitute contributory negligence and to hold that such failure in itself barred relief would, in effect, preserve a defense abrogated by the act.

The claimant, being charged only with the duty of using guards provided in pursuance of law or by order of the labor commissioner, can not in this case be charged with failure to use the guard furnished, there being evidence to show that the same was neither a proper guard nor one provided pursuant to order of the labor commissioner.

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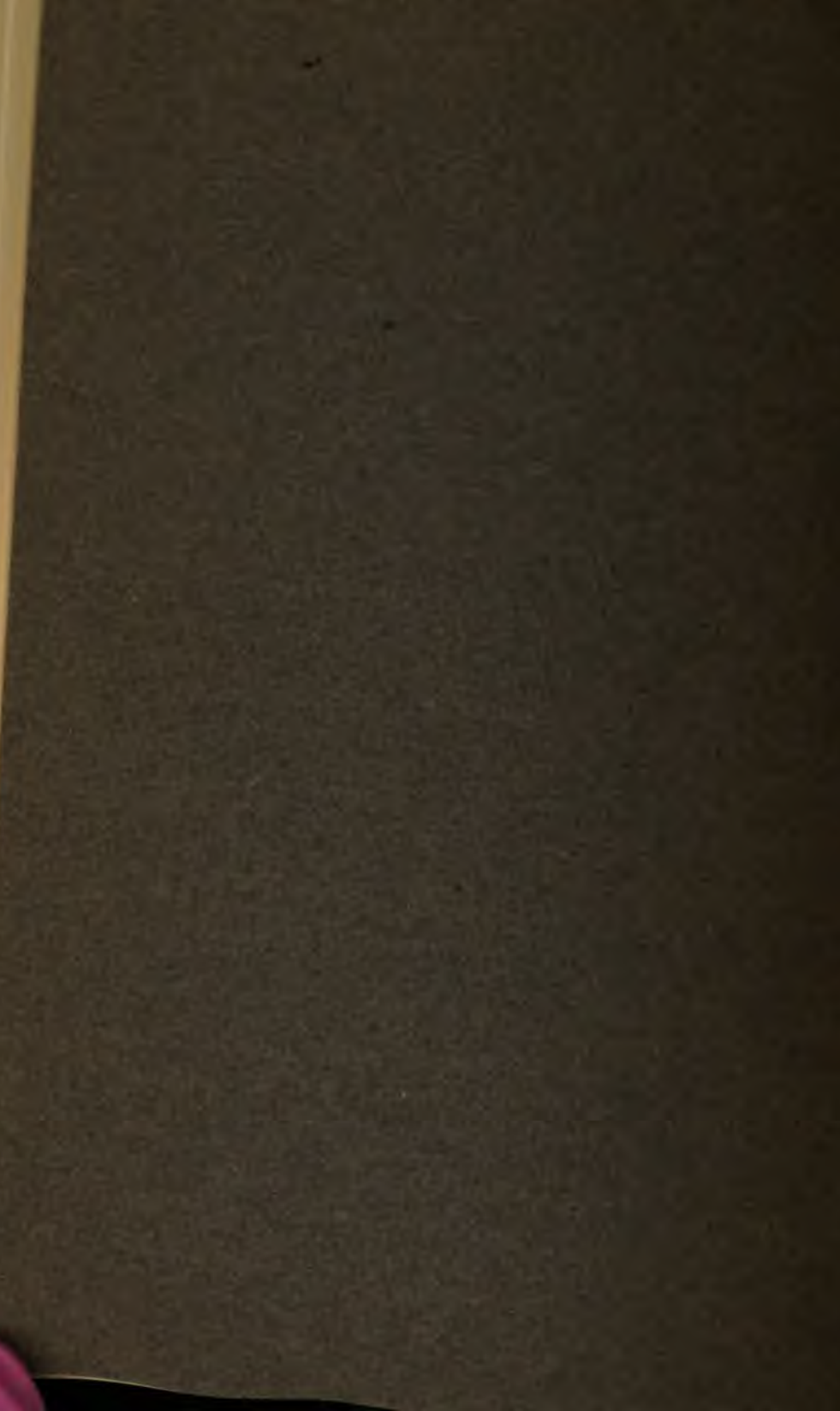
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- Bul. 210, May, 1918, Comparison of workmen's compensation laws of the United States.
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BUREAU OF LABOR STATISTICS
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BULLETIN OF THE UNITED STATES
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LABOR LAWS OF THE UNITED STATES SERIES

**DECISIONS OF COURTS AND
OPINIONS AFFECTING LABOR
1919-1920**

LINDLEY D. CLARK
AND
MARTIN C. FRINCKE, JR.



JANUARY, 1922

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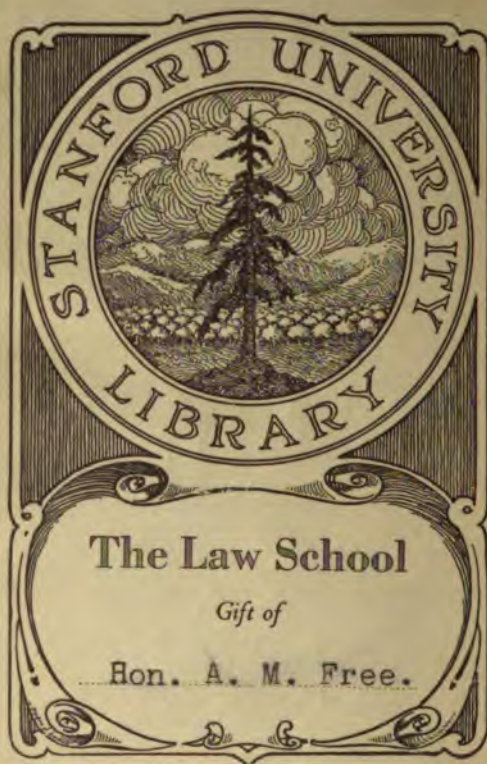
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REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1919-1920.

INTRODUCTION.

This bulletin is the eighth in the series devoted exclusively to the presentation of court decisions, the preceding numbers being 112, 152, 169, 189, 224, 246, and 258. The foregoing bulletins appeared abnormally, but for a variety of reasons the publication of a bulletin for 1919 was omitted and the material for that year is now combined with the material for the year 1920. The first bulletin noted bears date of 1912, prior to which time decisions of this nature appeared in practically every issue of the bimonthly bulletins, ending with No. 100. Brief statements of the most important cases are given in the MONTHLY LABOR REVIEW of the bureau as soon as they come to the knowledge of the office, but these cases are also included in the annual summary. No attempt is made to cover the entire list of decisions handed down by the State and Federal courts, representative types being usually sought for. In a few classes of cases, however, such as those construing workmen's compensation laws, those relating to labor organizations, and those involving important questions in interstate commerce, a more general inclusiveness is practiced. The decisions used are mainly those handed down by Federal courts and the State courts of last resort, though in some cases opinions of subordinate courts of appellate jurisdiction are used, notably of the Supreme Court of New York. Opinions of the Attorney General of the United States construing Federal labor legislation are also reproduced if of sufficient general interest.

The opinions and decisions are presented in abridged form, the facts being stated in most cases in the language of the editors, with quotations from the language of the court, though occasionally the conclusion reached is indicated without such quotation. The sources used are the same as in the past, i. e., the National Reporter System, published by the West Publishing Co., and the Washington Law

Reporter for the District of Columbia. With a few exceptions the cases used are those which were published during the calendar years 1919 and 1920, the volumes covered being as follows:

Opinions of the Attorney General, volume 31 and volume 32 to page 368.

Supreme Court Reporter, volume 39, page 21, to volume 41, page 64.

Federal Reporter, volume 253, page 481, to volume 268, page 96.

Northeastern Reporter, volume 121, page 81, to volume 128, page 800.

Northwestern Reporter, volume 169, page 577, to volume 179, page 1023.

Pacific Reporter, volume 176, page 321, to volume 192, page 560.

Atlantic Reporter, volume 104, page 896, to volume 111, page 688.

Southwestern Reporter, volume 206, page 577, to volume 225, page 288.

Southeastern Reporter, volume 97, page 609, to volume 104, page 785.

Southern Reporter, volume 80, page 25, to volume 86, page 448.

New York Supplement, volume 172, page 817, to volume 184, page 832.

Washington Law Reporter, volumes 47 and 48.

OPINIONS OF THE ATTORNEY GENERAL.

The opinions of the Attorney General of the United States are rendered on request of the President or certain officers of the Government and are usually limited to a specific case, though some of them are of general application. It occurred that during the period covered by the present bulletin no question was submitted in the labor field that called for a pronouncement of special interest, so that only the following notes are given. The Government control of the railroads during the war raised the question of the status of railroad employees in connection with the civil service, the decision being that they were not covered (31 Op. 530). Another question arising out of the same situation was as to the relation of the Director General to the United States Employees' Compensation Commission. It was held that the Government control, which involved the bringing of actions for damages directly against the Director General, did not deprive the commission of its power to require a compensated employee to assign to the commission his right of action to prosecute the same where the injury was due to negligence of the railroad as a third party (31 Op. 365). Other decisions under the compensation act were to the effect that an assistant United States district attorney was not an employee under the act, but was an officer of the United

States (31 Op. 201). A like conclusion was reached with regard to a surgeon in the Public Health Service, he having been appointed by the President by and with the advice and consent of the Senate (31 Op. 184).

The status of a State compensation fund was considered (31 Op. 308), the Pennsylvania Compensation Insurance Fund being held not subject to taxation under the income tax act of September 8, 1916; nor are policies of insurance issued by the State under the compensation act subject to the special tax placed upon insurance policies by the war revenue act of October 3, 1917.

The act of Congress authorizing a suspension of the eight-hour law in time of a national emergency, in the case of "persons employed upon" contracts with the United States was held to include only the "persons" referred to in the law—i. e., laborers and mechanics. Overtime pay for work in excess of eight hours was therefore only to be given in the case of such classes of workers (31 Op. 144).

The retirement act for United States employees was construed in an opinion appearing in volume 32 of the Opinions of the Attorney General, the law being held not to provide retirement but to compel dismissal of employees who had reached the age of 70 years without having rendered the 15 years of service which creates eligibility for retirement on annuity (p. 203); another opinion (p. 207) declares the authority of the President to extend the provisions of the retirement act to employees in the service of the United States who have not been included in the classified service. Deputy collectors of internal revenue and prohibition officers, not being definitely included under the civil service act and rules, are not within the scope of the retirement act regardless of whether or not they were in fact appointed in accordance with civil service rules (p. 273). The enforcement officers and employees under the national prohibition act were said in the same opinion to be required to be appointed with certain exceptions under the civil service act and rules, so that such of them as must be so appointed are within the provisions of the act. Unskilled laborers in the employment of the Superintendent of the United States Capitol Building and Grounds are covered (p. 311).

As already stated, no text of opinions is reproduced in the present bulletin.

DECISIONS OF THE COURTS.

ALIENS.

The subject of immigration under contract to perform labor was before the United States Circuit Court of Appeals in the case of an accountant who had come from Canada to work in a branch of a

Canadian bank opened in New York City. It was held (*United States v. Union Bank of Canada*, p. 71) that the employee was not a manual laborer and therefore not covered by the act. In the same decision the court passed upon another case (*United States v. Royal Dutch West India Mail Co.*, p. 71), the Government having taken an appeal from a decision by the district court (noted at page 48 of Bulletin No. 258). It was there held that a clerk coming from Holland to work for a time in New York in a branch office of the employing company had not been induced to immigrate to perform labor in this country in violation of the law; this decision was on appeal affirmed.

The same provision of the law was involved in another case (*United States v. International Silver Co.*, p. 71), the decision being rendered by a district court. British subjects resident in Nova Scotia had corresponded with a Connecticut employer and had come expecting work. A strike prevented their employment and they returned home, but the Government brought suit for a violation of the law by the company. The judgment was adverse to the prosecution, no sufficient cause of action appearing.

CONTRACT OF EMPLOYMENT.

ENFORCEMENT.

The enforceability of a contract made and performed in one State (Idaho), but sued upon in another State (Washington), where it was invalid, was considered in *Hatcher v. Idaho Gold & Ruby Mining Co.* (p. 84). The labor performed was to be paid for partly in commissary supplies, which might be done in Idaho, but not in Washington. However, the supreme court of the latter State construed the action of the parties in making their contract in a State where it was legal as placing them voluntarily under the rule of law in that State, so that the contract should be upheld.

Failure to carry out a contract of hire on the strength of which advances had been made was held (*State v. Oliva*, p. 85) not punishable under a Louisiana statute, which was held to be unconstitutional as in effect establishing a condition of peonage. A like contention of the defendant was made in an Arkansas case (*Johns v. Patterson*, p. 86), where a suit was brought against an employer who accepted the services of a laborer who had abandoned his contract while in debt to a prior employer. The court found the rule in this case to be different, the act in question being constitutional; however, the judgment of the lower court against the second employer was reversed on account of the errors in the instructions given by the judge. A quite similar case was that of *Shaw v. Fisher* (p. 87), where a second employer was sued for enticing and harboring an employee.

Judgment was in the plaintiff's favor in the trial court, but the Supreme Court of South Carolina reversed the judgment, finding that the second employer had merely accepted the services of an employee who had left the earlier employment on his own motion.

An implied obligation of the employee is not to disclose trade secrets where learned in confidential relations with his employer. In a case of this nature (*Vulcan Detinning Co. v. Assman*, p. 93) a workman leaving employment was held to trial for disclosure of trade secrets and resultant damages.

The relation of employer and employee was held not to exist in the case of a pupil conductor on a street car for the purpose of receiving instruction with a view to qualifying for employment; but his position was said to be different from that of a mere licensee, and a judgment in his favor was affirmed where an injury resulted from the company's negligence (*Fineberg v. Public Service R. Co.*, p. 89).

BREACH.

An apprentice agreement in which a father contracted to be liable for the payment of \$100 if his son should not live up to the contract was held to be binding in *Putnam Machine Co. v. Mustakangas* (p. 77), the decision of the court below being modified so as to require payment of the full amount agreed upon. Where a workman had been required to deposit a \$50 Liberty bond as security for the performance of a contract to work to the end of the season, and nevertheless struck and left employment, the court held that the performance of the contract was several, so that payment should be made for all services rendered; however, the bond was held forfeited because the full measure of service had not been rendered (*Englander v. Abramson-Kaplan Co.*, p. 78).

Breach by the employer was held to make him liable where a salesman was discharged after working for three months on a two-year contract, the discharge being attributable to the bad state of business necessitating retrenchment (*Dunbar v. Orleans Metal Bed Co.*, p. 79). A like judgment ensued in another case (*Lyons v. Pease Piano Co.*, p. 80), in which a contract was construed to be for a yearly hiring, while the employer claimed that it was terminable at will.

Where a seaman was discharged in violation of an oral contract made in California, where contracts continuing more than a year are void unless in writing, it was held that the maritime law controlled, no services being performed within the State, so that damages would lie for the breach (*Union Fish Co. v. Erickson*, p. 88).

COLLECTIVE AGREEMENTS.

The validity of a collective agreement is upheld in *Moody v. Model Window Glass Co.* (p. 81), where it was shown to be a mutual understanding that waiting time should be compensated where the employer failed to furnish work at the time agreed upon. Like value was attached to an agreement made as to the employment of railroad conductors, guaranteeing seniority rights, etc. In the case in hand the plaintiff was not a member of the union with which the agreement was made, but its terms were held to control all employment of that class by the employer affected (*Gregg v. Starks*, p. 82).

BLACKLISTING.

A statute of Oklahoma practically reads into the contract of employment a term requiring the granting of a service letter on the termination of employment. The constitutionality of this law was upheld (*Dickinson v. Perry*, p. 90) and a judgment for damages affirmed where it appeared that the letter granted misstated the facts and amounted to a blacklisting of the employee.

Placed here for lack of a better classification is the case *Putnal v. Inman* (p. 73), in which it was held that a credit list among the merchants of a town was not libelous, it being a privileged communication.

COMPULSORY WORK LAW.

Delaware was one of a number of States which during the war undertook to secure productive labor from all male residents between fixed ages. The statute was declared constitutional (*State v. McClure*, p. 74). This opinion is in opposition to that of the Supreme Court of West Virginia in discussing a similar law of that State (*Ex parte Hudgins*, p. 76).

EMPLOYMENT OFFICES.

An ordinance of the city of Denver regulating the activities of private employment agencies was held not to apply to a "Business Exchange Corporation," which placed only persons seeking clerical and technical positions (*Wilson v. City and County of Denver*, p. 151). A law of South Carolina fixes a license fee of \$2,000 per year for persons securing workmen to go outside the State for service of others. This act was held constitutional in *State v. Reeves* (p. 151), as against the contention that the fee was prohibitive and discriminatory.

WAGES.

MINIMUM WAGES.

The Minimum Wage Commission of Minnesota was made the defendant in a case (*G. O. Miller Telephone Co. v. Minimum Wage Commission*, p. 291) in which the validity of orders issued by it was challenged. The court below granted a temporary injunction restraining the enforcement of orders, but the supreme court, citing its previous decision as to the constitutionality of the act, in the present case sustained the validity of the orders under it.

PAYMENT.

The California law requiring the payment of wages on the termination of employment, and fixing a penalty for noncompliance, was held to be valid as against individual employers (*Manford v. Menil Singh*, p. 294), as had been previously done with regard to corporate employers. A similar law of Michigan, which provided a penalty of 10 per cent per day of the amount due in case of nonpayment, was held by the supreme court of the State to be unconstitutional as class legislation (*Davidow v. Wadsworth Manufacturing Co.*, p. 300). The seamen's act, authorizing the recovery of one-half of the wages due at any port in the United States, was held applicable and controlling in the circumstances in a case of employment on a British vessel in port at Pensacola, Fla. (*Strathearn S. S. Co. v. Dillon*, p. 297).

A public agency was required by mandamus to pay a balance due a discharged employee, against its contention that there was no money available from the funds for the fiscal year, where it was shown that the lack of funds was due to an apparently intentional act of the commission to avoid payment (*State ex rel. Stephens v. State Corporation Commission*, p. 295). A workman discharged from a railroad company because of theft was held nevertheless to be entitled to pay which had accrued prior to the date of his discharge (*Kowalski v. McAdoo*, p. 296).

The prevailing custom was held to control in a contest between employer and employee as to the right of the latter to receive pay for the time spent on vacation, his claim being allowed by the court (*Vaile v. Walker Construction Co.*, p. 302).

Where services were rendered by request without mention as to the amount of compensation, a reasonable amount was said by the court to be presumed in the absence of evidence that the work was to be done gratuitously (*Williams v. Jones*, p. 300).

Note may be here made of the finding of unconstitutionality of the antitipping law of Iowa, the law being held invalid because not

making proper classifications, employees only being subject to its restrictions, while employers might receive tips without incurring its penalties (*Dunahoo v. Huber*, p. 289).

SECURITY.

The Massachusetts statute regulating assignments of wages restricts both time and amount; it was held, however, in the instant case (*Raulines v. Levi*, p. 290) that the termination of the employment affected by the assignment rendered the assignment void regardless of the lapse of time.

Wages of employees carrying on a bankrupt business were held to be entitled to preference as against prior liens against the property of the company for which they were working (*Florida Construction & Realty Co. v. Pournell*, p. 294). A mechanic's lien was held enforceable under the Massachusetts statute against the owner of a house where a subcontractor's claim included both labor and materials, where the value of the labor could be distinctly shown (*Manson & MacPhee v. Flanagan*, p. 290).

HOURS OF LABOR.

Hours of labor of city firemen were considered in *Danielson v. City of Bakersfield* (p. 155), the law of California fixing an eight-hour day for "laborers, workmen, or mechanics" on public works being held inapplicable.

A Mississippi statute limits to 10 per day the hours of labor of workmen employed by persons, firms, or corporations engaged in manufacturing or repairing. This was held (*Handy v. Mercantile Lumber Co.*, p. 154) not to affect the status of a laborer unloading lumber from cars outside the planing mill of the defendant company, as his employment was not affected by the machinery.

The constitutionality of a statute limiting the hours of labor of women in hotels, etc., but excepting railroad hotels and eating houses, was upheld by the Supreme Court of the United States against the contention that there was an unreasonable classification involved in the law (*Dominion Hotel v. State of Arizona*, p. 160). The employment of women at collection stations for laundries was held not to be subject to the restriction of an act governing female employees in the District of Columbia employed in mercantile establishments, laundries, etc. (*District of Columbia v. Marshall*, p. 160). A Texas law limits to 9 per day and 54 per week the hours of labor of women, and a cafe proprietor was convicted for a violation of this law. His contention that an hour per day should have been deducted because that amount of time was used by the employees in eating their meals was denied, as it appeared that while eating the waitresses were subject to call to render service (*Haddad v. State*, p. 161).

The Adamson law, establishing a basic eight-hour day for certain classes of railroad employment, was held not to apply to switch tenders, the law having been enacted for the purpose of meeting conditions not involving that class of workmen (*Coke v. Illinois Central R. Co.*, p. 158). The Supreme Court also held that the law did not bar an agreement between an insolvent road and its employees to continue the operation of the road under a contract satisfactory to both parties, but not conforming to the law in question (*Fort Smith & W. R. Co. v. Mills*, p. 156).

The older law limiting hours of service to 16 per day for trainmen was held to apply to employees of a terminal company operating in the State of New York exclusively, but handling commerce for a number of railroads and steamship companies doing an interstate and foreign business (*United States v. Brooklyn Eastern District Terminal*, p. 162). A like conclusion was reached in another case (*Penn. R. R. Co. v. United States*, p. 166), the employee working in railroad yards making up trains, none of his duties calling him to work on the main line of the road.

The same statute fixes the hours of labor of telephone operators transmitting train orders to nine per day. A terminal company at Atlanta rendered practically the same service as the Brooklyn company in the case noted above, and a circuit court of appeals applied the same doctrine to the instant case, involving the services of a telegraph operator, reversing a directed verdict for the company in the lower court (*United States v. Atlanta Terminal Co.*, p. 163). That mealtime, during which an employee was subject to call, was not properly time off duty, deductible from the hours of service, was the conclusion in *Chicago R. I. & P. R. Co. v. United States*, p. 164). Another case along this line (*United States v. Baker*, p. 165) involved the question of continuous operation. Two railroads exchanged service in such a way as to have continuous service by their joint action. This was held to constitute continuous operation so that neither operator could be employed more than nine hours per day.

Not strictly falling under the heading of "hours of labor" is a case involving the right of an inventor to an invention which was perfected during the time of his employment by the United States, the court holding that the law did not exclude any portion of the employee's time from the time "of his employment or service" (*Moore v. United States*, p. 167).

MUNICIPALITY ENGAGING IN BUSINESS.

Kansas City, Mo., voted for an issue of bonds to enable the city to engage in the business of manufacturing and distributing to its citizens and the city offices a supply of ice. The city comptroller refused

to issue the bonds, claiming that the city had no authority to enter upon such an undertaking, this view being upheld by the supreme court of the State (*State ex rel. Kansas City v. Orear*, p. 282).

PENSION AND RELIEF SYSTEMS.

The deduction of a portion of the salaries of public employees for the establishment of a pension fund for their retirement was held valid in *Higgins v. Sweitzer* (p. 284), against the contention that their salaries were to be fixed by the county board and were not liable to such reductions as the law effected. The same court (Illinois supreme) had before it the claim of a policeman who was entitled to retirement under a provision fixing 20 years' service as the sole test of eligibility. Before final action on the claim, the legislature added a provision to the effect that the claimant must also be 50 years of age, and it was held that the added provision was a valid obstacle to the granting of the pension until he should satisfy it. (*Beutel v. Foreman*, p. 285).

An Ohio statute forbids compulsory contributions to relief departments maintained by any corporation. This was held constitutional and applicable in a case in which a former employee sought to recover from a railroad company the statutory penalty for deducting contributions from his wages, though the company claimed that he had agreed to such action (*Baltimore & O. R. Co. v. Bailey*, p. 286). The Court of Appeals of the District of Columbia reversed a former decision in refusing to a discharged railroad employee a refund of the contributions made by him to a relief department in excess of benefits received, there being no statute in this jurisdiction interfering with the withholding of contributions (*Philadelphia, B. & W. R. Co. v. Campbell*, p. 288).

EMPLOYMENT OF WOMEN.

A Texas statute requiring that female employees in certain establishments be furnished with seats which they might use when not engaged in active duty was held constitutional in *Glances v. State* (p. 150).

FACTORIES AND MINES.

A New York statute authorizes the fire commissioner of New York City to require certain safety devices to be installed in factories, etc. The owner of an office building claimed that the law did not apply where only office workers were engaged, and, if so, it was unconstitutional. These contentions were denied in the case of *People ex rel. Cockroft v. Miller* (p. 152), and the order sustained as affecting the particular building.

The constitutionality of an Illinois statute requiring the maintenance of wash rooms at coal mines, steel mills, foundries, "or other

like business" was declared constitutional by the Supreme Court of Illinois, but held not to apply to a railroad roundhouse (*People v. Cleveland, C., C. & St. L. R. Co.*, p. 153).

A law of Kansas forbidding the use of dynamite and similar explosives in coal mines unless certain regulations were complied with was held constitutional even though the power of regulation was in a measure delegated to operators and miners for mutual agreement (*Richards v. Fleming Coal Co.*, p. 282).

LIABILITY OF EMPLOYERS FOR INJURY TO EMPLOYEES.

ASSUMPTION OF RISK.

An injury to a member of a railroad bridge crew was held to be caused by the action of his foreman in driving a motor car in such manner as to cause a risk which the workman was not legally presumed to have assumed; and even if he was guilty of contributory negligence, under the South Dakota statute this would not bar recovery but would reduce the amount of it (*Dunn v. Great Northern R. Co.*, p. 99). A contrary finding was made in another case in which a simple operation was ordered to be performed without instruction as to the method, the court holding that the workman could see and understand all probable dangers and therefore assumed the risk (*Dean v. H. Koppers Co.*, p. 100).

Where a minor employee was urged to hurry in the performance of work on which he had had a limited experience but no warning as to necessary care was given, it was held that he did not assume the risk of a resultant injury (*Stam v. Ogden Packing & Provision Co.*, p. 101).

Somewhat similar was the determination of the Supreme Court in reversing the judgment of the courts below, in a case where a laborer had asked permission of his foreman to secure a stick with which to place a block under a rock which afterwards fell upon his arm (*Fillippon v. Albion Vein Slate Co.*, p. 141). The action of the foreman in ordering the workman to go on without procuring the desired instrumentality was held to relieve the injured man of the charge of contributory negligence.

NEGLIGENCE.

The State of California has a workmen's compensation law, but it contains a provision that where injury is due to gross negligence or willful misconduct a suit for damages will lie. This provision was held to control in a case where a workman was injured due to contact with exposed gears in a dimly lighted room (*Helme v. Great Western Milling Co.*, p. 102).

SAFE PLACE AND APPLIANCES.

A mason employed for construction work was injured while attempting to adjust the derrick by which stone was carried for his use. Against the employer's contention that he was not negligent, that the workman had assumed the risk and contributed to his injury, the court held that the common-law duty of furnishing safe place and appliances had not been fulfilled (*E. H. Parrish & Co. v. Pulley*, p. 103). A like conclusion was reached where a tannery employee received injury by falling from a walkway into a tub of scalding liquid owing to the darkness (*Beck v. Sylva Tanning Co.*, p. 104).

The factory laws of Indiana contain specific requirements as to safety, and also impose the general duty of supplying "every device, care and precaution" needed in the circumstances. This was held to charge an employer with negligence in failing to supply goggles for the use of a workman cutting steel with a cold chisel, and who received injury to his eyes (*Emerson-Brantingham Co. v. Crowe*, p. 112). Failure to provide fire escapes was held to charge the owner of a sawmill with liability for the death of a workman in a Louisiana case (*Dotson v. Louisiana Central Lumber Co.*, p. 144).

The fact that a State statute imposed direct duty on the employer to supply safe scaffolding in building operations fixed the liability of an employer who failed in this regard (*Propulonris v. Goebel Const. Co.*, p. 146).

A railroad employee adjusting ties with a defective bar, old and worn, was held entitled to damages in *Arkansas Cent. R. Co. v. Goad* (p. 142), as against the contention that the rule of "simple tools" should apply.

An injury due to a cause not foreseen by the employer was held, nevertheless, to entitle the injured workman to damages where the jury found that injury might have been reasonably anticipated, and no instruction was given (*Collins v. Pecos & N. T. R. Co.*, p. 146).

Electric haulage by locomotive operated from a trolley wire is forbidden in gaseous portions of mines by a law of Pennsylvania. Failure to observe this statute was held to charge the employer with liability as against the contention that the removal of a barricade that had been placed to prevent the running of the engine into a forbidden section was the approximate cause of the injury (*Jaras v. Wright*, p. 116).

Agricultural work, in the present instance shelling corn with the aid of a steam traction engine, was held not to come within the scope of the law requiring machinery to be guarded in "manufacturing or other establishments," so that no liability attached for the failure to guard the cogs of the sheller (*Hainer v. Churchill*, p. 143).

FELLOW SERVICE.

The doctrine of dual capacity was applied to a Missouri case in which the plaintiff was injured by reason of the negligence of a fellow workman under whose direction he was placed, though both were under a common foreman. The act of giving orders was held not to be one of fellow service but an exercise of supervision for which the employer was responsible (*Morin v. Rainey*, p. 114). Quite similar circumstances appeared in a Mississippi case (*Gulfport & M. C. Traction Co. v. Faulk*, p. 115). There was an assumption of authority by one of two fellow coworkers, but the court found no testimony to support the theory of actual control. It was further concluded that the act done by the injured man at the suggestion of his fellow worker was no part of his duty, so that in performing it he was a mere volunteer for whose injury the employer was not liable.

The negligence of an employee of a very different class may be noted here for lack of better classification. An employee suffered an injury to his finger and was treated by the employing company's physician in such a way as to necessitate amputation. Though the injured man had been directed to go to this physician, the court found the company not liable for the lack of skill of the latter, unless it had failed to exercise ordinary care in the selection of a physician. No recovery was therefore allowed (*Smith v. Buckeye Cotton Oil Co.*, p. 117).

COURSE OF EMPLOYMENT.

The Supreme Court of Washington held an employing company liable for injury to one of its workmen resulting from an assault by its superintendent, the ground being that even though the company had not authorized that action on his part he had attempted this method of obtaining discipline, so that the company must be charged with the consequence of his action (*DeLeon v. Doyhof Fish Products Co.*, p. 105).

UNLAWFUL EMPLOYMENT OF CHILDREN.

It is quite generally recognized that even technical requirements must be observed in employing children unless the employer is to be presumptively chargeable with negligence in cases of injury to them. Thus in *Wolff v. Fulton Bag and Cotton Mills* (p. 109), failure to obtain an employment certificate for a minor under 16 years of age, as required by the New York statute, was held to charge the employer with a misdemeanor, such employment being entirely un-

lawful. Therefore, it would not come under the workmen's compensation act, but would render the employer liable to a suit for damages for an injury received.

The courts of the same State had before them a case (*Karpeles v. Heine*, p. 106) in which a minor 13 years of age was injured by falling into the open shaft of an elevator which he had himself run to the floor from which he fell. Employment to operate elevators is absolutely forbidden until the age of 16 years is reached, and the court of appeals reversed decisions of the lower courts which denied recovery on the ground that the child had been guilty of contributory negligence, holding that this defense was not available for a young child, particularly in the face of the unqualified prohibition of the statute.

A Kentucky statute likewise fixes 16 years as the minimum for employment at certain machinery, including laundry machinery. An injury to a girl employed in violation of this law was held to make the employer liable without the intervention of the ordinary defenses, even though she had misrepresented her age (*Sanitary Laundry Co. v. Adams*, p. 107).

Very similar was the conclusion of the Court of Errors and Appeals of New Jersey (*Schwartz v. Argo Mills Co.*, p. 108), the minor in this case being injured by a moving portion of a carding machine. The law forbids employment between fixed and traveling parts of a machine while in motion. The court below denied recovery on the ground that the plaintiff was not between the parts, but this decision was reversed as not meeting the intent of the law.

An employer was held liable for the violation of the child-labor law of New York where the offense consisted in an act of the driver of a milk wagon securing the services of a boy of 13 to assist him, paying him out of his own pocket. The law fixes 14 years as a minimum age for employment, and it was found that other drivers had violated the rule with the knowledge of the employer but had not been disciplined other than by reprimand (*People v. Sheffield Farms-Slawson-Decker Co.*, p. 110).

No statutory provision was involved in the case of *Brown v. Atchison, T. & S. F. R. Co.* (p. 111), the foreman of the company being held negligent in directing a boy of 17 to undertake hazardous errands without appropriate instructions as to the dangers, for which action the company was held liable.

MARITIME WORKERS.

One of the difficult problems that has been presented for solution with the advent of liability and compensation laws, looking toward a more adequate protection of workers, is that which relates to mari-

time employments. Seamen have long been recognized as a distinct class of workers, subject to special privileges and limitations, but at present lacking much of the beneficial status secured by recent legislation in behalf of other classes of employees. The great enlargement of those groups of workers who are employed at loading and unloading, repairs, etc., involves other difficulties in view of the fact of the mixed nature of their employment, which is partly on the wharf, partly on the vessel, and partly on the runway, or serving the tackle which forms the means of communication between wharf and vessel. In *Siebert v. Patapsco Ship Ceiling & Stevedore Co.* (p. 94) a stevedore was injured while working in the hold of a ship, due to the negligence of the foreman of the defendant company. The injured man first gave notice that he would claim under the compensation law of Maryland, the injury having taken place in a harbor in that State. The claim was later withdrawn and placed in the hands of an attorney who brought action in admiralty, against the protest of the company. This step was declared legal by the district court, and a judgment was entered in his favor under the admiralty law.

A different course was followed in *Dziengelewsky v. Turner & Blanchard* (p. 96), where a longshoreman was drowned by falling from a defective companionway. A suit for damages at common law was brought, but the employer contended that recovery should be had under the workman's compensation act. The court refused to recognize this contention, holding the plaintiff to be within her rights in her suit for damages.

The refinements involved in the situation are suggested by the fact that where a longshoreman was injured in unloading a vessel, but was himself at the time on the land, it is held that the maritime law would not control (*Smalls v. Atlantic Coast Shipping Co.*, p. 98). In other words the man passes from one realm of law to another by the mere shifting of his position while employed in a single undertaking, with different procedure, remedies, and amounts of recovery.

Another case under this heading involves a construction company's laborer detailed to aid in unloading a barge of sand moored in navigable waters. The gang plank over which he passed in his work was unstable and he fell from it into the water and was drowned. His administrator sued in admiralty and recovered on the ground of failure of the employer to exercise reasonable care (*White v. John W. Cowper Co.*, p. 98).

The extent of the recovery allowed in case of a maritime injury due to the negligence of fellow servants was considered by a circuit court of appeals in *Great Lakes S. S. Co. v. Geiger* (p. 96).

RAILROADS.

Railroad employments are somewhat in the situation of those of a maritime nature, i. e., they are subject to Federal control to such an extent that the State laws are of secondary importance. However, State laws apply in certain situations, with the result that great uncertainty and confusion ensue. Thus, in *Chicago R. I. & P. R. Co. v. Cronin* (p. 137), a coach cleaner, injured while attempting to assist in jacking up an engine in a roundhouse for repairs, was held entitled to recovery under a State law, over the contention of the company that, since the engine was one regularly used in interstate commerce, the Federal law should govern.

The Federal safety appliance act relates to equipment on roads engaged in interstate business, whether the particular instrumentality is employed in interstate or intrastate service. A brakeman whose death was due to defective couplers on an intrastate car was held entitled to recover in a suit for damages on account of the liability entailed by the Federal statute, recourse to the State compensation act not being necessary (*Ross v. Schooley*, p. 138).

The nature of the compliance required by the Federal safety appliance act was considered in a case in which the company claimed that it had made a substantial compliance, though admitting technical violation of the act. The court found no room for such a theory and held the company liable for damages consequent upon its failure actually to comply with the law (*Hodgman v. Sandy River & R. L. R. Co.*, p. 138).

Another case involving sufficient compliance had for its subject matter the installation of grab irons on freight cars (*Boehmer v. Penna. R. Co.*, p. 136). The injured man attempted to board a car which had grab irons only on diagonal corners, he thinking that all four corners were supplied. Action for damages was unsuccessful, the court holding that installation on opposite corners was a sufficient compliance with the law.

The scope of a State law enacted for the special benefit of railroad employees was considered in a Minnesota case (*Seamer v. Great Northern R. Co.*, p. 118). The law was held to apply not merely to those employees who were engaged in the operation of trains, but also to office workers even though their place of employment was several blocks from the railroad.

Federal statute.—With the very general enactment of workmen's compensation laws applicable to intrastate employments of nearly all classes the importance of State liability statutes as regards railroad employment has diminished. However, Congress has as yet established no compensation system for employees in interstate commerce, and they form the principal groups of workers in the country

who are debarred from the benefits of compensation legislation, the Federal statute of 1908, amended in 1910, being practically their sole measure of relief. The act in question abrogated the defense of fellow service and modified that of contributory negligence, while no risks are assumed which arise from the violation of Federal statutes. On the other hand the doctrine of assumption of risks still operates in a fairly wide field. Thus, where a bridge worker was given a defective claw bar, the injury consequent upon its use was held in the trial court to be due to the negligence of the company in furnishing a defective tool. On appeal from the judgment in his favor the court of appeals ruled that the doctrine of assumption of risks barred recovery, but on the objection of one judge referred the case to the supreme court of the State. Here it was held that recovery was not barred but only reduced by reason of the employee's contributory negligence. A third appeal brought the case to the Supreme Court of the United States, which rejected the defense of contributory negligence but sustained that of assumption of risks, and sent the case back to the place of beginning for a new trial (*Pryor v. Williams*, p. 119).

The doctrine of assumed risks was held by the same court (Supreme Court of United States) not to have any proper place in the case of an injury to a switchman injured by the negligence of his engine foreman where the situation was one of emergency so that the employee had no time to appreciate and assume the risk (*Chicago, R. I. & P. R. Co. v. Ward*, p. 120). Similarly, the defense of assumed risks was disallowed when injury was obviously due to the failure of a railroad company to maintain its tracks in a suitable condition of repair (*Kansas City, M. & O. R. Co. v. Roe*, p. 120).

The vexed question of what constitutes interstate commerce seems hardly nearer its solution than it was at the beginning of litigation under the Federal act. In *Phila. B. & W. R. Co. v. Smith* (p. 122), a mess cook for a gang of carpenters repairing bridges along an interstate road was held to be engaged in interstate commerce. The same was found to be the case in *Chicago & A. R. Co. v. Industrial Commission* (p. 123), where a flagman at a crossing used by both interstate and intrastate trains was killed by an interstate train, but his dependents had secured an award under the State compensation law. On appeal this award was reversed and the Federal statute held exclusively applicable. A like conclusion was reached by a New Jersey court where a station agent was killed, while running alongside an interstate train from which he had taken letters and papers, by falling under the train. A compensation award was reversed, the court saying that as this train was interstate whatever he did in connection therewith partook of that nature and was under the Federal law (*Carberry v. Delaware, L. & W. R. Co.*, p. 122).

A track worker engaged in constructing a fill to take the place of a trestle already in use in interstate commerce was said not to be engaged in new construction, but in interstate commerce work of a current nature, reversing a judgment of the Supreme Court of Idaho (*Kinzell v. Chicago, M. & St. P. R. Co.*, p. 125).

A signal-tower man, also attending to pumping water to a tank which supplied interstate and intrastate trains, was held to be an interstate employee (*Erie R. Co. v. Collins*, p. 128). Involving the identical principle is the case, *Southern Pacific Co. v. Industrial Accident Commission of California* (p. 133); here a workman was electrocuted while cleaning the insulators of a steel tower which carried wires transmitting electricity to interstate and intrastate trains of the company, and the service was held to be interstate.

The Supreme Court of Michigan passed upon the status of a motor-man operating electric street railways across the State line. The man was injured while at his work and brought his action at common law, the company claiming that he should have sued under the Federal statute. This contention was sustained against the objection that electric street railways were not included under this act (*Nelson v. Ironwood & B. R. Co.*, p. 124).

The nature of the work was declared to be interstate in another case (*Kusturin v. Chicago & A. R. Co.*, p. 129) in which the man was injured while removing old rails from a roadbed, this being regarded as a part of the general work of repairing the track.

The Supreme Court of the United States denied the applicability of the Pennsylvania compensation law in the case of a trainman locally employed in the distribution of loaded cars from a colliery to a train yard two miles distant. Though he himself was never on a train that went outside the State, the cars which he handled were designated for distribution beyond the State boundary, and the employment was correspondingly held interstate so that the award must be disallowed and proceedings had only under the Federal statute (*Phila. & R. R. Co. v. Hancock*, p. 127). The Federal statute was held not applicable, however, where a coal car consigned from outside the State had reached its destination and was being removed from a stub switch to a siding in the town (*Del., L. & W. R. Co. v. Peck*, p. 131). The interstate journey was said to have been at an end before the work in which the injury took place began. The Federal law was therefore not applicable, even though there was negligence on the part of the company in its equipment under the safety appliance act.

Similar to the Hancock case above was the decision of the Supreme Court of Illinois where a locomotive engineer was killed while running to a water tank in an interval between moving two interstate

shipments (*Wangerow v. Industrial Board*, p. 132). The court found that the only purpose of the movement was to pass from one act of interstate commerce to another, so that the State compensation law would not apply.

LIABILITY OF THIRD PARTY.

Where an employee was injured by reason of the negligence of another than his employer, such negligent third party was joined as party to an action and the case carried to a decision in favor of the plaintiff. On appeal the claim was advanced that actions against the employer under the Federal law and against the third party on his common-law liability could not be properly joined. The court admitted this, if the point had been timely raised, but at this stage of the proceedings it was too late, and the liability of each party was affirmed (*Cott v. Erie R. Co. et al.*, p. 134).

A similar case was before the Georgia courts, where a demurrer had been interposed, and the question of the propriety of joining the statutory and common-law actions was submitted to the Supreme Court of Georgia. It declared the joinder not permissible (*Lee v. Central of Georgia R. Co.*, p. 135), and this decision was on appeal sustained by the Supreme Court of the United States.

RELEASE.

Two cases are available considering the effect of an injured person's release of the employer for liability for injury, in so far as such release affects claims against a surgeon for malpractice. The Supreme Court of Wisconsin (*Hooyman v. Reeve*, p. 139) took the view that a broad release given the employer operated also as a release against all claims of any nature arising out of the injury including the alleged malpractice.

The opposite view was taken by the Supreme Court of Massachusetts (*Purchase v. Seelye*, p. 140), the release covering "all claims and damages" arising out of the injury. This was held to apply to the employer and not to the unskillful treatment by the physician, which could not have been anticipated.

OCCUPATIONAL DISEASE.

The Ohio workmen's compensation law is not inclusive as to all classes of industrial injury and is construed as not covering occupational disease. When, therefore, a suitor claimed damages by reason of the continuing effect of the conditions of his employment impairing health and eyesight, the United States Circuit Court of Appeals took the ground that a common-law right of action for damages existed and reversed a judgment which denied the plaintiff the right to sue (*Zajkowski v. American Steel & Wire Co.*, p. 147).

WORKMEN'S COMPENSATION.

CONSTITUTIONALITY OF STATUTES.

Despite the far-reaching decisions of the Supreme Court sustaining the New York, Washington, and other laws embodying a variety of provisions, the question of constitutionality is still raised. The Montana statute was before the supreme court of that State in a case in which a plaintiff sued for damages at common law, the employer contending that the workmen's compensation act controlled. The court adopted this contention, declaring the abrogation of common-law defenses valid and that the industrial accident board is not a court such as to contravene the provisions of the State constitution (*Shea v. North-Butte Mining Co.*, p. 329).

The Arizona statute is peculiar in that it offers an injured person the right to elect his remedy after the receipt of the injury. This, together with the other more common provisions of compensation laws, was held to be valid legislation by the Supreme Court of the United States (*Arizona Copper Co., v. Hammer*, p. 330).

The statute of Tennessee excluded coal-mining operators from its coverage, besides the more common exclusion of domestic and agricultural service, casual employees, etc., and the constitutionality of the act was challenged on the ground, among other things, that it constituted class legislation. This contention was rejected by the Supreme Court of the State, together with others relating to the right to jury trial, due process of law, etc. (*Scott v. Nashville Bridge Co.*, p. 334). In one point the law was found unconstitutional, i. e., in its authorization of special fees for judges passing upon compensation claims, but this was said not to be an essential part of the law. Improper classification was likewise charged against the Texas statute which excluded farm laborers and gin laborers from its coverage. A case challenging the constitutionality of the law reached the Supreme Court of the United States, where the exclusion of gin laborers, farm laborers, and railroad employees was justified for reasons set forth in the opinion (*Middleton v. Texas Power & Light Co.*, p. 339). The provision that the employee shall have no option where the employer elects was likewise held to be valid legislation.

The North Dakota law is made applicable to hazardous employments, but these are defined so as to include practically every occupation. An employer engaged in real estate and loan business contended that his office employees could not be said to be engaged in hazardous work so as to bring them under the act, but this contention was rejected by the supreme court of the State and the constitutionality of the law upheld (*State ex rel. Amerand v. Hagan*, p. 337).

The compensation law of Utah is subject to a provision of the constitution which provides that the right of action for death can not

be taken away or limited. The survivors of a deceased employee may therefore sue at common law for damages or take compensation under the act. Where the latter option was chosen by a widow in behalf of herself and her minor children it was held that her legal appointment as their guardian rendered her election binding upon the children and safeguarded the employer from any second liability (*Utah Copper Co. v. Industrial Commission*, p. 346).

The civil code of Louisiana established the right of a survivor to sue for damages for death, the enactment of the compensation act being later. This later enactment was held (*Colorado v. Johnson Iron Works*, p. 348) to supersede the provision of the code, so that the widow of a workman whose employer was under the compensation act must accept its provisions and may not sue for damages. A similar conclusion was reached in a Kentucky case (*Grannison's Admr. v. Bates & Rogers Construction Co.*, p. 349), where the right to sue was claimed after the employee had elected to accept the provisions of the compensation act; this election was held binding upon both the employee and his personal representative.

The constitutionality of the Indiana statute was indirectly attacked in the case of a claim involving the death of a workman employed by an Indiana corporation, who was killed in Indiana while working under a contract made in Ohio, but claiming the status of a contract made in the District of Columbia, and purporting to exclude the operations of any compensation law (*Carl Hagenbeck & Great Wallace Show Co. v. Randall*, p. 343). Despite the complicated efforts to avoid liability, the claim was allowed as under the Indiana law, which was held constitutional and applicable in spite of the fact that the contract of employment was extraterritorial.

The constitutionality of a specific provision was involved in a New Jersey case (*Bryant v. Lindsay*, p. 344), the point being that of the right of the legislature to establish a special fund by contributions to be paid where injured workmen left no dependents. As formulated, this provision was held to be unconstitutional, not being offered as either a supplement or an amendment to the compensation act.

The application of compensation acts to work of a maritime nature has been the subject of much discussion since the introduction of legislation of this type. Following the denial of the right of the courts to apply their State compensation acts to longshoremen, etc., which had been done notably in New York and California, Congress undertook to amend the Federal judicial code so as to permit workmen in the various States to elect compensation under the State law as an alternative to an action in admiralty (act of October 6, 1917, 40 Stat. 395). This attempt to save to suitors the right of a common-

law remedy and the rights and remedies under the compensation law of any State would have furnished a choice among three options. The resultant situation was one of confusion. Thus in a United States court in the case of *The Howell* (257 Fed. 578), Judge Hand construed the amendment to the judicial code as giving the New York compensation law the exclusive status in such a case that it held in employments generally, so that an employer coming under the act was absolved from liability under the maritime law. A like court in Oregon (*Rohde v. Grant Smith Porter Co.*, 259 Fed. 304) allowed recovery in an admiralty action, holding that the maritime law gave rights which "can not be barred, enlarged, or taken away by State legislation." A Federal court in Louisiana likewise refused to make the compensation law of that State the exclusive remedy, holding that the injured employee might elect (*Hogan* for use of *Coffey v. Buja*, 262 Fed. 224).

Other cases might be cited, but all are governed by the finding of the Supreme Court of the United States that the attempted amendment was invalid as establishing discordant legislation contrary to the purpose of the Constitution with regard to commerce, so that while Congress may act in the establishment of a uniform rule of general application, it can not validate diverse State laws making them applicable to subjects of maritime jurisdiction (*Knickerbocker Ice Company v. Stewart*, p. 302).

The compensation law of Porto Rico was held to be compulsory against the contention that the employer could legally elect whether or not he should accept the act (*Camunas v. New York & P. R. S. S. Co.*, p. 327). A United States district court had declared the law elective, but the court of appeals took the opposite view.

PARTICULAR PROVISIONS OF THE LAW.

COVERAGE.

Occupations.—The California statute excludes employees in agricultural work, but the supreme court of the State declined to extend the meaning of this term to cover "fish farming" (*Krobitzsch v. Industrial Accident Commission*, p. 305). On the other hand a New York court refused to class ice harvesting done by a farm laborer for domestic supply as within the law, as it was not work "carried on by the employer for pecuniary gain," being merely incidental to farm purposes (*Mullen v. Little*, p. 306).

Work with a threshing machine owned by a group of farmers primarily for their own use was held to be agricultural labor even when employed at custom work, though the compensation commission of Utah had taken a contrary view (*Jones v. Industrial Commission*, p. 306).

Specific rulings are required where the law is limited to "hazardous" or "extrahazardous" occupations. The Supreme Court of Illinois held that the law of that State covered the conduct of a junk business where engines and boilers were stripped; also that a man working by piecework was not an independent contractor, but an employee under the act (*Cinofsky v. Industrial Commission*, p. 388). Likewise the Supreme Court of Washington refused to accept the claim of a woman employed in an office, but operating a stencil cutting machine part of the time, that she was not in hazardous work, saying that as to the stencil cutting her work was similar to the work of manufacturing, though her chief employment was clerical (*Gowey v. Seattle Lighting Co.*, p. 390). She was therefore under the compensation act, and could not sue for damages.

Persons.—The quite customary exclusion of casual workers was held applicable in an Iowa case where a handy man agreed to do a bit of repairing on a building for nothing, following service under a contract. Injury while performing the later work was held to be "casual employment" for which no compensation could be obtained (*Bedard v. Sweinhart*, p. 323). A different conclusion was reached by the Maryland Court of Appeals in regard to a farmer and teamster engaged to do hauling for a fruit-packing establishment whenever his services might be required, the work being regarded as under a continuing engagement and not casual (*State Accident Fund v. Jacobs*, p. 324).

A miner loaned by his employer to render expert service in extinguishing a fire in the property of another company was held entitled to compensation from the latter company as against the contention that his work for it was casual (*Tarr v. Hecla Coal & Coke Co.*, p. 322). Where, however, the local agent of a railroad company asked workmen of another employer to render assistance in closing a car door, an award was declared unwarranted as the accident had not occurred in the course of employment, the employment relation not having been formed (*Farrington v. United States R. R. Administration*, p. 373). Quite similar was the finding of the Illinois Supreme Court in regard to a volunteer who turned aside from his own employment, offering without request to do a dangerous piece of work, and suffering fatal injuries for which no compensation was allowed (*George S. Mephram & Co. v. Industrial Commission*, p. 376).

A workman employed to do a piece of work at a fixed time rate, but free to make use of his own methods of work in performing a single specific contract, was held by the Supreme Court of New Jersey to be an independent contractor and not an employee (*Otmer v. Perry*, p. 373). This defense was not allowed in an Indiana case where a workman was paid by the ton to unload coke, the court find-

ing him to be an employee and not an independent contractor (*Muncie Foundry & Machine Co. v. Thompson*, p. 374).

The miners in a coal mine in Iowa agreed to employ a person to act as shot firer for all blasting in the mine and had authority to discharge the man selected and paid by them. Nevertheless, the court held that a man so employed was in fact an employee of the company and entitled to compensation as such in case of injury (*Bidwell Coal Co. v. Davidson*, p. 375). The employment relation was held not to be interrupted where a general utility man and watchman employed by a company was killed while attempting to quiet a disorder on the company property, acting under his authority as a deputized sheriff (*Engels Copper Mine Co. v. Industrial Accident Commission*, p. 377). So also a director of a milling company who was also general manager and head miller of the company was held to be an employee, so that his dependents were entitled to compensation in case of his death from injury while at work (*Millers' Mutual Casualty Co. v. Hoover*, p. 379).

The relation of employment was held to exist in a case in which a city, which was under the act, contracted with a person not under the act for the removal of city garbage, an employee of the latter being classed as an employee of the city within the meaning of the act (*City of Milwaukee v. Fera*, p. 381).

A woman whose main support came from services rendered to her son-in-law and daughter as housekeeper was held not to be an employer under the California statute by reason of her ownership of some small dwellings from which she derived a meager income. An injury to a workman repairing the dwellings did not, therefore, charge her with the obligation of paying compensation, as she was not engaged in a trade or business (*Lauzier v. Industrial Accident Com.*, p. 380).

AWARDS.

A phase of compensation administration that involves considerable difficulty in spite of its apparently simple nature is that of determining the average weekly wages which shall form the basis of compensation awards. In a New York case (*Remo v. Skenandoa Cotton Co.*, p. 309) a night worker employed only five nights per week had been compensated on the basis of multiplying the average daily wage by 300 and dividing by 52 to secure the weekly wage. On appeal to the court this computation was set aside as one that could not be "reasonably and fairly" applied in the particular case.

The Maryland Court of Appeals declined to consider the money value of board where a workman was working for \$50 a month and board, affirming an award based solely on the money paid (*Picanardi*

v. Emerson Hotel Co., p. 310). What seems to be a more equitable rule was applied in an Illinois case in which a deduction of wages for powder, tools, etc., was not allowed to reduce the wage basis for the award (*Springfield Coal Mining Co. v. Industrial Commission*, p. 313). Tips were said by a New York court to be a proper part of the earnings of Pullman porters (*Bryant v. Pullman Co.*, p. 317).

Concurrent contracts with three employers to render janitor service were held to entitle the widow to compensation based on the aggregate weekly earnings of her deceased husband rather than on the amount paid by the individual employer in whose service he was injured (*In re Howard*, p. 311). The basis of aggregate weekly earnings was not allowed, however, in a Massachusetts case in which a workman gave his services under independent contracts to two different employers, benefits being restricted to the statutory percentage of the weekly earnings with the employer in whose service the injury occurred (*King's case*, p. 314).

The Pennsylvania compensation board, in computing wages, deducts from the 6-month period used as a basis Sundays, holidays, and absences not due to the fault of the workman. This last provision was held to cover time lost by strikes (*Rakie v. Jefferson & Clearfield Coal & Iron Co.*, p. 316).

A conversion in part of a time award to a lump-sum payment was upheld by the Supreme Court of Michigan against the contention that the employer's consent was necessary and that lump-sum payments were contrary to the intent of the act (*McMullen v. Gavette Const. Co.*, p. 317). The necessity for an expensive operation was held by a New Jersey court to be sufficient ground for a commutation to a lump sum over the employer's objection, the circumstances being regarded as unusual and warranting a waiver of the customary procedure (*Jensen v. F. W. Woolworth Co.*, p. 436).

The power of the Industrial Commission of Colorado to refuse approval to a settlement entered into by the injured man and the insurer for a less amount than provided by the statute was upheld in *Industrial Commission of Colorado v. London Guaranty & Accident Co.* (p. 320). The Industrial Commission of Utah was likewise held by the supreme court of that State to have control over settlements, so that an agreement between the guardian of an injured man and his employer for a lump sum in full discharge of all liability was held invalid without approval by the commission (*Reteuna v. Industrial Commission*, p. 318). The power of the district court to enter judgment on such an unapproved agreement was declared to be correspondingly limited. The discretion of the commission as to the desirability of continuing payments was held to be for its own exercise under the circumstances found by it.

The right of a beneficiary to a mandamus to compel a school board to pay an award due her was upheld by the Supreme Court of Utah over the contention that an individual had no such right (*Woodcock v. Board of Education*, p. 321).

Another case that may be noted here involves the status of awards under the New Jersey law, which gives them the same preference as unpaid wages for labor. Wages for two months are given a preferred status under this law, and it was held that the provision of the compensation act must be construed as subject to the same limitation (*Steel & Iron Mongers, Inc., v. Bonnite Insulator Co.*, p. 321).

Separate awards, one covering the period of disability prior to death, and the other a death benefit, were held by the Supreme Court of Connecticut to be the intent of the law in a case in which the right of the widow was said to be distinct from that of her injured husband during the period of his disability (*Jackson v. Berlin Construction Co.*, p. 350).

An unusual case was that of *Decker v. Mohawk Mining Company* (p. 353), wherein a girl was in receipt of compensation on account of the death of her father, and during the compensation period her mother remarried and her stepfather received a fatal injury. Compensation was awarded on account of the latter's death against the contention of the employer that double compensation could not legally be awarded.

DEPENDENTS.

The Supreme Court of Illinois affirmed an award of the State industrial commission refusing compensation to the illegitimate child of a deceased workman, holding that the word "child" as used in the statute meant only legitimate children (*Murrell v. Industrial Commission*, p. 354). The decedent in this case was living with a supposed wife and their children, and a ruling by the Supreme Court of Connecticut in a case before it, based of course on the law of that State, seems much more equitable. In this case (*Piccinini v. Connecticut Light & Power Co.*, p. 355) the court affirmed the award in favor of a common-law wife and her three children as belonging to the dependent family. This action accords also with the position of the Supreme Court of California in affirming an award where a man and woman, ignorant of the marriage laws, thought that the procuring of a marriage license was the only action necessary to make them husband and wife. An award by the commission was affirmed (*Temescal Rock Co. v. Industrial Accident Commission*, p. 360).

The effect of remarriage on the right of a widow to awards on account of the death of her husband was considered in a case before the Supreme Court of Rhode Island in which it was said the decree,

having been for a fixed period, was not subject to change by subsequent happenings, so that the compensation should continue for the full period of the award (*Newton v. Rhode Island Company*, p. 357). A similar construction of the Illinois law was made by the Supreme Court of that State under like circumstances, the right being classed as a vested right (*Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission*, p. 358).

The Pennsylvania law terminates a widow's benefits on her re-marriage, their maximum period being for 300 weeks, payments to children continuing until the age of 16 years is reached. On the termination of benefits to any beneficiary for any cause, surviving beneficiaries are to receive such benefits as they would have been entitled to if they had been sole survivors at the time of the death of the injured man. This provision was construed to sustain an award to a child under 16 entered upon the termination of the 300-week period of the mother's benefit, against the contention of the employer that such was not the purpose of the law (*Catlin v. Wm. Pickett Co.*, p. 359). The status of a minor dependent, not a child of the deceased, was considered by the Supreme Court of Colorado in a case in which a sister 17½ years of age was the sole dependent of the deceased. Benefits to children terminate at 18, but the court held that the award of the commission, extending over about 6 years, must be carried out in these terms, as the beneficiary was not a "child" of the deceased and so did not come under the limitation as to 18 years (*Hasselman v. Travelers Ins. Co.*, p. 352).

Partial dependency was held to sustain an award in a case in which a minor left his home to work, promising to send his mother all his earnings that he could spare from his support. His death ensued before his first pay day, but an award as for partial dependency was upheld by a Massachusetts court (*Freeman's case*, p. 356).

A provision of the New York compensation law directs the payment of \$100 to the State treasurer where an employee dies from an industrial injury without leaving dependents. This was held to apply in a case in which an award had been made to the injured workman himself and benefits paid between the interval of the injury and the death, this fact being without significance in so far as the leaving of dependents entitled to benefits was concerned (*Stempfler v. J. Rheinfrank & Co.*, p. 351).

DISABILITY.

The Supreme Court of Colorado construed the law of that State as warranting an estimate of the degree of disability on the basis of its effect upon the capacity of the injured man to continue the labor in which he was employed at the time of his injury. The commission

had made the award on this basis, and the lack of adaptability on the part of the injured man was cited as sustaining the reasonableness of such action (*Globe Indemnity Co. v. Industrial Commission*, p. 361). The loss of a negligible fraction of the first phalange of an index finger was held not to support an award for permanent partial disability, benefits being restricted to the amount due for the period of temporary total incapacity for work (*Edward E. McMorran & Co. v. Industrial Commission*, p. 364).

The Superior Court of Delaware sustained an order of the industrial accident board reducing benefits from the rate for temporary total disability to an award for partial disability in view of an offer of the employer to reemploy the workman at a reduced rate (*Frank v. Deemer Steel Casting Co.*, p. 365).

The Supreme Court of Illinois affirmed an award as for the total loss of an eye where there was such loss of the power of accommodation that a defective eye, useful at all only by the aid of special lenses, was of no service in coordination with the uninjured eye (*Juergens Bros. & Co. v. Industrial Commission*, p. 366).

The New York law was amended in 1916 so as to authorize awards not only for actual disabling injuries, but also for serious facial disfigurements. This provision was upheld by the court of appeals of the State as constitutional (*Sweeting v. American Knife Co.*, p. 369), the case being later appealed to the Supreme Court of the United States. Here, in connection with other cases, the decision of the court was upheld, the court saying that impairment of earning power could not be regarded as the sole ground upon which compulsory compensation might be based (p. 370). However, this doctrine was not allowed to have play in an Indiana case in which the injury was a mutilation but not a disfigurement (*Centlivre Beverage Co. v. Ross*, p. 453); but an identical injury was held by the Supreme Court of New Jersey to sustain an award (*Hercules Powder Co. v. Morris County Court*, p. 452).

Injuries to two fingers were followed by infections and poor recovery so as to affect the usefulness of the hand to the extent of one-half. A Minnesota court awarded benefits accordingly, over the employer's contention that the award should be based on the loss of the fingers and not the injury to the hand, and the supreme court sustained the award (*State ex rel. Broderick Co. v. District Court of Ramsey County*, p. 454). A similar case was similarly disposed of under the law of Nebraska (*Udike Grain Co. v. Swanson*, (p. 362).

Under the law of Maine compensation was refused for an injury which resulted in the loss of use of two fingers, but not in their amputation. The injuries affected two fingers of the left hand and the injured man, a painter, suffered no loss of earning capacity.

As he had suffered neither the loss of his fingers nor a reduction of wages, the court affirmed the decision rejecting the claim (*Merchants' case*, p. 363). A more liberal position was sustained by the Supreme Court of Pennsylvania in a case in which amputation about an inch below the elbow was compensated as for the loss of use of the entire arm against the contention of the employer that the disability should be classed only as loss of the hand (*Pater v. Superior Steel Co.*, p. 364).

A workman who had received benefits for the loss of a finger according to the legal schedule later found that another finger and the tendons of his hand were so affected as to interfere with his resumption of employment. An additional award was therefore made to cover the period of total disability in the employment in which he was engaged when injured, and this was upheld by the Supreme Court of Michigan over the employer's contention that no greater compensation could be given for the loss of a finger than the law allowed for the loss of a hand. It was held that the statute covers disability and is not limited to specific schedule awards in such a case (*Schimmel v. Detroit Pressed Steel Co.*, p. 461).

Where a workman who had previously lost the second finger of his left hand subsequently received an injury resulting in the loss of use of his hand, the question was raised whether the award should be for the loss of use of the hand or of the three fingers which the workman had at the time of the injury. An award as for the loss of use of the hand was affirmed by the Supreme Court of Illinois, the court ruling that the fact that the hand was not perfect at the time of the second injury did not render its loss less complete (*Mark Mfg. Co. v. Industrial Commission*, p. 457).

The requirement that the disability shall continue for two weeks found in a number of laws was construed by the Supreme Court of Kentucky as not requiring the disability to occur during the first two weeks succeeding the accident in order to give rise to a claim (*Raffaghelle v. Russell*, p. 367). The discretion of the trial court in allowing a lump-sum commutation in this case in lieu of the eight years' periodical benefits was held not to have been improperly exercised.

In determining the rights of a claimant to an award as for permanent total disability, where the action was for a lump sum as against a continuing payment, the plaintiff challenged the right of the insurer to demand a physical examination, and the trial court upheld him therein. On appeal to the Court of Civil Appeals of Texas this judgment was reversed and the authority to demand an examination was upheld (*Texas Employers' Ins. Assn. v. Downing*, p. 442).

A case of second injury resulting in the loss of three-fourths of the workman's vision was before the Supreme Court of Minnesota;

the left eye had had but one-half the normal vision before the second injury, which resulted in the entire destruction of the right eye and further injury to the left. Compensation was awarded on the basis of permanent partial disability covering a term of 300 weeks. This was sustained by the court as against the contention that the award should be as for the loss of one eye and separately for the loss of one-half the other eye, which would have resulted in reducing benefits one-half (*State ex rel. Melrose Granite Co. v. District Court*, p. 455).

Quite similar cases were passed upon by the Supreme Court of Louisiana (*Brooks v. Peerless Oil Co.*, p. 459) and the Supreme Court of Iowa (*Jennings v. Mason City Sewer Pipe Co.*, p. 461). In the former case the vision of the one remaining eye of the workman was so impaired as to make it impossible for him to reengage in his former employment or in fact in practically any employment for which he was qualified. An award as for permanent total disability was therefore affirmed. In the Iowa case there was total blindness following the loss of the second eye, and an award was made as for permanent total disability, but reduced by the schedule amount fixed for the loss of one eye. This was said to be "an effort on the part of the commissioner at attaining equity," his theory being that though the disability was total the injury was less than would have been the loss of two eyes.

Permanent total disability resulted from the loss of a leg by a workman who had previously lost an arm and had been employed as a watchman. The Illinois court adopted the position of the courts of Massachusetts and New York in classing this as permanent total disability, and affirmed a lump-sum award to be followed by a pension for life (*Wabash R. Co. v. Industrial Commission*, p. 458).

An unusual claim was made in a case before the Supreme Court of Rhode Island (*Keyworth v. Atlantic Mills*, p. 463) in which a workman suffered multiple injuries, resulting in the payment of compensation as for total disability for an indefinite period but not exceeding 500 weeks. This was held to be the full measure of benefits contemplated by the act, so that a claim for specific benefits for the loss of sight of an eye could not be granted.

INJURIES.

The question of industrial injury arose in a case in which a workman engaged in heavy but not unusual toil died from hemorrhage which developed immediately after the last piece of work was done. The employer contended that a preexisting disease of the heart was the cause and not an accident as that term is used in the compensation act. The Supreme Court of Illinois affirmed the award, and ordered execution of judgment on it (*E. Baggott Co. v. Industrial*

Commission, p. 390). Lobar pneumonia was said to have been caused by an accidental injury in a case under the Pennsylvania law, so as to warrant an award of compensation (*Murdock v. New York News Bureau*, p. 392).

The question of occupational diseases has been decided in a few States by mandatory legislation, though in most the matter has not received specific attention. Anthrax infection incurred through a pimple which a workman had scratched open while dressing in the morning was classed by the Illinois Supreme Court as an accidental injury and an award of compensation was affirmed (*Chicago Rawhide Mfg. Co. v. Industrial Commission*, p. 392). The New York Court of Appeals on the other hand was unable to take judicial notice of the probable presence of anthrax germs, so that no presumption could be indulged in favor of the proposition that a man working about hides in a tannery was likely to receive an anthrax germ into an open sore as a result of employment. An award of compensation was therefore reversed (*Eldridge v. Endicott, Johnson & Co.*, p. 393). A similar result was arrived at by the Supreme Court of New York, Appellate Division, in denying an award granted by the industrial commission in the case of a workman who inhaled the disease-laden breath of a horse infected with glanders and became himself infected with the disease, dying therefrom (*Richardson v. Greenburg*, p. 394). It may be noted in connection with these two cases that the New York law is now amended so as to include certain occupational diseases, anthrax and glanders being among them.

The effect of excessive exposure to influenza due to employment as a hospital steward at the time of the epidemic of October, 1918, was held to be an "injury or disease rising out of the employment," entitling the widow to an award (*City and County of San Francisco v. Industrial Accident Commission*, p. 396). The same court extended this principle to cover the case of a safety engineer of a mining company who was requested by the superintendent to aid in the nursing of the patients in a small community of miners and their families residing at the mine. A few days afterwards he himself contracted influenza and was left with a weak heart, largely incapacitating him for work, and he was allowed compensation (*Engels Copper Mining Co. v. Industrial Accident Commission*, p. 398).

Though the Massachusetts law has been construed as governing occupational diseases, occupational neurosis of a cigar maker due to faulty posture, which was in turn the result of a physical deformity, was said not to come under the act. "Although the condition arose during the course of the employment it can not be found to have arisen from it" (*Pimental's case*, p. 399).

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Disability due to infections following wounds accidentally caused are generally regarded as the proximate result of the original injury. This position was contested by the employer in a California case (*Bethlehem Shipbuilding Corp. v. Industrial Accident Commission*, p. 426), in which erysipelas of the face developed by the communication of infectious germs from an injured toe, but the Supreme Court affirmed the award.

ARISING OUT OF EMPLOYMENT.

The laws of most States, though not all, require that the injury shall arise out of the employment and also in course of the same. This provision was involved in a case before the Supreme Court of Illinois in which a workman whose overalls were greasy and oil soaked was burned to death as the result of the ignition of matches which he was carrying in his pocket. The practice was said to be so common that it was not unreasonable for the workman to have the matches, and their accidental ignition while at work was an accident within the law for which compensation should be allowed (*Steel Sales Corp. v. Industrial Commission*, p. 403).

The Supreme Court of New Hampshire affirmed an award in the case of a workman who was visiting about the shop in an interval of unemployment and was injured by an unguarded dangerous machine. The custom of visiting was said to be known to the employer so that the man was regarded as in the course of his employment at the time (*Barber v. Jones Shoe Company*, p. 418).

In Massachusetts compensation was allowed for the death of an insurance solicitor and collector, killed while attempting to catch a street car, as against the contention that his death was due to a common hazard, the court holding that he was exposed to these hazards as a result of his employment, so that they should be classed as hazards of the occupation (*Moran's case*, p. 404). The Supreme Court of Wisconsin took a like position with regard to a city salesman whose duties required much street travel (*Schroeder & Daley Co. v. Industrial Commission*, p. 428). The defense of "common hazard" was likewise rejected where a workman was caught among the bricks of a building in which he was employed which was blown down by a tornado, and escaping ammonia fumes also conduced to his death (*Central Illinois Public Service Co. v. Industrial Commission*, p. 407). Similarly the Supreme Court of Connecticut found that a park workman who took refuge under a tree as the only shelter at the time of a storm was subject to an unusual exposure on account of his employment and advised the affirmation of an award in his favor (*Chiulla de Luca v. Board of Park Commissioners*, p. 409).

Death due to a fight over the possession of a tool was held to be compensable as arising out of and in the course of employment under the Ohio law (*Industrial Commission v. Pora*, p. 405); so in Indiana where a workman, enraged at a remark of his fellow worker, threw a hammer at him inflicting fatal injuries (*Mueller v. Klingman*, p. 406); and in Nebraska where ill feeling had existed for some time between two workmen, due partly to their employment relations and partly to personal matters. A factor was the known quarrelsome disposition of the offending workman. An award of compensation was therefore affirmed by the supreme court over the disallowance of the court below (*American Smelting & Refining Co. v. Cassil*, p. 409). A point of interest in this decision was the credit given in the compensation award for an amount previously received by the claimant on account of insurance carried by the company on the life of the deceased workman at its own cost.

A workman fatally injured in a riot by strikers, while attempting to defend female fellow workers, was held to have been injured in the course of his employment, the injury also arising out of the same (*Baum v. Industrial Commission*, p. 415).

Pranks of fellow employees, when the custom is known to the employer, become an incident of the employment, so that an injury resulting therefrom would be classed as arising in the course of employment and compensable (*White v. Kansas City Stock Yards Co.*, p. 402). The Pennsylvania law does not require that the injury arise out of the employment, and an unexplained death by a bullet wound, presumably not suicidal, was held compensable by the supreme court of that State (*Keyes v. New York O. & W. Railway*, p. 401).

The Supreme Court of Minnesota held that a woman employed as elevator starter by a hotel had not left her employment even though she had "punched out" and was dressed for the street, when she was on practically continuous duty and was presumptively attending to duties incident to her employment (*State ex rel. Raddison Hotel v. District Court of Hennepin County*, p. 411). The injury was fatal in this case, and the question arose as to whether her children were dependent, the husband having abandoned the family three years before the accident. Though not technically orphans, the children were held to be entitled to compensation under the law.

Injury received on the way to work was held to arise out of and in the course of employment, where it was necessary to follow a given route which was dangerous by reason of the constant movement of trains and cars (*Great Lakes Dredge & Dock Co. v. Totzke*, p. 413). It would seem reasonable that this principle should apply in a case where the employer furnishes the means of transportation for the workers in his service, and this was the position taken by the Su-

preme Court of Connecticut where such transportation was furnished (*Scalia v. American Sumatra Tobacco Co.*, p. 414).

Where travel is a part of the employee's duty, the hazards may be regarded as incident to the service. Thus in a case before the Supreme Court of Pennsylvania (*Haddock v. Edgewater Steel Co.*, p. 426) an employee returning home late at night from a trip undertaken as a part of his duty was killed by an automobile. The circumstances were regarded as surrounding his employment, and the widow was allowed compensation.

To what extent the continuity of the employment relation is interrupted at lunch time is a matter for determination in accordance with the facts. Thus where a workman had returned from his home before the expiration of the lunch hour and joined other employees in a room where they were accustomed to eat, the conduct that gave rise to the injury was held to be "entirely foreign to the business of the subscriber," so that no compensation should be paid (*Rochford's case*, p. 416). A contrary view was taken by the Supreme Court of Kansas where a girl 17 years old was injured during the lunch hour while at play in a manner known by the employer to be a custom. The injury was therefore regarded as arising out of and in the course of the employment (*Thomas v. Proctor & Gamble Mfg. Co.*, p. 417).

The fact that an employee had allowed a stranger to do part of his work did not bar recovery where the injury was not caused by such act but was incurred in an attempt to perform a proper act in the employer's interest (*Employers' Liability Assurance Corp. v. Industrial Accident Commission*, p. 427).

INJURIES DUE TO THIRD PARTIES.

The Minnesota law authorizes a workman injured in the course of his employment by the negligence of a third party to sue such third party; however, if the latter is himself under the compensation law the recovery may not exceed the amount of compensation fixed by the statute. In accordance therewith, an injured workman sued a third party for his injury, the latter being under the statute, and it moved for a dismissal of the common-law action, asking the court either to grant or to deny compensation under the act. The court granted this request saying that, as the defendant invited the award and would not contest its liability up to the extent fixed by the statute, "there is nothing now to do but fix compensation." The suit was therefore dismissed and the case remanded for a determination of the amount of benefits due (*Hansen v. Northwestern Fuel Co.*, p. 419). The limitation of the third party's liability to the amount payable as compensation under the law was, however, held not to

apply in a case where the negligent third party caused the injury by an act not connected with the conduct of his business, but purely in the pursuit of his personal affairs. Recovery in a larger amount was therefore affirmed, and the right to sue was sustained even though the injured man had entered into an agreement with his employer for the payment of compensation, such agreement and payment thereunder not being sufficient to transfer the right of action to the employer (*Podgorski v. Kerwin*, p. 421).

Under the Maryland law it was held that where compensation had been awarded a claimant, his election barred a suit for damages against the negligent third party, the law providing that such settlement should be in lieu of all rights of action against any person whomsoever (*Mayor and Council of Hagerstown v. Schreiner*, p. 420).

The sending of a letter stating that a widow was contemplating making a claim for the death of her husband was held by the Supreme Court of Colorado (*Arkansas Valley Ry., Light & Power Co. v. Ballinger*, p. 423), not to be an election such as would bar the bringing of a suit for damages against the third party liable for the injury.

A Federal law provides compensation for civil employees of the United States, which includes railway mail clerks; but the act was held not to preclude an action for damages against a negligent third party on account of injury to such an employee (*Dahn v. McAdoo, Director General of Railroads*, p. 424).

INSURANCE.

The Supreme Court of Colorado affirmed a decision of the court below as to the liability of a school district to pay insurance premiums into the State fund, over its contention that the district was not an employer under the act, and that in any case the proper method of procedure had not been adopted, the court rejecting both these contentions (*School District No. 1 in City and County of Denver v. Industrial Commission*, p. 428).

The legal battle as to the right of private insurance companies to do business in Ohio would seem to have reached its end, in the absence of further legislative action, in decisions by the supreme court of the State and by the United States Supreme Court upholding the authority of the commission to issue regulations to carry out those provisions of the law which deny to self-insurers the right to insure their liability in stock companies. The State court discussed at some length the grounds for the action taken by the legislature and declared the enactment of the law to be within its power and fully supporting the action of the commission (*Thornton v. Duffy*, p. 429). The Supreme Court of the United States briefly disposed of the

matter when it was taken before it, affirming the decision of the court below (p. 432).

As in many other States, self-insurance is permitted under the law in California where the industrial commission is satisfied with the solvency of the employer. However, the law permits the commission to require the deposit of securities to guarantee payment, and the commission was held to be within its rights when it required the deposit of bonds as a prerequisite to granting to a corporation the privilege of carrying its own insurance (*Bank of Los Banos v. Industrial Accident Commission*, p. 432).

Where employers have employees in different lines of work, some of them not lawfully under the provisions of the compensation act, employees in such work should not be considered in computing the amount of premiums due for compensation insurance. The foregoing was the finding of the Supreme Court of Washington where an employer had men who were engaged in dredging operations and were therefore in maritime employment (*Puget Sound Bridge & Dredging Co. v. Industrial Insurance Commission*, p. 434).

MEDICAL AND SURGICAL AID.

The provision that the employer must furnish necessary medical and surgical aid was held to be binding in a California case where there was knowledge on the employer's part of the need of treatment, even though the treatment was rendered by a physician selected by the injured man, the employer taking no action; but after the employee had indicated that no further medical services were required he could not secure additional services at the expense of the employer (*Leadbetter v. Industrial Accident Commission*, p. 437). Where the employer gives clear and adequate directions as to how suitable medical service is to be obtained, he is not to be held liable for service from a different source, even as against the defense of the claimant's ignorance leading to unintentional departure from the course prescribed by the employer (*Cella v. Industrial Accident Commission*, p. 439). Still more would it be true that a voluntary abandonment of the physician provided by the employer, followed by recourse to another, would not charge the employer with liability for the costs of the services of the second physician (*Radil v. Morris & Co.*, p. 438). However, the employee's voluntary change of physicians will not be construed as working a forfeiture of the right to compensation as if for refusal to accept reasonable surgical, etc., services (*Neary v. Philadelphia & Reading Coal & Iron Co.*, p. 439); but where an operation is necessary to restore working capacity and is not dangerous, refusal to undergo the operation was held by the Supreme Court of Michigan to suspend payments until the workman should submit (*O'Brien v. Albert A. Albrecht Co.*, p. 446). The subject of concur-

rent awards was involved in this case, the workman having received a second injury while drawing compensation for the first. The law makes \$10 per week the maximum, and this was held to apply, "whether it is paid by one employer or several."

The same court on the same date had before it a case (*Rose v. Desmond Charcoal & Chemical Co.*, p. 441) in which a workman had drawn compensation for more than three years and refused to submit to an X-ray examination to determine his present condition. The industrial commission declined to terminate the payment of benefits on account of this refusal, but the supreme court took the opposite view and required the submission to an examination as a condition to the further receipt of benefits. The Supreme Court of Nebraska, on the other hand, refused to adopt this position in a case in which the employer's demand that the claimant submit to the examination was not supported by the opinion of physicians, and it appeared that no examination was necessary. On a new trial there was evidence that an X-ray picture was "a reasonable and necessary thing," but the trial court did not so find, and the supreme court refused to change its position in view of all the circumstances (*U. S. Fidelity & Guaranty Co. v. Wickline*, p. 444).

Where services in excess of the statutory requirement are rendered at the request of the employer, with an assurance of payment, the Supreme Court of Minnesota held that the statutory amount would not serve as a limitation on the employer's liability for medical benefits (*Collins v. Joyce*, p. 440).

The Supreme Court of Illinois held (*Central Locomotive & Car Works v. Industrial Commission*, p. 325) that a notice of claim for medical attendance was not sufficient in itself on which to base a much later claim for compensation.

ATTORNEYS' FEES.

In the Wickline case above, the injured woman had sought to secure the taxing of her attorney's fees as part of the costs for which she was entitled to reimbursement. The court held that as the law existed at the time this could not be done, though an amendment of 1919 changed the law in this regard. The power of the State board to determine the amounts of attorney's fees was upheld in a Kentucky case (*Rawlings v. Workmen's Compensation Board*, p. 308), in which the board had fixed a fee less than the attorney's claim, and less than the amount contracted for with the claimants, and less also than the statutory maximum; the attorney had a remedy in an action by appeal to the circuit court, so that a writ of mandamus could not be obtained. The Minnesota law was construed as making no provisions for attorneys' fees, and as they are not allowed in ordinary

civil actions the absence of a specific provision prevented a recovery (*Johanson v. Lundin Brothers*, p. 309).

MINORS ILLEGALLY EMPLOYED.

The Supreme Court of Indiana affirmed a judgment for damages in favor of minors illegally employed, holding that the compensation law covered only lawful employment (*New Albany Box & Basket Co. v. Davidson*, p. 448). In this case both the failure to secure a certificate and the employment of children under 16 years of age at dangerous machinery were involved. The same principle was applied by the Supreme Court of California in refusing to hold an insurance company liable for a compensation award made to a child employed without an age and schooling certificate (*Maryland Casualty Co. v. Industrial Accident Commission*, p. 449). On the other hand, the Supreme Court of Washington found the law of that State to be broad enough to cover all employments. civil suits for damages for personal injuries having been entirely abolished (*Rasi v. Howard Mfg. Co.*, p. 447). The Legislature of Wisconsin has adopted a special provision with regard to the employment of children in violation of the child labor laws, providing that in such cases treble compensation shall be allowed for any injury incurred during the course of such illegal employment; this provision was held constitutional by the Supreme Court of the State (*Brenner v. Heruben*, p. 450).

ELECTION.

The effect of an election by the employer upon a minor was considered by the Supreme Court of Kansas in a case (*Chicago R. I. & P. R. R. Co. v. Fuller*, p. 371) in which the injured employee, 20 years of age, denied the applicability of the law to him on the ground that the matter is contractual, and that a minor is not bound by his contract. This contention was rejected, and an award of compensation affirmed, no suit for damages being permitted.

The Illinois statute prior to the amendment of 1919 was elective, with a presumptive election as to certain classes of employment. The owner of a number of buildings who had no other business than their management and maintenance had not affirmatively accepted the act and denied that he was subject to it. However, the supreme court took the view that he was engaged in a business or occupation subject to the presumptive provisions of the act, and an award in favor of one of his employees was affirmed (*Storrs v. Industrial Commission*, p. 372). In this connection reference may be made to a decision of the District Court of Appeal of California in the Lauzier case above (p. 42), where the maintenance of a few small houses was regarded as not being the "business" of the owner.

An election out of the law was attempted in a case that was before the Supreme Court of California in which a physical examination prior to employment disclosed the fact of the applicant's susceptibility to hernia. The company therefore required him to sign a release for any disability due to this cause, but the court held that the attempted release was of no avail, being directly forbidden by the statute (*Hines, Director General of Railroads v. Industrial Accident Commission*, p. 456).

Other cases not strictly involving the question of election may be here noted as they turn on the question of what law was applicable. In one of these the Supreme Court of Illinois (*Chicago & A. R. Co. v. Industrial Commission*, p. 456) sustained an award for compensation under the State law as against the contention that if any recovery was possible it must be under the Federal liability act. The employee in the case was a watchman guarding property in the company's yards in the State of Illinois. The court found that his duties constituted no real or substantial part of interstate commerce and denied the railroad company's contention, affirming the award.

A rather unusual case was before the Supreme Court of California, involving concurrent employments, one employer doing both an interstate and intrastate business, the other doing only an interstate business. Both were railroad companies, and the employee was killed while performing his duties, upon the simultaneous approach of trains of each company. The widow executed a release as to the company doing an interstate business and obtained an award against the other employer, who thereupon appealed, claiming that the injured man was not its employee, and that any redress available was under the Federal liability act. The court did not accept this position, and also held that any release that the widow might have executed would not affect the obligation of the employer under the State compensation law; the award was therefore affirmed (*San Francisco-Oakland Terminal Railway v. Industrial Accident Commission*, p. 382).

Under an ordinance of the city of St. Paul firemen injured in the course of employment are entitled to six months' pay during disability. The obligation of the city to pay this amount, without regard to the subsequently enacted workmen's compensation law, which was also applicable, was upheld by the Supreme Court of the State (*Markley v. City of St. Paul*, p. 383).

WILLFUL MISCONDUCT.

The California law provides increased benefits in cases where the injury is caused by the willful misconduct of the employer. The constitutionality of this provision was upheld, and it was applied to

a case (*E. Clemens Horst Co. v. Industrial Accident Commission*, p. 463), in which a female employee's hair was caught in an unguarded shaft near the place where her employment required her to be. This additional award was held not to be a penalty for misconduct but only an increased benefit properly due as compelling the employer to carry a greater proportion of the burden in such case. The Supreme Court of Iowa refused to allow an action for exemplary damages in a case in which the reckless negligence of the employer was said to be the cause of the injury for which compensation had been awarded (*Stricklen v. Pearson Construction Co.*, p. 466). The court held that after the plaintiff had accepted compensation he had no standing to assert further liability.

The remaining cases under this head refer to the willful misconduct of the employee instead of the employer. In one of these (*Indianapolis Light & Heat Co. v. Fitzwater*, p. 465) the employer contended that the workman's injury was due to his failure to observe safety requirements prescribed by it. However, the court found that no great attempt had ever been made to enforce them and allowed the award to stand. The same court (Appellate Court of Indiana) refused to set aside an award in a case in which a workman met his death by continuing work in a place in which he had attempted to wear a respirator, but took it off, because, as he said, it did not work. The court held that it was a fair conclusion that the instrumentality had been put aside because out of order and there was no obstinacy or stubbornness involved, so that the award should stand (*General American Tank Car Corp. v. Borchardt*, p. 467). The Supreme Court of California likewise refused to cut off compensation where an injury was due to a hazard against which explicit instructions had been given, but where the action was impulsively taken to catch falling objects (*Hyman Bros. Box & Label Co. v. Industrial Accident Commission*, p. 468). Other cases noted in this connection before the same court involved the attempt to wipe off a stream of grease from moving machinery without regarding the warning "stop before oiling," etc. (*Western Pacific R. R. Co. v. Industrial Accident Commission*, p. 469); and one where a workman undertook to chip off a burr from a bar in which he was drilling holes without putting on the goggles which were specifically directed to be used in such cases. Here the customary award was reduced one-half under the law covering willful misconduct, as the workman had voluntarily and intentionally omitted the use of the safeguards directed, on the ground that he disliked them and they were "in his way" (*McAdoo, Director General of Railroads v. Industrial Accident Commission*, p. 470).

The Minnesota law denies compensation where intoxication is the proximate cause of the injury, the burden of proof being on the em-

ployer. Where an intoxicated fireman at a hotel fell from a stairway that had no railing, it was held that this fact, together with other causes of hazard, might be regarded as proximate causes, so that an award would not be disturbed (*State ex rel. Green v. District Court of Ramsey County*, p. 435).

EXTRATERRITORIALITY.

A prolonged discussion of the applicability of the California law to injuries occurring under home contracts but outside the territory of the State would seem to be terminated by the finding of the supreme court of the State in a case (*Quong Ham Wah Co. v. Industrial Accident Commission*, p. 385) in which an amendment to the compensation law declaring it applicable in such cases was upheld. The law as drafted was limited to workmen, residents of California, but it was held that the Constitution of the United States prevented discriminatory privileges, so that the law must be construed as applying to all citizens of the several States contracting in the State of California. As so construed the statute was upheld and declared applicable to an employee of a packing company injured in Alaska. The Supreme Court of the United States refused to review this action (p. 388).

A New York corporation doing part of its work in Pennsylvania paid compensation to a New York workman injured in Pennsylvania under a claim made by him in accordance with the Pennsylvania statute. A subsequent claim was made for the same injury under the New York law, which the commission allowed; the supreme court, appellate division, however, denied the right to this compensation on the ground that there was no New York contract sustaining such proceedings (*Thompson v. Foundation Co.*, p. 388). The Supreme Court of Illinois was not able to find in its compensation law any provision that "can be construed to authorize compensation for an injury occurring outside of the State." An award allowed by the industrial commission was therefore reversed where the injured man was employed at the time on the Kentucky side of the Ohio River in excavation work connected with the construction of a bridge between the two States (*Union Bridge & Construction Co. v. Industrial Commission*, p. 384).

LABOR DISPUTES.

An unusual situation with regard to the instigation of labor disputes was considered by a United States Circuit Court of Appeals in *Lamar v. United States*, p. 168). The appellant was found guilty of attempting to instigate strikes to prevent war production and was held to have been guilty of conspiracy to restrain foreign trade and

war production, so that the Clayton Act limiting strike injunctions was no defense.

The widely-known Court of Industrial Relations of Kansas was found by the supreme court of the State to be constitutional in the face of contentions that it was not a legally constituted body (*State ex rel. Court of Industrial Relations v. Howat et al.*, p. 170). The so-called court is not regarded as judicial in its character, but it may receive the aid of a district court in support of its decisions, so that offenders against it may properly be imprisoned.

LABOR ORGANIZATIONS.

BOYCOTT.

A case that has long been before the courts, and has received prior notice, is that of *Clarkson v. Laiblan* (p. 179), in which the plaintiff was in this instance awarded damages for loss of occupation by reason of the unlawful interference of a labor organization with his opportunities for employment. In another case the Court of Appeals of New York did not assess damages, but found that a combination of labor unions was unjustifiably and unlawfully interfering by boycott with the rights of the plaintiff, and an injunction was accordingly authorized (*Auburn Draying Co. v. Wardell*, p. 172).

Restraint of interstate commerce by boycott and secondary boycott was found by the Supreme Court of the United States to be carried on unlawfully in *Duplex Printing Co. v. Deering* (p. 174). The manufacturer at Battle Creek, Mich., had been subjected to strike, but the chief activities were in New York City and vicinity, and these activities were found to be not such as the Clayton Act made legal.

Combinations of manufacturers, rather than of laborers, were condemned in cases before the circuit court of appeals, one in the seventh circuit involving an attempted monopoly through a combination of manufacturers and union workers (*Boyle v. United States*, p. 181). Switchboard and like appliances for electrical installation were the subject of an agreement which was held unlawful in this case. Quite similar was the finding of the court of the third circuit, in which the tile industry was likewise made the subject of an agreement between dealers and the tile setters' union (*Belfi v. United States*, p. 183).

COLLECTIVE AGREEMENTS.

The effect of a trade or collective agreement, i. e., a contract between the employer and the members of a union, received consideration in a few cases of interest. Their validity was recognized in a case (*Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Steve-*

dores & Longshoremen's Benev. Soc., p. 184) in which members of labor unions who were under contract to load and unload vessels at a fixed price refused to complete the work of unloading a vessel without an increase in pay. The court awarded damages for their violation of the contract. That such an agreement was legal, even though it debarred an outside worker from employment, the result of the contract being to establish a closed shop, was held by the Supreme Court of Massachusetts (*Shinsky v. O'Neil*, p. 187).

A similar conclusion was reached in a case of like nature that came before the New Jersey courts. Here the discharged workman claimed that a monopoly had been established in violation of a State law, but the statute was held not to apply (*Reihing v. Local Union of Electrical Workers*, p. 188).

The violation of an agreement with a plumbers' union led to the inability of a contractor to complete his contract, and his surety was held liable on the failure to conclude the work within the time specified. The insurance company claimed that it was exempt from liability on the ground that the inability to secure labor was due to a strike, but the court denied this contention, holding that the contractor's own act in violating the agreement was the moving cause in the difficulty, so that it could not be called a strike (*Uden v. Schaefer*, p. 190).

A contract between a railroad company and the union of which its employees were members was held to control rather than an award by the War Labor Board before which the railroad had refused to appear. The contract was terminable upon 30 days' written notice, which the employees gave, but the company refused to enter into any discussion and the work continued under the old terms. Subsequently, a demand for back pay on the basis of the award of the War Labor Board was brought, but was denied by the court, which held that the collective agreement still prevailed (*Parker v. First Trust & Savings Bank*, p. 186).

EXTORTION.

During the year 1918 an organization representing members and business agents of unions of painters, glaziers, wood finishers, etc., in the city of Chicago, established a set of rules for the violation of which it assessed penalties against employers, including the payment of certain sums to the unions. If the money was not forthcoming the plate glass in the employer's store was broken and could not be replaced without the payment of the penalty, which was frequently increased. A conspiracy was found and convictions and fines followed, the court finding that the series of acts constituted

different parts of one conspiracy, so that no particular one need be singled out as the basis for prosecution (*People v. Curran*, p. 191).

Though not involving criminal prosecution, an action for damages was carried to a successful conclusion in a case in which violence and the destruction of property attended the efforts of a labor union to compel the unionizing of the mines of a number of companies where the open shop was being maintained (*United Mine Workers of America v. Coronado Coal Co.*, p. 192). Damages of \$200,000 trebled under the antitrust act were, therefore, allowed but without the interest claimed.

MEMBERSHIP

It is a general rule that unions will be permitted to determine the qualifications of their members and their rights within the union. However, the court will give relief if arbitrary action is taken or inadequate provision is made for the safeguarding of rights.

Thus, in *Staffan v. Cigar Makers International Union* (p. 202), it was found that a member had been dropped without just cause, so that his widow was entitled to recover the insurance benefits which membership involved. On the other hand, an amendment to the constitution of a union which operated to forfeit the benefits which would have accrued prior to the change was held not to be unreasonable, and the anticipated beneficiary was held not entitled (*Tierney v. Perkins*, p. 201).

Charges of wrongdoing under the rules of the union led to the suspension of members of a railroad brotherhood, which involved the loss of insurance. Instead of appealing to the highest authority in the order after their suspension, the plaintiffs took the case to the courts, claiming wrongful expulsion. The matter was fully reviewed and the acts of the union were found, though harsh and drastic in some respects, not to be so unreasonable or unfair as to warrant outside interference (*Simpson v. Grand International Brotherhood of Locomotive Engineers*, and *Smith v. Same*, p. 233).

The same court (Court of Appeals, West Virginia) had before it the complaint of three members of the Brotherhood of Railway Trainmen, in which they sought to prevent a committee of the brotherhood from making an agreement with their employer modifying an old rule under which the complainants enjoyed certain benefits of which they would be deprived by the proposed new agreement. It was held that the action of the committee was in due form and presumably for the general good of the brotherhood, and that the old rule did not create a property interest that the complainants could defend (*Burger v. McCarthy*, p. 238).

In the broader field of the rights of unions themselves is a case (*Gardener v. Newbert*, p. 274) in which a local lodge was disfran-

chised and expelled from an international and a new lodge chartered to take its place to operate in the same territory. Members of the original lodge thereupon sought an injunction to prevent the international lodge from interfering with their original status. This was shown to involve interests in property and other valuable rights which were held by the court to be entitled to protection.

A very similar situation developed in a New York case involving a local union which had had long-continued relations with the international, but owing to personal differences officers and members of the local were suspended and finally the local itself. The court granted an injunction to protect the local organization both in its rights of international control and against a requirement that its members join another local (*Bricklayers, Plasterers & Stone Masons Union v. Bowen*, p. 275).

The same principle was applied to a manufacturers' organization in which an association of clothing manufacturers undertook to discipline a member for refusing to dismiss his workmen, in an attempt to compel the workmen's union to permit arbitration, and a fine of \$2,000 was assessed. The employer refused to pay the fine and a suit was brought to enforce its collection, but the court refused to entertain the action on the ground that the association had no authority in law to fix an arbitrary assessment by way of a fine (*American Men's & Boy's Clothing Manfrs. Assn. v. Proser*, p. 280).

Involving the insurance feature rather than that of membership is another case that may be noted in this connection, in which a locomotive engineer lost his employment by reason of color blindness. His policy in the association to which he belonged called for benefits in case of loss of sight, but the court held that the impairment suffered did not warrant the payment of benefits under the terms of the policy (*Fallin v. Locomotive Engineers Mutual Life & Accident Insurance Assn.*, p. 200).

An entirely different phase of the question of membership was involved in cases in which the matter of deportation of aliens was before the courts, and membership in the order of Industrial Workers of the World was found to be sufficient basis for upholding a deportation order, in view of its avowed program (*Ex parte Bernat*, p. 195).

A similar conclusion was arrived at where the question involved was that of canceling the naturalization certificate of a member of the I. W. W., citation being made from publications of the order as evidence of its nature (*United States v. Swelgin*, p. 197).

A third case involved the conviction of a member of the crime of criminal anarchy under a Washington statute, the conviction resulting from the admission into evidence of various documents of an inflammatory character issued by the order and in the possession of the defendant (*State v. Lowery*, p. 198).

Like the Bernat case, a case before the United States Court of Massachusetts considered the deportation of a considerable number of aliens, but as members of the Communist Party or the Communist Labor Party. The Departments of Labor and of Justice had cooperated in making a number of arrests, but on this trial it was found that the organizations named were not of an essentially illegal nature under the Federal statute relied upon, so that membership therein was not of itself a basis for deporting the persons arrested (*Colyer v. Skeffington*, p. 206).

The right of employers to discharge their employees "for any reason or no reason" naturally involves the right to discharge workmen for membership in labor unions. This principle was held to be applicable to city firemen in the employ of the fire department of Dallas, Tex. (*McNatt v. Lawther*, p. 208). A like situation led to a similar conclusion in the city of San Antonio (*San Antonio Fire Fighters Union v. Bell*, p. 210).

INTERFERENCE WITH EMPLOYMENT.

The Supreme Court of Georgia sustained the legal right of an employer to conduct his business as an open shop without interference by organizations from outside which sought to secure the violation of contracts which included an agreement not to join a labor union during the period of service (*Callan v. Exposition Cotton Mills*, p. 203).

A similar view was taken by a California court where a union of glassworkers sought to prevent employees of the plaintiff's company from carrying out their contracts by various inducements. An injunction was therefore granted against the threatened interference (*Patterson Glass Co. v. Thomas*, p. 203).

A different conclusion was arrived at in a Texas case (*Sheehan v. Levy*, p. 205), in which the court refused an injunction and damages as for interference with employment where a master plumber charged other master plumbers with complicity with a union of workers to prevent his obtaining men for his jobs; while the workmen were said to be within their rights in refusing to work if they chose to do so.

PICKETING.

The act of picketing is not illegal per se since the passage of the Clayton Act, but the effect of this statute has been widely discussed. Thus, in the United States District Court of Missouri it was held that no injunction could be granted against pickets who sought to make effective a strike to compel the maintenance of a closed shop (*Kinlock Telephone Co. v. Local Union*, p. 212). The fact that employees of a company were involved in this case distinguishes it from

those cases in which outside organizations are active, as in *Moore v. Cooks, Waiters & Waitresses Union* (p. 221), where picketing to compel the discharge of employees and the employment of union workers was held to be subject to injunction.

In another case (*Rosenberg v. Retail Clerks Association*, p. 223), picketing which interfered with the customers of a store was declared unjustified as constituting threat or menace against them which should be enjoined without requiring the owner to institute further proceedings.

The right of the owner of a motion-picture theater to operate his own machine without being subjected to picketing and called unfair to union labor was declared in a Missouri case, the maintenance of such a course being classed as unlawful conspiracy (*Hughes v. Kansas City Motion-Picture Machine Operators Local*, p. 214).

Quite similar to the situation in the Moore case, above, was one before the New York Supreme Court in which a restaurant corporation was the subject of picketing in an attempt to compel unionization, which the court held subject to injunction (*Stuyvesant L. & B. Corporation v. Reiner*, p. 211).

In an Illinois case a portion of the employees of a corporation went on strike and picketed the establishment, resorting to violence and intimidation to compel the remaining employees to quit work. A temporary injunction had been procured but without effect upon the picketing and other unlawful acts. The members of the union denied that they had violated the injunction, and also challenged the power of the court to issue the injunction. They were found guilty, however, and the judgment against them was affirmed by the supreme court (*Lyon & Healy v. Piano etc. Workers International Union*, p. 217).

A United States district court found the Clayton Act not applicable in a case (*Dail-Overland Co. v. Willys-Overland (Inc.)*, p. 218) in which it appeared that overt acts had been done in furtherance of a conspiracy which were beyond any possible classification as the lawful carrying out of legitimate objects. There was restraint of commerce and a continued effort to interfere with production even after the evident failure of the strike. The original injunction was therefore continued.

An Arizona statute permits injunctions against picketing only when necessary to prevent injury to property rights and to prevent unlawful acts. This was held by the supreme court of the State (*Truax v. Corrigan*, p. 222) to be a constitutional enactment, the court saying also that the good will of the public while valuable to business success does not belong to any man as "a vested property right."

RESTRAINT OF TRADE.

An interesting group of decisions have been rendered in connection with the conditions affecting dock laborers, etc., in New York City. In June, 1919 the supreme court in special term had before it the case of a trucking company employing both union and nonunion men on terms satisfactory to all parties concerned. However, checkers, weighers, and clerks at the various terminals undertook to compel the employer to unionize his business by refusing to handle any goods delivered by his men. An injunction was allowed restraining the unions from thus refusing to handle goods offered for transportation, the injunction to remain in force until the trial on the merits (*P. Reardon (Inc.) v. Caton and Reardon v. International Mercantile Marine Co.*, p. 225). Separate appeals were taken in these cases, the appellate division reversing the judgment of the court in special term in both cases. It was said that other trucking concerns in the city were transacting business without difficulty and that the demand on the employer did not appear to be unlawful or unreasonable. As to the mercantile marine company, it was said that to undertake to compel it to receive goods which its employees would not handle would result in an embargo on business generally and that furthermore the injunction was contrary to law.

Later a case involving a dealer in lumber who did a large export business was before the supreme court in special term, the question being the right of a group of unions to compel the company to maintain a closed shop. The former employees had gone on a strike but the business was continued on the open-shop plan. Its goods were therefore blacklisted, and steamship companies were notified that if they received any of this company's goods for transportation the employees of the steamship company would be called out. The court had before it the action of the appellate division in setting aside its injunctions in the Reardon cases, but distinguished the present case therefrom and issued an injunction directing the steamship companies and those employed about the docks to give impartial and uninterrupted service to the plaintiff as to all others offering business in the usual way (*Burgess Bros. Co. v. Stewart*, p. 229).

The latest decision noted in this series is by the United States Circuit Court of Appeals on February 2, 1921 (*Buyer v. Guilan*, p. 231). A restraining order had been issued in the first instance on the petition of Buyer to prevent interference with his shipments of goods, but this had been set aside, and it was from this latter action the appeal was taken to the court of appeals. This court found that the refusal of the employees of a steamboat company, loaders, checkers, weighers, etc., to accept for shipment goods handled by nonunion workers was unlawful interference with interstate commerce and

reversed the action of the court below, directing it to issue a preliminary injunction, in effect mandatory, directing the workers, so long as they remained in such employment as affected transportation, to handle alike all goods offered.

STRIKES.

The right of a union to care for striking employees by erecting shelter for them in the vicinity, to care for them after ejection from the company's houses, was upheld by the Court of Appeals of Kentucky, which reversed a temporary injunction to the contrary issued by the courts below (*Diamond Block Coal Co. v. United Mine Workers*, p. 239).

An Oregon statute declaring labor organizations lawful and restricting the issue of injunctions against picketing was declared not applicable in a case (*Heitkemper v. Central Labor Council of Portland*, p. 241) where the only question involved was of recognition of the union, there being no dispute as to wages, hours, or employment conditions.

Quite similar circumstances in a Massachusetts case (*Folsom Engraving Co. v. McNeil*, p. 243) led to a like finding by the supreme court of that State which pointed out that a strike to enforce both a legal and an illegal purpose was of itself illegal and was therefore subject to injunction, in spite of a restrictive statute authorizing peaceful persuasion. Of like tenor was a decision by the United States Circuit Court of Appeals in California, affirming an order restraining a union from attempting to unionize a railway company by inducing violation of contract and the calling of a strike (*Montgomery v. Pacific Electric Railway Co.*, p. 245).

Where certain activities of strikers were shown to be unlawful in the view of the court and an injunction against them had been granted, it was said on further proceedings that even though there was no violence the maintaining of a blacklist and an attempted boycott were illegal and would be specifically enjoined. However, the injunction did not go so far as to anticipate acts not yet committed, but the facts might be brought before the court at any time for an extension of the provisions of the injunction on a proper showing (*Thomson Mach. Co. v. Brown*, p. 247).

Far-reaching disturbances in the city of Omaha involved such large numbers of employers organized in a business men's association and of workers organized in their labor unions that an injunction was sought against both parties restricting the methods and activities of their collective and individual warfare. Only a part of the request was granted, but the supreme court refused to extend the scope of the injunction, saying that employers and workmen alike had

the right to associate in organizations for their personal benefit, and so long as they did not interfere with personal property rights the courts would not intervene (*State v. Employers of Labor*, p. 248).

In Cleveland, Ohio, a general disturbance led to an order by the mayor of the city directing the arrest of all persons coming thereto as strike breakers, the sole reason assigned being that the persons arrested were "suspicious persons." The prospective employer sought an injunction against this method of interfering with the flow of labor to its plant which was allowed by the district court (*American Steel & Wire Co. v. Davis*, p. 251).

The effect of a strike interfering with the completion of a contract was considered by the United States Circuit Court of Appeals in a case (*The Richland Queen*, p. 251) in which the owner of the boat sought to recover damages for loss of the use of the vessel owing to delay on repairs. The existence of a strike was held to be a reasonable excuse for the delay even though it was peaceable.

Where a collective agreement contained no provision for a closed shop, a strike to prevent the employment of a nonunion man was held not to be justified. The strike had resulted in the discharge of the worker, or at least in his withdrawal from service on request. However, he was granted an injunction, which was affirmed by the Supreme Court of Massachusetts, preventing the union from interfering with his employment (*Smith v. Bowen*, p. 254). The same court found a strike justifiable where representatives of a union came at the employer's appointment to discuss a closed-shop contract, but he violated his agreement and failed to meet with them, the case being one of "breach of good faith and square dealing"; however, the methods of picketing were such as to warrant an injunction, which had been violated. The question of contempt proceedings was therefore before the court, and it declared unconstitutional a statute which had undertaken to require a jury trial in lieu of summary procedure in determining punishment for contempt (*Walton Lunch Co. v. Kearney*, p. 255).

The constitutionality of a law of Oregon restricting the issue of injunctions was upheld by the supreme court of that State, and an injunction issued by a lower court was modified. The employer had violated a closed-shop contract, and the strike was declared to be justifiable, and picketing in the manner prescribed in the injunctive order was authorized (*Greenfield v. Central Labor Council of Portland*, p. 262). It is to be noted in this case that there was an actual dispute between employer and employees and not a mere outside activity as in the Heitkemper case noted above.

The Oregon statute quite closely resembles the Clayton Act; this latter act was held by a United States district court not to prevent the issue of an injunction in the case in hand, which showed "an out-

rageous condition of mass picketing" (*Langenberg Hat Co. v. United Cloth Hat & Cap Makers of North America*, p. 264).

A case before a New Jersey court was of particular interest because of the joint activities of 15 complainants, employers, against three local unions. The propriety of the joinder of the plaintiffs was upheld by the court on the ground of the identity of their interests and of the circumstances giving rise to their actions. A closed-shop contract was the end in view in the strikes, picketing, etc., and the court held that considering the scope of the purposes such action was illegal, as an attempt to establish monopoly. One of the defendant unions was found not to have been active, and the bill against it was dismissed, but as to the others an injunction was ordered (*Baldwin Lumber Co. v. Local 560, International Brotherhood of Teamsters, etc.*, p. 259).

The matter of punishment for violation of injunctions has already been noted. A case of this sort was before the Supreme Court of Illinois in which a representative of the union had instructed the members to disregard the injunction, and he was thereupon tried for contempt and sentenced to jail. The case was appealed, the claim being made that though the injunction had been violated it was erroneous and therefore invalid. The appellate court therefore reversed the decision of the court below as to the fixing of a penalty, but on further appeal to the supreme court, this action was in turn reversed and the case was remanded to the trial court for further action (*Ash-Madden-Rae Co. v. International Ladies' Garment Workers' Union*, p. 265). Penalties were likewise assessed in a New York case (*Kayser v. Fitzgerald*, p. 267) in which the defendants were found to have advised the strikers that an injunction "did not amount to anything," and acts of violence and use of opprobrious epithets were continued. However, the Supreme Court of Texas ordered the discharge of a union officer who had disregarded an injunction against the use of "villifying" or "opprobrious" epithets, the court saying that the control of the freedom of speech was beyond the power of the court (*Ex parte Tucker*, p. 269).

An unusual distinction was drawn in a case before the United States Circuit Court of Appeals in Tennessee where a strike was being enforced by picketing. The workmen who wished to continue their service were mostly colored men and the pickets were white men. The point was raised on the appeal that the trial court had held that the degree of intimidation, while not necessarily sufficient to affect white men, was coercive as to the Negro. Without admitting the contention, or deciding whether judicial notice should be taken of the alleged difference, the court of appeals was not willing to disregard the findings of the trial judge. "The question is not one of color; it is one of individual or class intimidation." It was held in

this case that the Clayton Act limiting the issuing of injunctions to cases in which injury is threatened to a "property right" did not prevent the issuing of an injunction where the principal right was that of carrying on business, holding this would be in itself a property right (*King v. Weiss & Lesh Mfg. Co.*, p. 270).

The question of the status of employees on strike was considered in the Greenfield case above, the court there holding that the declaration of the strike and a walkout of employees did not terminate the employment relation. The same point was involved in an Ohio case (*Vonnegut Mach. Co. v. Toledo Mach. & Tool Co.*, p. 271), in which a Federal district court held that on account of the insufficiency of the reason for the employees leaving service, they must necessarily be regarded as strangers to their former employers' business. The action in this case was by one corporation seeking an injunction to restrain another from breaking its contract to deliver certain manufactured articles, charging a conspiracy to restrain interstate commerce. The injunction was granted, the judge holding that in view of the termination of employment relations the Clayton Act restricting the issue of injunction in case of dispute between employer and employee did not apply. The conflicting interests of two corporations were discussed also, though from a different standpoint, in a New Jersey case (*Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, p. 278), in which the latter company sought to compel the discontinuance of a contract which was being performed by the assistance of nonunion labor, the motive being to safeguard the complainant's business from interruption by reason of sympathetic strikes threatened if the contract named were actually carried out by nonunion workers. The construction company was granted an injunction to prevent both the complaining company and the union from interfering with its work by maintaining a strike, the court saying that "the principle of the closed shop, i. e., the monopolization of the labor market, has found no judicial sponsor."

The relations of rival organizations were involved in a case before the New York Supreme Court, trial term. The Amalgamated Clothing Workers had sought to secure control of the clothing manufacturing industry in the city of Rochester and were successful with a single exception. The employer in this case refused to recognize this organization, but fostered a local affiliated with the American Federation but made up principally of its own employees. However, the court recognized the right of the latter union to engage in the same activities and forms of control as the Amalgamated. An injunction against continued picketing, intimidation, threats and violence was, therefore, made permanent and directions given for the determination of the damages to be recovered against the offending union (*Michaels v. Hillman*, p. 257).

DECISIONS OF COURTS AFFECTING LABOR.

ALIENS—CONTRACT LABORERS—CLERKS—MANUAL LABORERS—*United States v. Union Bank of Canada, and United States v. Royal Dutch West India Mail Co., United States Circuit Court of Appeals, Second Circuit (Dec. 10, 1919), 262 Federal Reporter, page 91.*—The two cases named involve prosecutions brought by the United States for the violation of the Federal laws prohibiting the importation into this country of contract laborers, the United States appealing from adverse decisions in both cases. In the first case the Union Bank of Canada opened a branch in New York City and imported an accountant by the name of Schilling from the branch in Toronto, Canada. The second case involved the importation of a clerk from Holland, and the decision of the district court was reported in Bulletin No. 258, page 48.

The court combined the two cases, and affirmed the decisions of the district courts, holding that such employees as here involved are not manual laborers and therefore are not covered by the Federal statute. The opinion first cites the law and various decisions under it and concludes:

Without inquiring whether an accountant as defined by the defendant's rules is a member of a learned profession we affirm the judgment on the ground that Schilling was not a laborer within the meaning of the act.

In the second case * * * the defendant sent a clerk named Mook from its office in Amsterdam to be employed in its office in New York at a salary of \$1,250 per annum, and paid the expenses of his transportation. There was an expectation to send him from New York to its office at Paramaribo, Dutch Guiana, after he had familiarized himself with the New York business. The grounds on which the verdict was directed were: First, that this employment at New York was a temporary one in a business of an international character; and, second, that Mook was not a contract laborer at all. Without considering the first reason we concur in the second.

Judgment affirmed in each case.

ALIENS—CONTRACT LABORERS—PENALTY—SUFFICIENCY OF COMPLAINT—*United States v. International Silver Co., United States*

District Court, District of Connecticut (Feb. 1, 1919), 255 Federal Reporter, page 694.—Mrs. George C. Pearson, a subject of Great Britain and a resident of Nova Scotia, wrote a letter to the defendant company asking if it had employment to offer to experienced hand burnishers and whether it had any work that could be offered her husband and son. The company replied that it had need for experienced hand burnishers and for unskilled men, and that if she were in the United States and applied for a position it could place her. Later Mr. Pearson, her husband, wrote to the company saying that Mrs. Pearson could not leave at that time but that he and his son were coming, provided they could be sure of obtaining employment. The company replied as follows:

DEAR SIR: Referring to yours of the 15th, will say that the conditions stated in your letter are satisfactory, and we will keep a place open for Mrs. Pearson. Kindly advise when you will report for duty.

The husband and son came to Meriden, where the company was located, but upon finding a strike on at the company's plant they both returned to Nova Scotia without having worked for the company. The company was sued for the \$1,000 penalty for the violation of the "act to regulate the migration of aliens into the United States," approved February 20, 1907, as amended March 26, 1910, for contracting for the services of the husband and in a second count charged a second violation and claimed an additional penalty of \$1,000 for contracting for the employment of the son. The company demurred to the complaint on the grounds that it failed to allege sufficient facts to show that the Pearsons were contract laborers within the act and because it was not alleged that defendant knew that the Pearsons were contract laborers, if such were the fact. In sustaining the demurrer to the complaint the court said, in part:

In the case at bar we have only the allegation set forth in the seventh paragraph of the complaint, and quoted in full it alleges:

"(7) That during the period covered by the correspondence mentioned in paragraphs 2, 3, 4 and 5 hereof, and for a further period of time, to wit, until on or about April 4, 1916, the said George C. Pearson was a contract laborer and was known to the defendant corporation to be a contract laborer, to wit, an ordinary unskilled workman."

Nowhere in the complaint is it alleged that the defendant knowingly and unlawfully assisted Pearson to migrate from Nova Scotia to the United States by knowingly and unlawfully prepaying his transportation, or inducing or soliciting him, or encouraging him, to so migrate; and nowhere in the complaint is it alleged that Pearson, whose immigration was assisted as above, was a contract laborer within the meaning of the statute; and nowhere in the complaint is it set forth that the defendant made to Pearson in Nova Scotia a "certain offer of employment"; and nowhere in the complaint does it appear, even if any offer was made, of what the offer consisted;

nor is it alleged that the defendant unlawfully assisted him to migrate by doing anything prohibited by the act; nor is it alleged that, induced by the offer or assisted in any way, did he migrate to the United States; nor does it appear anywhere in fact that any of the allegations set forth in the Dwight case (*U. S. v. Dwight*, 210 Fed. 81, Bul. 169, p. 47), which formed the gravamen of the complaint upon which Judge Dodge overruled the demurrer, are set forth in this complaint.

It follows that the demurrer to the first and second counts of the complaint must be sustained, for the first and second reasons above set forth. It therefore is unnecessary to discuss or decide the remaining reasons for demurrer.

The demurrer to the relief prayed for in the second count must be sustained upon the authority of *United States v. N. Y. Central Ry. Co. (C. D.)*, 232 Fed. 179. On page 184 Judge Ray said:

"As there was but one solicitation, all one act, the defendant incurred one penalty."

So here there was but one transaction, all one act, and even if the allegations of the second count be sufficient to state a cause of action, there could be only one recovery.

The case was therefore dismissed.

BLACKLIST—MERCHANTS' CREDIT ASSOCIATION—PRIVILEGED COMMUNICATIONS—*Putnal v. Inman, Supreme Court of Florida (Dec. 16, 1918), 80 Southern Reporter, page 316.*—The merchants of the town of Perry organized the Perry Merchants' Protective Association, of which Inman was a member, for the purpose of regulating the extension of credit. After reciting some of the methods employed by certain customers, who purchased from one merchant on credit and when their credit was exhausted, would then go to other merchants and buy on credit, the constitution and by-laws of the association required any of its members who for any reason no longer desired to extend credit to a customer to report to the attorney of the association the name of the customer, the amount of his indebtedness, and his own name. It was then the duty of the attorney to inform each of the other members of the association with reference to these facts, and if after such notification any member extended credit to such customer, he would thereby assume said customer's bill with the other merchant. The plaintiff, Putnal, was presented with a bill by Inman, which Putnal claimed he did not owe. Inman notified the association's attorney, who in turn notified one Blanton and one Bloodworth, both of whom were members of the association and also private clients of the attorney. Putnal sued for libel, claiming that the attorney's report by innuendo branded him as a "dead beat" and presented him as dishonest in his methods. Judgment was in his favor in the trial court, and in reversing this judgment the supreme court said, in part:

The constitution provided that when "any person has failed to pay his or her account," and "the merchant is no longer willing to carry the account of such defaulting person," he may turn the account over to the attorney for collection, and then it becomes the duty of the attorney to notify all the members of the association. He was not required to notify all the members that the plaintiff was such a person as described in the innuendoes, but merely that plaintiff was "in default, together with the amount of the account, and to whom it is due." According to the agreed statement of facts this was all that he did.

The matter of extending credit is a large part of modern business, and merchants have the right to organize for their own protection and agree to report to each other the name of a person to whom credit has been extended who has failed to pay his account, and agree that they will not extend credit to such person without assuming his indebtedness. This is not the same as blacklisting or boycotting by refusing to trade with him, but is only an agreement not to extend him credit without assuming whatever indebtedness he may owe to any other member of the association. (*Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063.)

The pivotal question in this case is the nature of the communication made by the defendant to the other members of the association through their attorney. If it was a privileged communication, no action will lie.

Even if Calhoun [the attorney], when he notified these parties, was acting as the attorney of the association and notified them in accordance with the requirements of the constitution, such notice was a privileged communication, and it does not appear that the privilege was abused by giving it undue publication by proclaiming it to persons other than members of the association.

There is nothing in the agreed statement of facts nor in the declaration itself to show malice on the part of the defendant, nor did the attorney of the association disregard the restraints and qualification imposed by law upon the publicity to be given such communications, nor did he exceed reasonable bounds in making such communication. As the communication made by Calhoun to the members of the association was privileged, there can be no recovery, and it is needless to discuss the many questions presented by the assignments of error on the pleadings.

COMPULSORY WORK LAW — CONSTITUTIONALITY — INVOLUNTARY SERVITUDE—*State v. McClure*, *Court of General Sessions of Delaware* (Jan. 7, 1919), 105 *Atlantic Reporter*, page 712.—McClure was indicted under what is known as the "Council of defense law of Delaware" of April 8, 1918 (Bul. 257, p. 29), which, among other things, provides that:

It shall be the duty of every male resident of this State between the ages of eighteen and fifty-five years who shall not be in the National Army or a public officer, to be employed in a useful or lawful occupation during said period [of the war].

McClure, upon a motion to quash the indictment, contended that said act is in violation of article 13 and section 1 of article 14 of the Constitution of the United States which provide that slavery or involuntary servitude except as punishment for crime shall be prohibited and no person shall be deprived of the equal protection of the laws and that life, liberty, or property shall not be taken from any citizen "without due process of law." In upholding the constitutionality of this statute the court said, in part:

Unless the power of the several States to enact legislation beneficial to the Federal Government while it is at war with a foreign country is expressly prohibited by the Constitution or such prohibition is a necessary implication from other powers granted to the Federal Government or denied to the States, the several States have such power.

We find nothing in the Constitution either expressed or implied which would deny to the several States such power.

If then it be true that the State has the same power to enact legislation to aid in carrying on the war that a sovereign State would have, restricted only by the provision that there shall not be involuntary servitude except as a punishment for crime, do the provisions of the council of defense act complained of impose such servitude, in view of the necessities incident to the carrying on of a great war? We are clearly of the opinion that it does not.

One of the objects of the act was to aid in winning the war by increasing the production of food and supplies and by saving the loss incident to the maintenance of those male citizens between the ages of 18 and 55 who were engaged in no useful or lawful occupation. War can not be carried on without food and supplies, nor can food and supplies be produced except by labor, and who are more able to labor than male citizens between the ages of 18 and 55?

One of the objects of the act as expressed in section 1 was to preserve order within the State. The passage of the act compelling male residents of the State between the ages of 18 and 55 to be employed during the period of the war and six months thereafter we believe was a reasonable exercise, under the circumstances, of the police powers vested in the legislature. In *Webber v. Virginia*, 103 U. S. 344, the Supreme Court of the United States defined police powers to be "those powers by which the health, good order, peace and general welfare of the community are promoted."

It is generally known that the demands of the National Government in waging the present war have greatly curtailed the means of preventing crime and reduced the number of men available to protect the lives and property of the public. It was proper for the legislature having this in mind to pass reasonable and just laws to preserve order within the State and to protect the lives and property within its borders by providing that male residents between certain ages should be engaged in some useful or lawful occupation.

For the reasons stated, motion to quash the indictment is denied.

COMPULSORY WORK LAW—CONSTITUTIONALITY—"VAGRANCY"—*Ex parte Hudgins*, *Supreme Court of Appeals of West Virginia* (May 20, 1920), 103 *Southeastern Reporter*, page 327.—Clifton Hudgins was found guilty in the McDowell County Court of violating the provisions of an act of 1919 (second extraordinary session), which sought to require every male resident of the State between the ages of 16 and 60 years, except bona fide students during school term, to be regularly and steadily employed for 36 hours per week in some lawful and recognized employment; otherwise to be held as a vagrant and subject to punishment therefor. Hudgins had been a soldier and served overseas in various battles, being discharged in May, 1919, and informed that his enlistment for the duration of the war was ended and the army disbanded. In stating these facts, Judge Miller, who delivered the opinion, regarded them as "perhaps not very material," but not to be overlooked in view of the nature of the law and the offense under consideration.

The act was to continue in force until six months after the termination of the war, and the offense was said to have been committed during the week beginning March 29, 1920. The court did not regard the question of whether or not the war was ended as important, since "we have reached the conclusion that the act is unconstitutional and ought to be so declared." The court first pointed out the difference between the present law and vagrancy statutes, in that the act under consideration was not conditioned on the possession of means by the offender or his obligation to others to furnish them with support. A contention made against the law was that it was an unjust and unreasonable restraint upon personal liberty. After noting the restrictions and limitations which may properly be placed upon personal liberty, to prevent crime, enforce duties in defense of the State, etc., the court said:

Tested by these general rules, what may be properly determined of the statute here involved? To bring it within these limitations it must have some reasonable relation to one or more of the subjects over which the State may properly exercise its police power. Manifestly the enactment of the statute was intended as a war measure, for it is limited in its effect to the period of the war and six months after termination thereof. The State, under our constitution, has no power to declare war; the war power, so far as it exists under the constitution and laws of this State, is in the governor as commander in chief of the military forces, except when called into the service of the United States, to call out such forces to execute the laws, suppress insurrection, and repel invasion. The statute in no way relates to the raising or organization of the military forces of the State, for State or Federal purposes.

It is apparent that the legislature has attempted to justify the measure on the theory that the persons against whom it was directed were, or might become, charges upon the public, but by its terms it is limited to the period of the war, and six months thereafter; and

that during that term the productive resources of the State should be brought up to the highest standard, for war purposes. With the State, however, this could amount only to a semblance of right. While greater production during the period of the war might be desirable, is that a subject with which the State had the right to deal? We think not. Certainly not by accusing all citizens coming within its provisions with vagrancy, and as criminals, without reference to their ability to support and maintain themselves and their dependents without work.

So the purpose of the statute was not to subserve any of the purposes for which a citizen may rightfully be deprived of his liberty. Its effect was to require every able-bodied male resident of the State, between the ages specified, regardless of his financial ability, to work, not simply long enough each day of the week to acquire means of support for himself and his dependents, but for the number of hours required.

It was said in *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, that, although the court might not impute to a State an actual motive to oppress by a statute, yet it should consider the material operation of such a statute and strike it down if it becomes an instrument of coercion forbidden by the Federal Constitution.

Our conclusion is that the petitioner is entitled to be discharged from custody, and it is so ordered.

CONTRACT OF EMPLOYMENT—APPRENTICES—BREACH—LIQUIDATED DAMAGES—*Putnam Machine Co. v. Mustakangas*, *Supreme Judicial Court of Massachusetts, Worcester (Oct. 18, 1920)*, 128 *Northeastern Reporter*, page 629.—The Putnam Machine Co. entered into a contract with one, Mustakangas, whereby the latter placed his son with the company as an apprentice for a term of three years to learn the trade of machinist. The company agreed to furnish the son with suitable work and instruction, and the father relinquished all rights to his son's wages. It was further agreed that if the son failed to fulfill the contract the father would be liable for the payment of \$100 as liquidated damages. The son it seems did not live up to the contract, and the company sued the father for the \$100. The company was given a verdict, but having failed to present proof of damages was awarded only \$1. Both parties appealed and the judgment was modified to be \$100 and entered in favor of the plaintiff company. The decision is in part as follows:

There was a consideration for the contract. Although the agreement sued on was not a statutory indenture of apprenticeship and was not made in accordance with the statutes of the Commonwealth governing the relation of masters and apprentices (R. L., c. 155), under it the plaintiff as against the defendant, had the right to the services of his son; the contract was valid at common law, and an action could be maintained for its breach.

The defendant also contended that the plaintiff could not recover because it failed to prove the proper execution of the contract. He

admitted signing the agreement, and upon the "copy" delivered to him "was written by a typewriter 'Putnam Machine Company,' but it was not signed by anyone." It was not questioned that the contract was assented to and accepted by the plaintiff; it therefore became bound by its terms, even if the instrument was not signed by it.

There was no evidence that the plaintiff suffered damage by the breach of the contract and the judge instructed the jury they were to return a verdict for nominal damages only, to which instruction the plaintiff excepted. From the nature of the undertaking and the subject matter of the contract, it might be difficult to determine the exact amount of damages. The parties might well agree upon them when the contract was made and it does not appear that they are excessive. It is expressly stated that the defendant was to pay \$100 as ascertained and liquidated damages if the agreement was not fulfilled by his son. There is no suggestion of a penalty, and the language indicates the intention of the parties to be that the sum agreed upon should be treated as liquidated damages, and not as a penalty. The instructions given on this point were erroneous. The plaintiff's exceptions must be sustained and judgment entered for the plaintiff in the sum of \$100 with interest from the date of the writ.

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES—ENFORCEMENT—
CONTRACT SEVERAL IN PERFORMANCE—*Englander v. Abramson-Kaplan Co., Supreme Court of New Jersey (Feb. 13, 1920), 109 Atlantic Reporter, page 307.*—The Abramson-Kaplan Co. was engaged in the manufacture of ladies' garments. There had been strikes and labor difficulties in this trade, and the company, to protect itself from future strikes, required Englander, whom it employed as a presser, to sign an agreement to remain in its employ and work to the end of the season, about October 15. Englander was also required to put up a \$50 Liberty bond as security for the performance of the contract. Notwithstanding the contract, Englander struck in August, but was persuaded to continue at work until the ensuing Saturday upon the promise that he would be paid for his work. He struck, as he had promised to do, on the following Saturday. The company refused to pay him, and he sued for his compensation and his bond. The court held that although the agreement to work until October was entire, its performance was several and plaintiff was entitled to the amount he had earned, but that because of the breach of the contract the Liberty bond could not be recovered. The decision is in part as follows:

It is undisputed that the work was to be paid for by the piece from time to time as it was done. It is not suggested that the amount claimed was due on the Saturday in August when the plaintiff demanded it. By the contract itself, failure to pay by the defendant was a default on its part. For that default an action would nor-

mally lie at once. It is, however, suggested that because the contract was an entire contract and could not be fully performed before the middle of October, an action could not be maintained for money earned in August. The defendant's error, we think, is in failing to note that "although the agreement is entire the performance is several" (*Badger v. Titcomb*, 15 Pick. (Mass.) 409; 26 Am. Dec. 611); as the same court elsewhere stated it, "divisible in its operation" (*Denny v. Williams*, 5 Allen (Mass.), 1, 4). The question has been before this court (*Skillman Hardware Co. v. Davis*, 53 N. J. Law, 144, 20 Atl. 1080), and a result reached adverse to the present defendant's contention. We think legal principles require us to sustain the plaintiff's right of action upon the defendant's default. The defendant is protected by his right to sue for damages for breach of the contract to serve the whole term or to recoup in the present action. This he might have done by reason of the anticipatory breach by plaintiff (although this action was brought in August), but for the fact that the defendant, with knowledge that the plaintiff did not mean to perform on his part, nevertheless assented to the breach, in order to have pressing work done at once, instead of treating the anticipatory breach as putting an end to the contract. Under the circumstances we need not consider whether the parties meant that the security of the \$50 bond should be the defendant's only remedy for plaintiff's breach. The case bears some analogy also to short deliveries in case of a contract of sale of goods under section 44 of the sales of goods act (4 Comp. St. 1910, p. 4657). Williston on Sales, 466. Section 76 of the statute defines "divisible contract to sell." It is, we think, of some consequence that contracts to sell and contracts for work and labor should be governed by the same legal principles. It is, at any rate, important to adhere to the rule holding defendants to responsibility for the value of the labor of others, where they have accepted the benefit with knowledge that an entire contract had not been fully performed (*Bozarth v. Dudley*, 44 N. J. Law, 304; 43 Am. Rep. 373), or would not be.

CONTRACT OF EMPLOYMENT—BREACH—DISCHARGE—RECOVERY—
Dunbar v. Orleans Metal Bed Co., Supreme Court of Louisiana
 (June 30, 1919), 82 Southern Reporter, page 889.—Dunbar was employed under a written contract of employment for a period of two years to act as a salesman for the defendant company at a salary of \$150 per month. After working under this contract for about three months he was discharged because "business is so exceedingly 'rotten' they have got to retrench." Dunbar thereupon brought suit under the Civil Code, article 2749, for the salary due him under the contract. He recovered judgment and the employer appealed. In affirming the decision the court said in part:

Any form of words, either written or verbal, which convey to the servant the idea that his services are no longer required and will not be accepted, will constitute a discharge. (20 A. & E. Enc. of Law, 26; 26 Cyc. 987.)

It is not pretended that defendant had any serious ground of complaint against plaintiff, or any ground whatever. According to the Civil Code, and numerous decisions of this court interpreting it, if a laborer (or clerk), hired for a certain time, be sent away without any serious ground of complaint before the time has expired, he is entitled to recover the whole of the "salaries" that he would have received had the full term of his service arrived. (C. C., art. 2749.) The right of action for the entire amount called for by the contract arises immediately, and the employer by whom he is discharged has no power, as a condition precedent to paying him, thereafter to require that he work out the term for which he was employed. (*Sherburne v. Orleans Cotton Press*, 15 La. 360.) Nor is his right of recovery under his first employment affected by the fact that he engages his services for the unexpired term to another employer. (*Shea v. Schlatre*, 1 Rob. 319.) Nor is it necessary that he should tender his services to the employer by whom he was discharged, or put him in default, since the whole amount of the salary called for by his contract becomes due and exigible upon and by reason of his discharge. (*Tete v. Lanaux, Ex'r*, 45 La. Ann. 1343, 14 South. 241.)

CONTRACT OF EMPLOYMENT—BREACH—TERM—*Lyons v. Pease Piano Co., Court of Errors and Appeals of New Jersey (Mar. 3, 1919), 107 Atlantic Reporter, page 66.*—Simpson B. Lyons brought suit for damages for the breach of a contract of hiring and recovered judgment. The defendant appealed. The relations between the parties was evidenced by various writings. Plaintiff was a salesman and undertook to sell defendant's pianos. The following letter states their relations as they stood when Lyons was discharged in May 19, 1917:

"I will accept your proposition on salary for the writer, i. e., \$50 per week and 1% commission, on net sales over \$60,000 made through our Newark store, this to include any and all sales, with the understanding my salary starts with the new year, January 1, 1917; all our reports run from January 1st to December 31st."

The defendant claimed that the contract of hiring, as evidenced by this and other letters, was in legal effect a hiring at will or by the week. The lower court held that the contract was for a yearly hiring. In affirming this decision the court said, in part:

The construction of the contract was properly conceded to the court by both parties, as a legal proposition. Where the term of employment involved is left by the writing in the sphere of doubt, and a practical method of determining it is the circumstance of weekly or monthly payments made during its continuance, as evidencing the mutual intent by the construction of the parties themselves, the settled rule is to resort to that circumstance as an aid in the proper construction of the contract.

As a result of the proposal and its modified acceptance, the plaintiff had a conversation with the president and vice president of de-

endant company, and his yearly salary was discussed. It was conceded at the trial that plaintiff was expected to transact business in sales to the net amount of \$60,000 per year. His salary was to begin on January 1, and his reports of business were to comprehend an annual period from January 1 to December 31. An appropriation of \$1,200 per year was allotted to him for advertising purposes; and a concession was made to him of 1 per cent on net sales of over \$60,000 for the year 1917.

These facts and circumstances, combined with the language of the acceptance, evince that the period contemplated was neither a hiring at will nor by the week, and that the trial court properly construed the contract as a yearly hiring. No other question is discussed in the briefs, and presumably the propriety of the submission to the jury of the question of the amount due to plaintiff under the contract is not contested:

CONTRACT OF EMPLOYMENT—COLLECTIVE AGREEMENTS—ENFORCEMENT—BREACH—STIPULATED DAMAGES—*Moody et al. v. Model Window Glass Co., Supreme Court of Arkansas (Sept. 27, 1920), 224 Southwestern Reporter, page 436.*—Moody and Gerard were window-glass workers and belonged to the National Window-Glass Workers' Union. They had been in the employ of the plaintiff company until it shut down its plant in 1917, when they went to California. The plaintiff's plant, which was at Fort Smith, Ark., had been operated as a union plant under an agreement known as the "national agreement" which was a general contract between the window-glass manufacturers of the United States and the National Window-Glass Workers. Article 5 of the agreement reads as follows:

ARTICLE 5. Any company hiring a member and said member upon arriving and reporting for duty, finding no vacancy existing or plant not ready to operate as per notification, shall pay said member at the rate of \$20 per week until place is vacant or plant in operation, or, at the option of the member, said company shall defray all expenses incurred by said member from the time he left his home or place of starting until his return to destination.

Zenor, who was plaintiff's manager, had been a member of the union and was familiar with this article of the agreement. On September 6, 1918, he wrote to Moody and Gerard and asked them if they would come back when the plant reopened. They replied that they would, and Zenor wrote them stating the plant was expected to be reopened on December 9. Moody and Gerard were on hand on the date fixed, but the plant was not ready to start operations. The wage-scale agreement, unknown to them, expired December 8. Zenor paid Moody and Gerard the \$20 agreed to in contract with the union for two weeks, but at the end of the third week refused to make any further payments. Moody and Gerard were without

employment for two additional weeks, aggregating five weeks in all. The company sued Moody and Gerard for the recovery of the \$40 paid them, claiming that it had been given them merely as a loan. The lower court awarded judgment in favor of the company, and the defendants, whose counterclaims for the \$20 per week for the remainder of the time they were unemployed had been dismissed, appealed. In reversing the judgment of the lower court, the court said in part:

Zenor testified that the wage scale between appellee and the union, of which appellants were members, expired December 8, and that he did not know why it was not renewed on that day.

It is undisputed that the letter of December 4 [announcing a delay in starting up] was not sent appellants; and it is also undisputed that appellants left California on December 3, relying upon appellee's letter of November 19 that the plant would start on December 9; and it is undisputed that the plant had, during appellants' previous employment, been run as a union plant, and therefore operated under the national agreement; and it is undenied that appellants supposed the wage scale was in effect when they left California. But it is not contended that the expiration of the wage scale abrogated other provisions of the national agreement, and the binding effect of article 5, set out above, was not impaired because the wage scale had expired.

We think the court below erred in its judgment. The facts stated constituted an implied contract, if not an express contract, to settle with appellants according to the terms of the national agreement. The correspondence set out above warranted appellants in believing, under the circumstances of the case, that they would be given employment, or be paid in accordance with the provisions of the national agreement, with reference to which the parties must be held to have contracted. Appellants paid their own transportation and expenses from California, and remained unemployed for five weeks; yet they ask no recovery on that account. They ask judgment only for the money coming to them under the agreement, with reference to which they contracted; and we think an erroneous judgment was entered by the court below, and that judgment will therefore be reversed, and the cause remanded for a new trial.

CONTRACT OF EMPLOYMENT—COLLECTIVE AGREEMENT—ENFORCEMENT—EFFECT AS TO PERSONS NOT MEMBERS OF UNION—RAILWAY BOARD OF ADJUSTMENT—*Gregg v. Starks et al.*, Court of Appeals of Kentucky (Oct. 1, 1920), 224 *Southwestern Reporter*, page 459.—Gregg and the defendants, including one Pennybacker, were conductors on the Louisville & Nashville Railroad Co. The railroad company had entered into a contract with all its conductors fixing the terms and conditions of their service, including the stating of their seniority rights. The portion referring to the seniority privileges is as follows:

"Conductors displaced on account of reduction of crews, or other causes, will be permitted to exercise their seniority rights to any run held by a junior conductor, section (j) to govern passenger service."

"(j) Conductors will be required to participate in extra passenger work before being permitted to exercise their seniority rights to permanent passenger vacancies."

The controversy centers around the last three quoted words. Gregg had been 26 years with the company and for the last 20 years was a passenger conductor. Pennybacker, the only defendant who answered, had been in the company's service 31 years, the past 25 years as a freight conductor. Pennybacker had done certain extra passenger service and was given a regular passenger run. Later this train was dropped, and he laid claim to Gregg's run on the ground of seniority, but the company refused his claim. Later Pennybacker and the company agreed as to the facts and submitted the question to Railway Board of Adjustment No. 1, which was organized under the Federal control act of 1918. Gregg was not made a party to this proceeding. The board of adjustment awarded Gregg's run to Pennybacker and Gregg brought this action for an injunction to prevent his run being taken from him. The lower court refused the injunction and Gregg appealed. In sustaining the motion for the injunction the court spoke in part as follows:

It is contended for Gregg that such a construction of section (j) entirely ignores and disregards the last three words thereof, namely, "permanent passenger vacancies." He contends that these words must be considered, and that when considered the section as a whole can only mean that the right of a senior freight conductor to a regular passenger run is confined to permanent passenger vacancies, and can not be exercised where there is no vacancy, as is the case here. We must assume that these words were intended to have some force, and we are unable to attribute to them any meaning whatever except that given them by plaintiff; nor does counsel for defendant suggest anything else they could mean, but insists they have no qualifying effect whatever. To this we can not agree, but must hold that by its terms a freight conductor qualified for passenger service can not enter that service by displacing a junior occupant of a regular passenger run but must await a vacancy, when by reason of his seniority he will be given the run in preference to junior passenger conductors applying therefor.

The court then considered the authority of the railway board of adjustment and found that it could pass only upon questions arising during Federal control. This dispute having arisen since that time, the board's award was "wholly without legal effect."

Continuing, the court said:

It is insisted that plaintiff is not entitled to the benefits of the contract simply because, as shown by parol evidence, it was negotiated

between the railroad company and the Order of Railway Conductors, of which Pennybacker is and Gregg is not a member. There is nothing in the contract to indicate this or that it applies only to such of the conductors as are members of the order. It is not signed by the Order of Railway Conductors or by anyone for it or any of the conductors; neither is the name of the railroad company subscribed thereto, but it is signed by two of its officers, and upon its face purports to be an agreement between United States Railroad Administration (Louisville & Nashville Railroad Co.) and all of its conductors.

Mr. Turner, assistant superintendent of the transportation for the company, testified that Gregg was an employee of the company working under the same kind of contract as the one filed by him, which is not denied by any witness, and the mere fact that the contract was negotiated between the railroad company and an organization representing a part of its conductors can not exclude other conductors not members of the organization from its benefits, when the nonmember conductors and the railroad company recognized and treated it as the contract under which the services of such conductors were rendered and accepted.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—LEGALITY WHEN MADE IN FOREIGN STATE—*Hatcher v. Idaho Gold & Ruby Mining Co., Supreme Court of Washington (Mar. 12, 1919), 179 Pacific Reporter, page 106.*—Hatcher entered into a contract with the mining company in Idaho whereby he was to work a mine for 60 cents per hour, payable partly in commissary supplies for his living during his employment, the balance to be paid in notes bearing 7 per cent interest and to be paid out of the proceeds of the operation of the mine. This contract was valid under the laws of Idaho but was invalid under the laws of Washington, where the suit was brought, where the payment of wages in anything but cash is prohibited. The plaintiff, Hatcher, brought suit for services rendered, disregarding the contract entirely on the ground that it was invalid in Washington, and that that State would not enforce it, as to do so would violate its public policy as expressed in the wage and employment statute—sections 6560 and 6561, Rem. Code. The lower court rendered a decision in accordance with this view, in favor of the plaintiff. In reversing this judgment Judge Parker, of the supreme court, said, in part:

These parties both voluntarily went into the State of Idaho and made this contract there. They thereby voluntarily submitted themselves to the laws of Idaho, in so far as their rights are concerned. And we think in seeking to enforce it in this State, either affirmatively or as a defense in an action between them directly involving it, they should be treated, and their rights measured, by our courts exactly as if they were residents of Idaho. * * * When a resident of this State voluntarily goes into another State and

there makes a contract wholly to be performed there, which contract is valid and binding under the laws of that State, and it is sought to be enforced by the other party thereto in the courts of this State, either as a basis for a cause of action or as a defense thereto, we are quite unable to see any sound reason why he should have any higher or better right to invoke the public policy of this State in avoidance of the contract than he would have if he were a nonresident of this State. Having voluntarily gone into Idaho and there entered into the contract, we think Hatcher is in no position to claim any special rights or privileges looking to the avoidance of it, merely because he is a resident of this State, and that he can not rightfully claim to be injured thereby as a resident of this State.

CONTRACT OF EMPLOYMENT—ENFORCEMENT—PEONAGE—INVOLUNTARY SERVITUDE—*State v. Oliva, Supreme Court of Louisiana (Dec. 2, 1918), 80 Southern Reporter, page 195.*—Israel Oliva made a contract of hire and received advances on the strength of it. He then, without tendering back the advances, broke the contract and was arrested for misdemeanor for the violation of a statute forbidding such breach. The law in question was held unconstitutional in the district court of Vermilion Parish, and the indictment was quashed, whereupon the State appealed. The opinion of the supreme court, sustaining the position of the court below, is mainly as follows:

The thirteenth amendment to the Constitution of the United States, after declaring that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, ordains that Congress shall have power to enforce this article by appropriate legislation. Pursuant to the power thus delegated to it, Congress adopted section 1990 of the Revised Statutes (U. S. Comp. St. 1916, sec. 3944), which, in so far as it affects State legislation, is equal in authority to the amendment itself, and which reads as follows:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited," etc.

"Peonage" has been defined by the Supreme Court of the United States as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness, and indebtedness is the cord by which the victim is bound to the master's service. It matters not that the service was begun voluntarily by contract, for, if it is enforceable by criminal prosecution instead of a civil action for damages, it is nevertheless peonage. (See *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145 [Bul. No. 93, p. 634], and the authorities therein cited.)

An analysis of the law (No. 54, Acts of 1906) under which the defendant is being prosecuted shows at a glance that it comes under the inhibition of the thirteenth amendment and the legislation adopted by Congress in pursuance thereof, as interpreted by the United States Supreme Court. It does not pretend to enforce a contract of hire except where money or goods have been advanced

on the faith of the contract, and then only in the instance where the laborer leaves without first tendering the return of the money or the value of the goods. This indebtedness becomes the cord by which the laborer is bound to the master's service, and the service is enforceable by the most potent means, the instrumentalities created by the State to punish lawlessness and crime.

Our attention has been called by the attorney general to the case of *State v. Murray*, 116 La. 655, 40 South. 980 [Bul. No. 67, p. 861], decided by this court in 1906, but whatever may have been said in that case in conflict with our present ruling is overruled.

The judgment appealed from is affirmed.

CONTRACT OF EMPLOYMENT—ENTICING AWAY SERVANT—PEONAGE—CONSTITUTIONALITY OF STATUTE—*Johns v. Patterson*, *Supreme Court of Arkansas* (Apr. 21, 1919), 211 *Southwestern Reporter*, page 387.—One Meyers made a contract with Patterson to work a crop for him on shares for the year 1918. Before the contract was completed Meyers left Patterson while owing him \$51 and entered the employ of Johns. Patterson sued Johns for the \$51 which Meyers owed him under a statute (Acts of 1905, p. 726) making the enticing away of another's servant a misdemeanor and requiring the guilty party to defray all damages resulting from his act. Johns' counsel contended that this act was unconstitutional because it conflicts with the peonage act of Congress (act Mar. 2, 1867, c. 187, 14 Stat. 546; U. S. Comp. St., sec. 3944). In dismissing this contention of the defendant the court said in part:

We do not think that the contention of counsel for the defendant is well taken. A comparison of the two statutes will show that they have wholly different objects in view. Congress undertook to prevent, either directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in the liquidation of any debt or obligation. In other words the gist of the offense denounced by the act of Congress is the holding of persons in unwilling servitude in payment of a debt. (*United States v. Reynolds*, 235 U. S. 133, 35 Sup. Ct. 86 [Bul. No. 189, p. 177].)

On the other hand the State statute was enacted for the purpose of providing a penal and civil liability against third persons who with knowledge of an existing contract of employment induce the laborer to quit to the injury of the employer.

Peonage is based on a condition of compulsory service by the debtor for the payment of his debt. The State statute under consideration has no such purpose, but was enacted for the purpose of fixing the criminal and civil liability of a third party for the violation of contracts of service. Our State statute was based upon the common-law rule and was upheld by this court in the following cases: *Tucker v. State*, 86 Ark. 436, 111 S. W. 275; *Park v. Depriest*, 210 S. W. 777.

The essence of peonage is the compulsory service in payment of debt. So it will be seen that neither the plain language of the statute, nor the construction placed upon it by the court makes it in any sense in conflict with the peonage act of Congress.

The appeal was brought by the defendant and although the foregoing contention was ruled against him, a reversal was had on the ground that the trial court erred in refusing an instruction to direct a verdict in favor of the defendant if it should be found that Meyers had quit Patterson's employ before he was employed by the defendant Johns.

CONTRACT OF EMPLOYMENT—ENTICING AWAY SERVANT—PEONAGE—EMPLOYMENT OF SERVANT WHO QUILTS EMPLOYMENT OF ANOTHER—*Shaw v. Fisher, Supreme Court of South Carolina, Feb. 23, 1920*), 102 *Southeastern Reporter*, page 325.—John L. Shaw entered into a contract with one Carver in March, 1916, whereby the latter was to work as a share cropper until the end of the year 1916. In June Carver left Shaw and took up his abode in a house on the plantation of the defendant, for whom he went to work. As a reason for breaking his contract with Shaw, Carver stated that the farmer was so contentious and hard to get along with that he would "die and go to hell" rather than to have worked for him any longer. Shaw brought suit against Fisher for damages (1) for enticing away his servant and (2) for harboring his said servant after notice that he was under contract to him. The trial court, which rendered judgment in favor of the plaintiff, gave the jury the following instruction as to the law which should govern in cases of this kind:

It must now be considered clear law that a person who wrongfully and maliciously, or which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as a servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. [Sec. 2596, vol. 7, Labatt's Master and Servant.]

The defendant admitted that the law as to the enticing away of a servant had been correctly stated, but contended that the law had been incorrectly stated as to the employment of a servant who had already quit the employment of another, and for this reason appealed. The decision was reversed. The opinion of the supreme court is in part as follows:

The issue is one of grave concern both to employers and employees, and we have given it consideration commensurate with its importance.

No doubt the law declared to the jury was at one time the common law of England, and we will assume that it was also the common law in this country prior to the adoption of the thirteenth and fourteenth amendments to the Federal Constitution. But those amendments superseded and annulled all law—statutory or common law—

which was in conflict with them. And we think the law as declared to the jury in this case as to the liability of one for harboring the servant of another does conflict with the spirit and intent of both those amendments.

The court cited *Clyatt v. United States*, 197 U. S. 207, 215, 25 Sup. Ct. 429, Bul. No. 60, p. 695, quoting therefrom, and continued:

If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract, for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract, which was condemned as violative of the thirteenth amendment in *Ex parte Hollman* (79 S. C. 9, 60 S. E. 19). The prohibition is as effective against indirect as it is against direct actions and laws—statutes or decisions—which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect.

Of course, the sanction of the obligation of the contract and the liability to pay damages for breach thereof inhere in every contract, and these alone do not amount to that compulsion which is prohibited so long as the employee has the liberty at any time to elect to break the contract, subject only to the legal consequences—an action for damages—just like any other contractor. But if the law should penalize all who give him employment after he has breached his contract the effect would be to deny to him the same freedom that every other contractor enjoys, to wit, that of electing at any time to break his contract, subject only to his liability for damages. To that extent liberty of action and freedom of contract is guaranteed by the fourteenth amendment. (*Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240; *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7.)

If Carver, of his own volition and without enticement from defendant, put an end to his contract with plaintiff, as we have seen he had the constitutional right to do, with or without cause, subject only to liability for damages for an unwarranted breach, he had the right thereafter to contract with defendant or any other person for his labor, and those who gave him employment are under no legal liability to plaintiff. Their right to hire him is determined by his right to hire to them. (*Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7 [Bul. No. 189, p. 53].)

In this view of the case it becomes unnecessary to consider the error assigned in the charge as to the measure of damages resulting from the harboring of Carver. The other exceptions are overruled.

CONTRACT OF EMPLOYMENT—SEAMEN—WRONGFUL DISCHARGE—
STATE STATUTE OF FRAUDS—*Union Fish Co. v. Erickson*, *Supreme Court of the United States* (Jan. 7, 1919), 39 *Supreme Court Reporter*, page 112.—The defendant company employed Erickson under an oral contract to take charge of a vessel as master, conduct it to

Pirate Cove, Alaska, and operate it there for a year. The contract was made in California where the statute of frauds provides that contracts not to be performed within a year are void unless in writing. Erickson proceeded to Pirate Cove and performed his duties until, as he alleges, he was wrongfully discharged by the company. He brought libel in admiralty to recover damages for the breach of his contract, and the defendant claims that, in view of the above statute, there was no contract and that the discharge was because of Erickson's wrongful conduct. A decree was awarded Erickson by the district court, and, on appeal, was affirmed by the circuit court of appeals. The Supreme Court in affirming the decree, said in part:

The question presented and argued here concerns the application of the California statute of frauds, which it is alleged rendered the contract void because not to be performed within one year from the making thereof.

In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly on the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made.

If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a State may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States.

We think the circuit court of appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner.

EMPLOYER AND EMPLOYEE—PUPIL CONDUCTOR—ACTION FOR DAMAGES—*Fineberg v. Public Service Railway Co., Supreme Court of New Jersey (Nov. 25, 1919), 108 Atlantic Reporter, page 311.*—The plaintiff, Fineberg, made an application on May 8, 1918, for a position in the service of the defendant as a conductor. He was sent to the school for conductors, which he attended for three days and then left. On the 17th of June he signed an agreement with defendant whereby it was agreed that the workmen's compensation act of 1913 would govern the parties in "any relation of employer and employee into which they have or may enter." On the occasion of the accident Fineberg was on board one of the defendant's cars being instructed as a conductor. The car in which he was riding turned over while passing a switch and pinned him beneath the rear platform, causing

him injuries for which he sought to recover in a common-law action for damages. At the time of the injury Fineberg was still an applicant for the position and was not being paid while he was being instructed. He was awarded damages, and the defendant company appealed from the decision of the lower court denying a motion for nonsuit. Defendant claimed (1) that the action should have been brought under the workmen's compensation act and (2) that Fineberg was merely a licensee while on defendant's car. In affirming the decision the court said, in part:

It is clear that the plaintiff was not an employee of the defendant at the time of the accident, and the State compensation act therefore does not apply to him. But two questions are before this court, presented by the defendant's grounds of appeal, viz: The refusal of the court to grant defendant's motion for a nonsuit; and the refusal of the court to grant defendant's motion for a direction of a verdict in its favor.

The solution of the entire inquiry thus presented, it will be observed, is dependent upon the legal status occupied by the plaintiff at the time of the accident. Manifestly he was not in the defendant's employ, because his employment obviously was dependent and conditioned upon his qualification to serve under the instructions then being extended to him. The relation of master and servant, therefore, is not the determining rule of liability.

That the situation here presented involves more than the possession of a mere license, which usually inures only to the benefit of the license, without any reciprocal benefit to the licensor, must be obvious from the fact that a tentative or conditional agreement existed between the parties, which was expected by its terms to ripen into a contract of service, mutually beneficial to both, and from which would be finally evolved the legal status of master and servant.

In either aspect of the situation the defendant was under the legal obligation to exercise due care under the circumstances, and to the jury in this instance was properly committed the solution of that issue of fact.

The judgment under review will be therefore affirmed with costs.

EMPLOYER AND EMPLOYEE—SERVICE LETTER—CONSTITUTIONALITY OF STATUTE—BLACKLISTING—*Dickinson v. Perry*, Supreme Court of Oklahoma (May 27, 1919), 181 Pacific Reporter, page 504.—Daniel J. Perry had been employed for nine years by the Chicago, Rock Island & Pacific Railway Co., of which Dickinson was the receiver as a switchman. While in the discharge of his duties he was thrown from a box car by reason of a defective brake. The company voluntarily compensated him for his injuries. When he was discharged from the hospital where he had been sent by the company, the physician gave him a letter stating that he was again able to work. He applied to the yardmaster of the company and declared himself willing to

resume his old duties. The yardmaster said he must go to the superintendent as he could not reemploy him. The superintendent declared that according to the doctor's report he could not reemploy him. Perry then asked for a service letter and received the following:

That Daniel Jackson Perry has been employed on the Indian Territory division of the Chicago, Rock Island & Pacific Railway Co. as a switchman from November 1, 1904, to July 1, 1913. Dismissed: Account responsibility in case of personal injury to himself June 30, 1913. Services otherwise satisfactory.

H. F. RETTIG, *Superintendent.*

He again applied to the superintendent for reemployment, and upon being refused he applied to four other railroads for employment, exhibiting his service letter, and in each case he was refused. Whereupon he brought suit against Dickinson as receiver of the railway company for damages for giving him a service letter containing statements which were not true and for blacklisting him. The question was submitted to the jury and a verdict was rendered giving Perry \$3,000 damages. The receiver appealed but the judgment was affirmed. The court, discussing the constitutionality of the law requiring employers to issue service letters, said, in part:

Whether or not the custom still prevails, it appears that at one time it was the rule among railway companies and other corporations to keep a list of employees who were discharged or left the service and to furnish such list to other railway companies and employers. Any reason which might be agreed upon among employers was sufficient for "blacklisting" employees, thereby possibly preventing their again securing employment in their accustomed occupation or trade. It was this abuse, among other things, which caused the legislatures of various States to enact laws declaring blacklisting unlawful and requiring corporations to give a letter to employees discharged or leaving the service setting forth the reasons for the discharge of the employee or of his leaving the service and the nature of the service rendered by the employee.

The idea of requiring employers to give employees leaving their service a letter showing the character of work performed while in their service is not a new one. The common law recognized a moral obligation resting upon the employers to give a "character" to servants leaving the employment of their masters, but no legal obligation of this nature existed until laws touching these matters were enacted.

The legislation is attacked herein upon the grounds that it is in violation of section 7 of article 2 of the constitution of Oklahoma, which provides that no person shall be deprived of life, liberty, or property without due process of law; that it is in violation of section 22, article 2, of the constitution of Oklahoma, in that it denies the right of free speech, and that it is in violation of the Constitution of the United States and the fourteenth amendment thereof, in

that it denies to the defendant due process of law and equal protection of the law.

The right of contract may be arbitrarily interfered with and comes within the protection of the provisions of the constitution of the State of Oklahoma and the United States protecting the life, liberty, and property of the citizens of the State. But the right of contract is not an absolute and unyielding right. It is subject to limitations in the interest of the public welfare.

There is nothing in the law contested which attempts to prevent a corporation from hiring whomsoever it pleases, or from discharging its employees when it sees fit. Neither is there anything in the law which requires a corporation to give a letter of recommendation to employees discharged or leaving service. All that is required is a statement of the employer showing the character of services rendered by the employee and the reason for his leaving the service of his employer. It is a certificate which, when the facts are favorable to the employee, may assist him in securing other work along the line of his trade, and is a certificate to which he feels that in justice he is entitled.

The service-letter law is in line with the spirit of a progressive age. It aims to protect the wage earner in his right to work and labor for himself and for those who are dependent upon him. It aims to protect him from a condition that might pauperize him and his family and indirectly reflect itself in the conditions of society. (*Cheek v. Prudential Insurance Co. of America*, 192 S. W. 387 [Bul. No. 246, p. 75].)

We think that the legislation attacked does not deny to the defendant due process of law, that it does not constitute an illegal infringement upon the right to contract, and that it is within the police power of the State.

It is argued that this legislation is a denial and abridgment of the right of free speech. *Labatt, Master and Servant*, volume 8, section 2867, suggests:

"The theory that a constitutional provision which merely purports to secure freedom of speech includes by implication a guaranty of the 'liberty of silence' seems to involve some very questionable logic."

With this statement we fully agree. The right of free speech is not an absolute one; neither is the right to remain silent. One does not have the absolute right to speak that which may injure the public or an individual, or to remain silent when silence would work a similar result. (*Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247.)

The right of free speech guaranteed by the Constitution of the United States and the constitutions of the various States does not include the absolute right to remain silent under all conditions and when doing so may injure the rights of others in public. A corporation exists and does business within the State under and by virtue of the laws of the State. It is subject to such reasonable restrictions as the State may see fit to impose, and these restrictions may include the requirement to give information necessary to the public welfare. We hold that the giving of a service letter to employees discharged or leaving the service is the giving of information which concerns and affects the public welfare, and is a reasonable requirement which

may be imposed by statute, as was done by the Legislature of Oklahoma.

In connection with the foregoing, the court noted the contrary conclusions reached by the supreme court of Georgia, in *Wallace v. R. Co.*, 94 Ga. 732, 22 S. E. 579, Bul. No. 2, p. 201; of Kansas, in *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kans. 312, 102 Pac. 459, Bul. No. 84, p. 416; and of Texas, in *St. Louis S. W. R. Co. v. Griffin*, 106 Texas, 477, 171 S. W. 703, Bul. No. 189, p. 61, but added:

We believe that the better reasoning favors the sustaining of this and similar legislation.

The judgment is affirmed.

EMPLOYER AND EMPLOYEE—TRADE SECRETS—DUTY OF EMPLOYEE—DAMAGES—*Vulcan Detinning Co. v. Assmann et al.*, *Supreme Court of New York, Appellate Division* (Dec. 20, 1918), 173 *New York Supplement*, page 334.—The Vulcan company spent large sums of money and employed expensive experts for a period of several years for the purpose of evolving a scheme by which tin might be separated from tin scrap in such a manner as to make the process available for commercial use. Adolph Kern, one of the defendants, was the vice president and general manager and a dominant figure in the conduct of the Vulcan company's affairs. The investigations of the Vulcan company revealed a new system of detinning by means of the use of chlorine gas, which system, however, seemed to have been anticipated by the patents of Von Kugelgen and Seward. The Vulcan company thereupon bought a license from the patentees. Kern, in his position of power, of course knew all the secrets revealed by the Vulcan company's investigations, knew of the license acquired from the patentees, and knew of the people from whom the Vulcan company purchased its scrap. While still an employee of the Vulcan company, Kern negotiated with the above-mentioned patentees for the purchase of the patents and with one Assmann for the incorporation of the Republic company for detinning tin scrap. Kern also gave the Republic company the benefit of all information he received as a result of the Vulcan company's investigations. The Vulcan company sued Assmann, Kern, and others for damages for the revelation and use of its trade secrets. The complaint was dismissed by the lower court. This court affirmed the lower court's decision as to Assmann and certain other defendants, but as to Kern and certain former employees of the Vulcan company it reversed the judgment, saying in part:

In this case, while Kern did not himself sign a secrecy contract, he required everyone else to, and the evidence leaves no room to doubt that he understood that the plaintiff regarded everything done in

connection with developing this process as secret, and required it to be kept secret. Kern's information concerning the development of this process was of the most confidential character.

"Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to its interests." (2 Story, Eq., sec. 952.)

As was said in the leading case of *Morison v. Moat*, 21 L. J. (N. S.), ch. 248:

"There is no doubt whatever that when a party who has a secret in trade employs persons under a contract, express or implied, or under duty, express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer."

Neither process of manufacture, nor machinery, nor machinery installation need be patentable to be protected as trade secrets. Kern was not only turning over to the Republic company the results of the plaintiff's experiments and its consequent decisions, as indubitably shown by the dates of the various plans and contracts, and the other circumstances hereinabove shown, while in the plaintiff's employment, but, which makes the case even more aggravated, it was he who instigated and persuaded Assmann to form the Republic company and set it up against the plaintiff. This was certainly far from living up to the rule in *Nichol v. Martyn*, 2 *Espinasse*, 732, where it was said:

"A servant, while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business."

As to Kern, therefore, and those classed with him, the case was remanded to the trial court for a new hearing, the case against the others being dismissed.

EMPLOYERS' LIABILITY—ADMIRALTY—ELECTION OF REMEDY—INJURY TO STEVEDORE—*Siebert v. Patapasco Ship Ceiling & Stevedore Co.*, *United States District Court, District of Maryland* (Nov. 7, 1918), 253 *Federal Reporter*, page 685.—*Siebert*, the complainant, was employed by the defendant company as a stevedore, and on the occasion of the accident he was working in the hold of a ship. Through the negligence of the foreman of the defendant a hatch beam was left over the hatch and was not bolted in place. The hook used to raise and lower the cargo caught under the beam and pulled it out of its support, causing it to fall on *Siebert*, who was very seriously injured as a result and was compelled to have his leg amputated. While still in the hospital an attorney came with a paper for him to sign by which he notified the defendant of his injuries and his election to recover under the workmen's compensation act of Maryland. Not fully realizing what he was doing, he signed the notice, and it was served on the employer. The attorney filed a claim with the industrial com-

mission, which was not heard because Siebert was in the hospital. When Siebert recovered sufficiently, he placed his case in the hands of another lawyer and asked to have the claim withdrawn, which the industrial commission permitted to be done, and Siebert brought this action in admiralty. The defendant company denied Siebert's right to bring such an action, alleging that he had already made his election to recover under the compensation act. District Judge Rose, in giving judgment in favor of Siebert, spoke, in part, as follows:

Every rational system of jurisprudence strives to insure, as far as may be, that a man shall not lose important rights merely because he has done some formal thing in excusable ignorance of its nature and significance.

The act of Congress approved October 6, 1917 (40 Stat. 395, c. 97), gave an employee, injured on water, the right to avail himself of the workmen's compensation law of the State. This result was accomplished by amending paragraph 3 of section 24 of the Judicial Code (act Mar. 3, 1911, c. 231, 36 Stat. 1091; Comp. St. 1916, sec. 991). The amending statute added the words, "and to claimants the rights and remedies of the workmen's compensation law of any State."¹ So far as I know, it has never been held that the mere institution of a common-law suit to recover for a maritime tort precluded the plaintiff from subsequently seeking relief in admiralty.

The judge, having decided that the action in admiralty before him could be maintained, proceeded to consider the merits of the case. After reviewing the fact that the defendant had issued instructions that hatch beams should always be removed and that such instructions were habitually disregarded by the foremen, he proceeded as follows:

So generally was the instruction ignored, and so easy would it have been for the employer to have discovered that fact, that it can not now be successfully claimed that by merely issuing the order it had done all that was incumbent on it to make sure that the men were given a safe place in which to work. That obligation it could not delegate. Moreover, the foreman, or "chargeman," who should have seen that the beam was removed or bolted in, was, upon the evidence, a vice principal, rather than a fellow servant of the libellant. He had full charge of the loading of the ship and the men employed in doing it. Subject to his orders were the gang leaders, who had the right to employ and discharge the workmen—in the modern vernacular, the power of "hiring and firing." The men who did the actual work were bound to obey the orders of the foreman. I am satisfied, although he denies it, that he gave the order not to remove some of the beams, including the one which fell on the libellant, and the libellant and his fellow workmen, if they were to maintain their places, had no choice other than to do what he told them to do. The employer must be held liable.

The costs of medical attendance, of the artificial limb, and the loss of wages of the libellant while in the hospital, total \$791. I will allow

¹ Held unconstitutional. See p. 302.

\$3,000 more as compensation for his suffering and permanent injuries, or an aggregate of \$3,791.

A decree against the employer for that amount will be signed.

EMPLOYERS' LIABILITY—ADMIRALTY—ELECTION OF REMEDY—LONGSHOREMAN—*Dziengelewsky v. Turner & Blanchard, Supreme Court of New York, Special Term, Kings County (Apr., 1919), 176 New York Supplement, page 729.*—Turner & Blanchard were engaged in loading a steamship and for this purpose had moored a lighter alongside the steamship. A companionway belonging to the ship connected the ship with the lighter. Dziengelewsky was employed by the defendant as a longshoreman and was occupied in loading the vessel. He was required to use the ship's companionway in his work. While he and three other workmen were leaving the steamship, the companionway broke down and he was thrown into the water and drowned. Dziengelewsky's widow sued the defendant for damages in a suit at common law. The defendant claims that the action must be maintained under the workmen's compensation act. In refusing to grant a motion to set aside a verdict in favor of the widow the court said, in part:

The plaintiff urges that her right to recover finds full support under the Federal Judiciary Code (Act Cong. Mar. 3, 1911, c. 231, 36 Stat. 1087) as amended prior to the happening of the accident hereinbefore mentioned, and that the plaintiff is expressly given the right to bring her action in the State courts and to assert her common-law rights and to have recovery therefor. The plaintiff cites the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, as a supporting authority, and contends that in such cases as that of plaintiff there is the right to elect whether to take compensation under the workmen's compensation law of the State of New York or whether to bring an action at common law, as plaintiff has elected to do in this case. (*Nilsen v. American Bridge Co.*, 221 N. Y. 12, 116 N. E. 383.)

A careful reading of the briefs submitted on this motion, and a full consideration of the arguments made and the cases cited, convinced this court that the plaintiff was within the law by coming in the State court and asserting her common-law right to recover damages for the loss of her husband while engaged in maritime work. (See *Liverani v. Clark & Son*, 176 N. Y. Supp. 725.)

The decision in this case was followed by the court at the trial term in a subsequent case (*Simpson v. Atlantic Coast Shipping Co.*, 176 N. Y. Supp. 731).

EMPLOYERS' LIABILITY—ADMIRALTY—EXTENT OF RECOVERY—*Great Lakes S. S. Co. v. Geiger, United States Circuit Court of Appeals,*

Sixth Circuit (Nov. 5, 1919), 261 Federal Reporter, page 275.—Charles E. Geiger was employed by the appellant company as a seaman on the Great Lakes, sailing from a port on Lake Erie to the head of Lake Superior and return. In the course of the voyage he suffered an injury by reason of the negligence of his fellow workers and not of the ship, for which he received adequate treatment at the steamer's cost and wages to the end of the voyage as per contract. His disability continued for 13 weeks, during which time the cost of his maintenance was \$10 per week. Geiger sued in admiralty to recover for his injuries and was allowed maintenance and wages for the period of disability, amounting to \$374.14, which included interest from the time when payable. The case was appealed on the ground that the court below had wrongly construed the law in allowing wages for the full time of the disability, or rather for the period succeeding the termination of the contract.

The court of appeals admitted the correctness of this contention, saying in part:

It is settled that injuries suffered under circumstances such as here presented are maritime in their nature and within the jurisdiction of admiralty, and that under general admiralty law the vessel owner is, broadly speaking, liable only for maintenance, cure, and the wages of a seaman injured in the service of his ship through the sole negligence of members of the crew. [Cases cited.] In neither of these cases did the issues require a determination of the period for which wages are recoverable. The question is one of general admiralty law; the right of recovery for maintenance and cure and wages not being created by Federal statute.

Judge Knappen then discussed a number of cases as throwing a measure of light on the question, after which he said:

The record in the instant case contains no statement that the libelant's shipment contract extended beyond the voyage in question, and the contrary has been, in brief and argument, at least impliedly assumed. Our conclusion is that, upon the record presented, libelant's right to wages is, as a matter of law, confined to the end of the voyage, and that the award below was in this respect unwarranted. We do not decide what the rule would be had the contract of employment extened beyond the end of the voyage.

The award for maintenance was proper; and, this being so, we think libelant plainly entitled to interest from the time its payment was due, as a part of the damages, if on no other ground. The decree of the district court is accordingly reversed, with directions to enter a new decree in favor of libelant for \$130 plus interest thereon. In view of the nature of this case, no costs will be awarded in this court. Respondent [the steamship company], in fact, does not so ask.

EMPLOYERS' LIABILITY—ADMIRALTY—LONGSHOREMAN—SAFE PLACE TO WORK—*White v. John W. Cowper Co., United States District Court, Western District of New York (July 31, 1919), 260 Federal Reporter, page 350.*—The defendant company was engaged in some construction work and employed one Falzone as a laborer. Falzone was engaged in unloading a barge of sand moored in navigable waters. In doing his work Falzone was required to pass from the barge to a scow over a gangplank made of three boards fastened together with a cleat. This gangplank was very springy, and when Falzone commenced his work it was nearly level. Later, however, the barge, becoming lighter as it was unloaded, rose higher in the water, and a pile driver having been placed on the scow made the latter sink lower in the water. This caused the gangplank to tilt so that it was about 4½ feet higher at one end than at the other. In passing over the gangplank with a wheelbarrow load of sand Falzone fell into the water and was drowned. His administrator, White, sued for damages in admiralty. In awarding him damages the court held in part as follows:

The main grounds of negligence attributed to respondent are fault for not sufficiently stiffening the gangplank by a stiffening timber placed lengthwise on the underside thereof, and, generally, failure to supply a reasonably safe place to work, in that by placing the pile driver on the construction boat a dangerous incline of the gangplank was created, which the deceased could not have anticipated. While it is true that the master does not insure the safety of the employee, he is nevertheless required to exercise reasonable care, in view of the character of the work, to furnish a suitable place for its performance and reasonably safe materials to enable the workman to do the work with reasonable safety to himself; and in admiralty he is liable for the acts and negligence of the crew in that regard.

The deceased made no objection to working under the original conditions, and may not have regarded it hazardous to do so. It does not appear how often he went over the gangplank in the afternoon just before the accident; but as the work did not begin until 1.30, after the noonday meal, and as the increased peril does not seem to have been comprehended by him, he, in my opinion, neither assumed the additional risk, nor was he guilty of contributory negligence.

As to jurisdiction: The barge was moored in navigable waters, and the character of the work was such as to confer a right to redress in admiralty. (*Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733.)

In view of the insufficiency of proof as to surviving dependents, the award was limited to \$1,800 and costs.

EMPLOYERS' LIABILITY—ADMIRALTY—LONGSHOREMAN INJURED WHILE ON LAND—*Smalls v. Atlantic Coast Shipping Co., United*

States District Court, Eastern District of Virginia (Dec. 15, 1919), 261 Federal Reporter, page 928.—Smalls was engaged as a longshoreman in unloading steel rails from a steamship lying at a pier into railroad cars. It seems that the steel winch of the vessel which was used for this purpose was defective and by reason of such defect Smalls was injured. He was on land when he received his injuries. This action was brought in the form of a libel in admiralty against the defendant company, which excepted to the libel. In sustaining the exceptions the court held that the action was not one that might be brought in an admiralty court. The decision is as follows:

This cause is now before the court upon exceptions filed by the respondent to the libel, which present the question of whether the cause of action is one properly the subject of maritime jurisdiction, it appearing upon the face of the libel that the injury to the libelant occurred on land, and not on water.

The case is a very close one, of unusual interest, and was argued with much ability, the libelant's proctor especially presenting with much force the fact that the occurrence was so related to the water as under modern decisions to bring it within the admiralty jurisdiction.

The court, having given much thought to the question presented, and appreciating the force and reasonableness of the contentions made, has come to the conclusion that the exception is well taken, and that the cause of action sued for can not be maintained under maritime law, under the great weight of authority relating to and controlling the same.

The libel will therefore be dismissed.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—COMPARATIVE NEGLIGENCE—*Dunn v. Great Northern Ry. Co., Supreme Court of Minnesota (Dec. 6, 1918), 169 Northwestern Reporter, page 602.*—Dunn was in the employ of the defendant in a bridge crew. He was riding on the tracks of the defendant railroad with some of his fellow workmen on a gasoline motor car driven by the foreman. This car was about 5 feet wide and 6 or 7 feet long. It was about the size of an ordinary hand car, but the wheels were larger and it was somewhat more heavily built. Planks extended lengthwise of the car on either side over the wheels, and on these planks the men sat with their feet dangling over the sides of the car. The car was being driven at the rate of 30 miles an hour, and the day was windy and cold. In endeavoring to put on his mackinaw Dunn fell or was thrown from the car and was injured. In an action for personal injuries Dunn recovered judgment in the lower court and the defendant appealed. Judge Dibell, in affirming the judgment, said in part:

The plaintiff assumed the ordinary risks necessarily attendant upon riding upon such a car and all other appreciated risks. He

did not as a matter of law assume the risk attendant upon riding upon the car driven as it was at the time under the conditions obtaining; nor was the risk as a matter of law one of his own making.

The plaintiff may have been contributorily negligent. The accident occurred in South Dakota. In South Dakota the doctrine of comparative negligence is adopted by statute. Contributory negligence did not bar a recovery, although it reduced the amount of it.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—DUTY OF EMPLOYER TO GIVE INSTRUCTIONS—*Dean v. H. Koppers Company, Court of Appeals of the District of Columbia (Feb. 2, 1920), 48 Washington Law Reporter, page 150 (263 Fed. 626).*—Dean was employed by the H. Koppers Co. as a laborer to aid in the hauling, unloading, and installing of gas appliances for the Washington Gas Light Co. A heavy tank had been removed from the wagon on which it was delivered, and the foreman ordered Dean and some other laborers to remove the wagon. Some of the men got behind the wagon and pushed, and Dean and another took hold of the tongue of the wagon and pulled. While so progressing the right front wheel struck an obstacle, causing the tongue of the wagon to swing around and strike plaintiff, inflicting upon him the injuries for which he unsuccessfully sued. He alleged that the work of moving the wagon was not properly a part of his duties and that the employer failed to warn him of the dangers of the work. The court of appeals affirmed the decision of the lower court in favor of the defendant, saying in part:

This brings us to the question of assumed risk—a doctrine which grows out of contract. This is coupled with the duty of the employer to instruct the employee of dangers attendant upon the duties assigned him. The duty of warning and instruction is not incumbent upon the employer where the duty assigned, as here, is simple and the dangers, if any, are obvious. "The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience and with the same capacity for estimating their significance would see and understand, and if he neglects to observe and consequently remains in ignorance of perils of the employment the fault is his own, not that of the employer." (18 R. C. L. 570.) The court, however, submitted the facts to the jury with a clear statement of the law of assumed risk applicable thereto, and the verdict of the jury is conclusive.

We find nothing to support the contention of plaintiff that assisting in the removal of the wagon was not within the scope of his employment or that the risk was not as open and obvious to him as it was to the defendant.

The judgment is affirmed with costs.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—MINOR EMPLOYEE—ORDER TO WORK FASTER—*Stam v. Ogden Packing & Provision Co., Supreme Court of Utah (Dec. 17, 1918), 177 Pacific Reporter, page 218.*—The defendant company was engaged in the business of slaughtering and preparing meat for consumption. It owned and operated a machine designed to clean animal intestines for sausage casings. Stam, a boy 16 years of age, was employed and put to work by the company to feed and operate one of these machines. He had had, prior to the time of the injury, about three months' experience in their operation. On the day of the accident the foreman of the company told Stam to hurry his work to finish a supply of casings, but did not give Stam any warning. Stam, in compliance with this order, worked fast, and as a result of his increased haste he got his hand caught and so cut and lacerated that it had to be amputated first at the wrist and later above the wrist. He brings action for damages against his employer. Judgment was awarded him in the lower court. In affirming the judgment of the lower court Judge Thurman said in part:

In this case it is clear to the court that the plaintiff's knowledge and understanding of the machine in question, the manner of operating it, and appreciation of the dangers incident thereto, were such that, if there had been no abnormal or unusual condition intervening at the time of the accident, he would, as a matter of law, be held to have assumed the risk, and in such case many of the authorities cited by the appellant would be in point.

But another element enters into the case at bar, and one that must be considered and determined in order to do justice to the parties before the court. As shown by the evidence, just before the accident happened, something out of the ordinary occurred. The plaintiff was suddenly ordered by his foreman to work faster in order to dispose of the uncleared casings. Plaintiff, immediately, in obedience to the order, commenced to feed the machine faster, and his hand was thereupon caught between the rollers and drawn into the machine. It will be observed that this sudden order was not accompanied with a warning to be careful. This, it seems to the court, is the turning point on this particular question.

In this case we do not assert that the order to the plaintiff to work faster, standing alone, constituted negligence; but we do maintain that considering the age of the plaintiff, the character of the work, and all the attendant circumstances, the giving of the order, unaccompanied by some kind of warning to the plaintiff to be careful, made it essentially a case for the jury. It is only in cases where it is clear that there is no negligence, or that there is contributory negligence, or that the party complaining assumed the risk in question, that we can interfere with a finding or verdict as a matter of law. This doctrine has been so frequently, and in so many cases, enunciated by this court, that it is not necessary to make specific references to cases. Besides this, it is a proposition that is well-nigh universal.

It is our opinion that the trial court did not err in refusing to direct a verdict for the defendant.

EMPLOYERS' LIABILITY—COMMON-LAW ACTION—WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—*Helme v. Great Western Milling Co., District Court of Appeal, Second District, of California (Oct. 3, 1919), 185 Pacific Reporter, page 510.*—Helme was employed by the defendant company to operate a bran packer, his duty being to keep the bran which passed through this machine loose so that it would not clog. On the occasion of the accident a portion of the mechanism became clogged and caused a belt to slip off a pulley in the basement. Helme went into the basement to put the belt back on the pulley, and while attempting to do this his arm came in contact with some exposed and unhoused gears and was injured. The basement was poorly lighted and the exposed gears were not readily observable.

Ordinarily an accident case of this kind would have to be brought under the workmen's compensation act, but Helme sued for damages for personal injuries, claiming he was entitled to do so by section 12, subdivision "b," of that act (Stats. 1913, p. 283). This declares that an action for damages may be brought by an injured employee where the employer has been guilty of (1) gross negligence or willful misconduct, (2) where the act or failure to act which is the cause of the injury is the personal act or failure to act of the employer and (3) where the act or omission indicates a willful disregard for the safety of the employees. Judgment was awarded Helme in the sum of \$3,500, and the employer appealed. In reversing the judgment the court held in part as follows:

Here the failure to act, which is charged as the cause of the injury, was the failure to inclose the gears in a housing, or otherwise to keep them from being exposed. Therefore, to entitle plaintiff to recover in this action he must allege, and by a preponderance of the evidence prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "willful misconduct"; (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of the defendant corporation, as, for example, a director or directors; and (3) that such failure to house the gears indicates a willful disregard of the life, limb, and bodily safety of defendant's employees. Unless, by failing to house the gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the industrial accident commission, or with some safety requirement expressly defined and provided for by the act itself, it can not successfully be claimed that defendant was guilty of either "gross negligence" or "willful misconduct."

"Gross negligence" is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there

is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequence, without the exertion of effort to avoid it.

The mere failure to keep the gears in a housing, apart from any willful disregard of some order of the commission, or of some particular safety provision of the act itself, does not evince such an utter disregard of consequences as to suggest some degree of intent to cause the injury, or to justify the belief that there was a conscious indifference to consequences.

The evidence fails to show that the commission ever made or served any order requiring the gears to be housed or incased, or any other order with which defendant has neglected to comply.

In the absence of any such general or special order by the commission with respect to the gears, defendant's duty must be measured by the general requirements of the act itself.

The judgment was therefore reversed.

EMPLOYERS' LIABILITY — COMMON-LAW DEFENSES — SAFE APPLIANCES—*E. H. Parrish & Co. v. Pulley, Supreme Court of Appeals of Virginia (Nov. 20, 1919), 101 Southeastern Reporter, page 236.*—Pulley was employed by the defendant company as a stonemason. During the course of the work it became necessary to hoist and set in place a heavy stone. To do this an "A" derrick was moved into place against the wall of the building under construction. The derrick was held in place by two guy ropes, one end of which was attached to the top of the derrick; the other end of the back guy rope was fastened to a girder, and that of the front guy rope to a crowbar sunk half way into the roadway at an angle of 60 degrees and with the small end up. Landes, the defendant's foreman in charge of the work, fastened the front guy rope. In order to operate the derrick for the purpose of hoisting the stone, it was necessary to move it a trifle and to do this Pulley commenced to move the foot of the derrick with a crowbar. While doing this the vibration caused the front guy rope to work off its anchorage, and the derrick fell over and knocked Pulley to the ground, breaking his arm and dislocating his shoulder. He sued for damages for negligence of the employer by reason of the faulty way in which the front guy rope was fastened, and was awarded judgment. The employer appealed, alleging assumption of risk, fellow service, contributory negligence, and a denial of negligence on its part. In affirming the judgment the court said in part:

The suggestion that Landes, in tying the rope to the crowbar, was a fellow servant is not sound. A servant may in the performance of one act be a fellow servant and in the performance of another be a vice principal. (*Norfolk & W. Ry. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.) But it appears from the testimony of Landes, directly

or inferentially, that it was the duty of the defendants, not only to furnish the derrick, but also to erect it and move it when necessary, and that the plaintiff was not required to furnish anything but his trowel and hammer. This duty was therefore the master's duty, and was not assignable, and if there was negligence in the discharge of it, the negligence was that of the master. In addition to this, Singleton, one of the defendants, was present assisting in this work, and the negligent manner in which the work was done was, in part, his negligence. While a representative of the master may become a fellow servant if engaged in a mere operative act, the master never can. The servant never under any circumstances impliedly assumes any risk of negligence on the part of the master, and if his personal negligence proximately contributes to the injury of the servant, he is liable as though he only were at fault. The same is true where the injury is the result of the concurrent negligence of the master and a fellow servant. If the master is a partnership, then all the partners are liable, as the negligence of one is the negligence of all. (*Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.)

Having ascertained that the slipping of the rope off the crowbar was the proximate cause of the injury, the jury could not have found that the plaintiff assumed that risk. Under the evidence, it was not an ordinary risk incident to the business in which he was engaged, nor was the danger from insecurely fastening the guy rope, under the circumstances detailed, an open and obvious one.

We are unable to find anything in the record to justify the conclusion that the plaintiff was guilty of negligence proximately contributing to his injury. It is true that the derrick was plumb when erected, and would probably have remained so if it had not been touched, but no stone could ever have been hoisted unless the derrick was adjusted for that purpose, and the means of adjusting was by pinching. It is also true that the plaintiff pinched the derrick in order to adjust it to the work to be done, but it was put there to be pinched, and it was the plaintiff's duty to pinch it. In no other way could the derrick be utilized. The record, however, fails to disclose any negligence on the part of the plaintiff in the manner in which he pinched it. A servant has the right to assume that a tool or appliance furnished him by the master is a reasonably safe tool or appliance with which to do the work assigned to him. (*Richmond Ry. Co. v. Williams*, 86 Va. 165, 167, 9 S. E. 990, 19 Am. St. Rep. 876.)

EMPLOYERS' LIABILITY — COMMON-LAW DEFENSES — SAFE PLACE AND APPLIANCES—*Beck v. Sylva Tanning Co.*, *Supreme Court of North Carolina* (Dec. 20, 1919), 101 *Southeastern Reporter*, page 498.—Beck was employed by the defendant company, his duties requiring him to fill tubs with chips over which boiling fluids were poured in order to extract certain acids from the wood. While engaged at his task Beck stumbled over some chips which had negligently been permitted to accumulate in the walkway and fell into a tub, the lid of which had negligently been left off, and he was seriously burned about the feet and legs. The locality about the tub was

dark, owing to the fact that some lights which had been broken had not been replaced. Beck sued for damages and recovered a verdict of \$300, and the employer appealed. The employer claimed that Beck was contributorily negligent because it was his and his fellow-employees' duty to clean the walkways, put the lid on the tub, and to replace broken light bulbs. It also claimed that if Beck was not negligent then his injuries were caused by the negligence of fellow servants, and that he assumed the risk of his employment and therefore he could not recover. In affirming the award of damages the court said in part:

It is unquestionably the duty of the master to use proper care in providing a reasonably safe place where the servant may do his work, and reasonably safe machinery, implements, etc., with which to do the work assigned to him, and this duty is a primary and an absolute one, which he can not delegate to another without at the same time incurring the risk of himself becoming liable for the neglect of his agent, so intrusted with the performance of this duty which belongs to the master, for in such a case the negligence of the agent, or fellow servant, if he is appointed to act for the master, is the latter's neglect also. (*Hicks v. Mfg. Co.*, 138 N. C. 319, 50 S. E. 703.)

The charge of the court as to assumption of risk and contributory negligence was plainly correct, and in strict accordance with the precedents. There was strong evidence of negligence, and we can see very little, if any, of assumption of risk or contributory negligence; but the charge gave the defendant the full benefit of both pleas, and we do not see how the judge could have gone further than he did, in favor of these defenses, without transgressing the well-settled principles.

EMPLOYERS' LIABILITY—COURSE OF EMPLOYMENT—ASSAULT BY SUPERINTENDENT ON EMPLOYEE—*De Leon v. Doyhof Fish Products Co.*, Supreme Court of Washington (Nov. 27, 1918), 176 Pacific Reporter, page 355.—The home office of the defendant company was in Seattle. It operated a cannery in Alaska over which it placed one Scott as superintendent with very broad powers to conduct the business. De Leon was employed by the Alaska cannery and was afterwards suspected of attempting to create unrest and discontent among the laborers of the cannery. Scott, in an effort to set things right, sent for De Leon. When De Leon put in an appearance Scott roundly abused him and finally, without provocation, assaulted him. De Leon brought this suit for damages against the defendant company and recovered judgment. The company appealed, declaring that it was not liable for the torts of its servants, and that the assault was not in the scope of the superintendent's employment. In affirming the judgment in favor of the plaintiff, the court said in part:

When a party is sued for assault and battery by his servant upon another, liability must depend either upon proof of an express direc-

tion or upon such facts and circumstances as will imply direction or authority, and this inference may be drawn by the jury from competent attending facts and circumstances, and if a servant is engaged in the discharge of his duties to the master and is acting for the betterment or well-being of his business, and in so doing wantonly or maliciously injures another, the master is liable to the person so injured. Having given his servant general power to maintain discipline within the bounds of his own discretion, the respondent made itself, under the elementary principles of law, liable for the abuse of that power.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—AGE LIMIT—CONTRIBUTORY NEGLIGENCE—EFFECT OF STATUTE—*Karpeles v. Heine*, *Court of Appeals of New York* (July 15, 1919), 124 *Northeastern Reporter*, page 101.—The defendant Heine was the owner of a tenement house containing 24 apartments. The building was in charge of a superintendent, who had authority to hire and discharge the operator of the house elevator. Karpeles, the plaintiff, was a boy 13 years of age and lived in the apartments. He was greatly interested in the operation of the elevator, and when he heard that the regular operator was about to leave his employment he asked the superintendent for the job. On the day of the accident the old operator, an applicant for his job, Karpeles, and the superintendent were on the ground floor of the building. A window cleaner entered the elevator and desired to go to the third floor. Karpeles ran into the elevator and said he would take him up, but the window cleaner refused to permit him to do so until the superintendent intervened and assured him that it was all right for plaintiff to take him up. Karpeles took the window cleaner to the third floor, discharged him, and returned to the second floor, where he left the elevator for some purpose. When he returned, unknown to him, the elevator had ascended of its own volition and he unwittingly walked into the open shaft and fell to the ground below, sustaining injuries, for damages for which he brought this action. Section 93 of chapter 31, Consolidated Laws of New York, absolutely prohibits the employment of a minor under 16 years of age to operate an elevator. The trial court refused to allow damages and entered judgment in favor of the defendant on the ground that Karpeles had been guilty of contributory negligence. On appeal this decision was affirmed by the appellate division. (167 N. Y. Supp. 925; see Bul. No. 258, p. 64). Karpeles again appealed and the supreme court reversed the lower court's decision on the ground that the violation of the statute created an absolute liability on the part of the employer which can not be defended on a plea of contributory negligence, and ordered a new trial. The opinion of the court is in part as follows:

Except where a child is so young as to be incapable of exercising judgment or discretion, the law of contributory negligence applies when the person injured is an infant the same as when he is an adult, although the age, judgment, intelligence, and experience of the child must be taken into account in determining whether he was negligent. (*Ihl v. Forty-Second Street etc. R. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450.)

A person under the age of 16 years has not the experience or mature judgment of an older person. The statute arbitrarily declares that—

“No child under the age of sixteen years shall be employed or permitted to have the care, custody, or management of or to operate an elevator either for freight or passengers.” (Sec. 93, Labor Law, ch. 31, Consol. Laws.)

The prohibition is without qualification or condition. It was enacted to wholly prevent a person of such immature age from running an elevator and exposing himself to the danger incident thereto, and at the same time to relieve persons who are carried on an elevator from the danger which would result from committing the care, custody, management, or operation of the elevator to a person under 16 years of age. It is based upon the legislative determination that a person under 16 years of age has not the experience, judgment, or caution required of one who is to assume the care, custody, management, or operation of an elevator.

The employment of a person under 16 years of age to run an elevator is unlawful. Where a statutory prohibition is not a mere regulation or dependent upon some other fact, such as obtaining a certificate of the capacity of an infant, but is absolute and unqualified, its violation is in itself a basis of liability by the employer to a person who is injured as the proximate result of his employment contrary to the provisions thereof. In such a case the liability is per se. (*Amberg v. Kinley*, 214 N. Y. 531, 108 N. E. 830.)

The judgment of the lower court was therefore reversed and a new trial ordered.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—LAUNDRY MACHINE OPERATOR—*Sanitary Laundry Co. v. Adams*, *Court of Appeals of Kentucky* (Jan. 24, 1919), 208 *Southwestern Reporter*, page 6.—The laws of Kentucky (subsec. 9 of section 331a of the Kentucky Statutes) prohibit the employment of children under 16 years of age in connection with the operation of laundering machinery. Virginia Adams was a girl under 16 years of age. She misrepresented her age and was employed by the defendant laundry company. While operating a mangle she sustained injuries to one of her hands. She brought action for damages and recovered in the lower court. In affirming the judgment the court said in part:

It has been held by all courts, so far as we are aware, that where a master employs an infant in contravention of a statute and the infant

sustains injuries proximately resulting from and having a causal connection with the employment, the master is liable and can not escape such liability through the intervention of any of the ordinary defenses available against adults, including the affirmative ones of contributory negligence, assumed risk, etc. [Cases cited, including *L., H. & St. L. Ry. Co. v. Lyons*, 155 Ky. 396, 159 S. W. 971; Bul. No. 152, p. 111.]

In the Lyons case above referred to this court had under consideration the effect of the employment of infants contrary to the provisions of our statute, and after considerable discussion in which cogent reasons for denying the defense are stated, summed up its conclusion by stating:

"We therefore hold that neither the doctrine relating to assumed risk or fellow servants or contributory negligence has any place in the application of this statute. The employer takes all the risk; the child none. It is true this construction makes the employer the insurer of the safety of the child, and so he should be. The lives and limbs of children are too valuable to be sacrificed in dangerous employments; and if an employer, in violation of the statute, engages the services of a child in such employment, he must see to it that no harm comes to him; or, if he does, he must compensate him in so far as money can do for the injury inflicted."

With reference to the defense that the child was by her own prior acts estopped from bringing a suit for damages, the court said:

There are other cases from this court holding that under peculiar circumstances, an infant would be estopped, especially if he had rendered himself unable to restore the consideration. But it does not necessarily follow that because this court in such cases, contrary to the general rule upon the subject (22 Cyc. 512, 610, 611), applies the doctrine of estoppel to infants, that a master may plead estoppel against his infant servant, who was employed contrary to statutory provisions, so as to obtain the benefit of defensive pleas which would have been applicable but for the infancy of the servant. To so hold would result in indiscriminate evasions of the statute, and permit the parties to accomplish by indirection that which is expressly prohibited by the statute in furtherance of a wholesome public policy. The courts have quite generally declined to permit this to be done. Cases cited, among others: *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320, 34 Sup. Ct. 60; Bul. No. 169, p. 64.

It would therefore seem that upon authority, as well as upon reason, the defense of estoppel herein urged could not prevail.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—WORKMEN'S COMPENSATION ACT—MACHINERY—*Schwartz v. Argo Mills Co.*, Court of Errors and Appeals of New Jersey (Nov. 18, 1918), 105 Atlantic Reporter, page 199.—Schwartz, a minor under the age of 16 years, was employed by the defendant company and his employment certificate was placed on file. Schwartz's duties were at first the operating of an elevator. Later

he was given the duty of emptying cans into which a moving transverse piece of machinery dumped waste from the carding machines. While emptying a can he lost his balance and accidentally got his hand caught in the moving portion of the machine and was severely injured. Both he and his father brought actions for damages based on an act (as amended P. L. 1914, p. 488) prohibiting employers from permitting minors under the age of 16 years to work between fixed or transversing parts of any machine while in motion. The trial court refused to let the case go to the jury, holding "that plaintiff was not working between fixed or transversing parts of machinery and was therefore not being required to work in a forbidden place" and granted the defendant nonsuits in both cases. In reversing this judgment and awarding a new trial the appeal court said in part:

We are of the opinion that this was error. The clear intent of the legislature is to forbid children from being put at work when part of the appliance is stationary and part in motion. The machine in question consisted of two parts, one the moving part for combing the cotton, and the other the can to receive the waste; they were parts of the machinery necessary to accomplish the purpose of combing the cotton, and while the can was movable it was so only for the purpose of permitting the removal of the waste, a necessary part of the production of the machine, and a jury might well find it to be within the legislative meaning of a fixed part used in conjunction with the moving part of the machine, which was the direct cause of the injury.

That the common-law rules and not the workmen's compensation act is applicable to the situation now presented was settled by this court in *Hetzel v. Wasson Piston Ring Co.*, 89 N. J. Law, 201, 98 Alt. 306 [Bul. No. 224, pp. 74, 75]. If the plaintiff proved the foregoing facts, he was at least entitled to the judgment of the jury as to the inferences to be drawn.

We think that the plaintiff was entitled to have the jury say, among other things, whether he was put to work in a place forbidden by law under such conditions as amounted to negligence on the part of the defendant, and that the nonsuit can not be supported by this record.

EMPLOYER'S LIABILITY—EMPLOYMENT OF CHILDREN—DANGEROUS EMPLOYMENT—WORKMEN'S COMPENSATION ACT—SUIT FOR DAMAGES—*Wolff v. Fulton Bag & Cotton Mills, Supreme Court of New York, Appellate Division, Second Department (Dec. 6, 1918), 173 New York Supplement, page 75.*—Mary Wolff, a minor under the age of 16 years, was employed by the defendant company and put to work operating a power press. The company had failed to procure an employment certificate from the plaintiff Wolff, as required by

the labor law. It had also failed to provide the machine with proper guards. The plaintiff in operating the machine had her hand crushed and amputation followed. She disregarded the workmen's compensation law and gave notice and brought action as required by the employers' liability provisions of the labor law. The lower court sustained the defendant company's plea that the workmen's compensation law was a bar to a recovery of damages under the employers' liability provisions. In reversing this judgment and granting the plaintiff right to proceed with her case the appellate division said, in part:

We reach the conclusion that the workmen's act is not a bar to the plaintiff's common-law action for damages. Her employment in the defendant's factory on the day of the accident was unlawful, the defendant had no right to employ her, and in doing so it was guilty of a misdemeanor. (Penal Law, sec. 1275 (Consol. Laws, c. 40).)

We think that, in enacting the workmen's compensation law with reference to the rights and remedies of employers and employees the legislature referred to legal employment. To construe the law as permitting an employer, who has employed children illegally in work expressly forbidden by law, to insist that they are deprived of their common-law rights and must look to the compensation act for relief, would be to nullify the provisions of the labor law and to disregard the public policy of the State.

The judgment of the lower court was therefore reversed.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—LIABILITY FOR ACTS OF SERVANTS—*People v. Sheffield Farms-Slawson-Decker Co., Court of Appeals of New York (Dec. 10, 1918), 121 Northeastern Reporter, page 474.*—The defendant company is engaged in the sale of milk. It employs 125 drivers to deliver the milk. It has a rule, of which all of its drivers are aware, forbidding the permitting of anyone not in the employ of the defendant to ride on the wagons or assist them in their work. This rule had been violated a number of times, but the only discipline meted out by the company was reprimands. One employee had been arrested and convicted for employing a child under the age of 14 years, but he had not been discharged. Schmidt, one of defendant's drivers, employed a boy of 13 years and paid him himself. His purpose, it seems, was to prevent the theft of milk bottles and was thus of benefit to the defendant. The defendant had inspectors and was aware that its rule had been violated in a number of cases, but it had had no actual knowledge of the employment of the boy by Schmidt. This action is brought by the State of New York to prosecute the defendant for the violation of section 162 of the labor law (Consol. Laws, ch. 31), and de-

fendant was convicted and fined \$20. Defendant appealed. The court of appeals, in affirming the conviction spoke, in part, as follows:

The employer is, therefore, chargeable with the sufferance of illegal conditions of delegates of his power. But to say that does not tell us how sufferance may be implied. We do not construe the statute with all the rigor urged by counsel for the people. Not every casual service rendered by a child at the instance of a servant is "suffered" by the master. Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes in most cases a fair measure at least of continuity and permanence. Whatever reasonable supervision by one's self or one's agents would discover and prevent, that, if continued, will be taken as suffered. Within that rule, the cases must be rare where the prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided. But where work is done away from the plant, the inference of sufferance weakens as the opportunity for supervision lessens. On the other hand, we think the statute draws no distinction between sufferance and permission. This is apparent from its scheme as revealed in related sections. (Labor law, secs. 70, 161, 93, 131.) The two words are used indiscriminately. In such circumstances each case may take some color from the other. Permission, like sufferance connotes something less than consent. Sufferance, like permission, connotes some opportunity for knowledge. Thus viewed, the scheme of the statute becomes consistent and uniform.

Our conclusion is that there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of this child; that the omission to discover and prevent was a sufferance of the work; that for the resulting violation of the statute a fine was properly imposed.

EMPLOYER'S LIABILITY—EMPLOYMENT OF MINORS—INJURY TO SERVANT—CARE REQUIRED—FAILURE TO WARN OF DANGERS—*Brown v. Atchison T. & S. F. Ry. Co., Supreme Court of Kansas (Apr. 12, 1919), 180 Pacific Reporter, page 211.*—A foreman of the railway company in its water service was doing some work in connection with a masonry well which was located in the bed of the Walnut River about 50 to 60 feet from the bank and surrounded by water 20 feet deep. Some driftwood had become lodged against the well which it was found desirable to have removed. This necessitated the use of a boat, and having none for this purpose the foreman engaged Willie Brown, a boy of 17 years, who had a boat, to assist in this work. Brown proceeded to work as directed by the foreman until instructed to cease and go after the man who was on top of the well and who had been assisting him in removing the drift. When his boat reached the well, the masonry gave way and it fell into the water drawing the boat in the vortex and partially filling it. Brown and the man on the well fell into the water and Brown was drowned.

Action was brought for damages for his death and recovery was had, from which judgment the company appealed, on the ground that a rule of the company prohibited the employment of minors without the consent of their parents, and therefore Brown had not been an employee and the company had owed him no duty of protection. The court in affirming the judgment for plaintiff said in part:

The point is made in behalf of the company that, even if the foreman did undertake to employ Willie Brown, his act was not binding upon the company because of this rule. If the point were otherwise good, it might be met by the suggestion that the employment of the boy was within the apparent scope of the foreman's authority (*Townsend v. Railway Co.*, 88 Kan. 260, 128 Pac. 389), or that the foreman was authorized to employ the boy at once, notwithstanding his minority, by reason of the emergency with which he was confronted. However, we deem it unnecessary to invoke either of the principles referred to. The rule of the company that, when a minor is employed, the written consent of the parents shall be required, does not, in our judgment, prevent the relation of employer and employee being established between the company and a minor without such consent, so far at least as to render the company liable for an injury received by him while working for it, caused by its failure to take such precautions for his protection as it owes to employees generally. But, however that may be, we hold that a minor who without notice of such a rule performs services for the company at the instance of the person authorized to employ workmen for that purpose is, while so engaged, entitled to the care and protection ordinarily due from an employer to an employee.

There was clearly room for a reasonable conclusion that, if the boy had been warned of the likelihood of the well falling, and of the probable effect of its fall, he might have proceeded with more caution and saved himself. This is perhaps what the jury had in mind in saying that the company neglected to provide necessary means for escape. At all events we consider the evidence as justifying the verdict against the defendant on the ground of negligence in failing to warn the boy of the danger he was incurring.

EMPLOYERS' LIABILITY—FACTORY REGULATIONS—FAILURE TO PROVIDE SAFETY DEVICES—GOGGLES—*Emerson-Brantingham Co. v. Crowe*, Appellate Court of Indiana (Nov. 26, 1919), 125 *Northeastern Reporter*, page 223.—This was an action for damages for personal injuries sustained by Crowe while working for the Emerson-Brantingham Co., brought under chapter 236, Acts of 1911 (sec. 3862a et seq., Burns' R. S. 1914). This act imposes upon all employers the duty of providing safe and tested tools, appliances, and mechanisms and also requires them to make all machinery and equipment safe and to provide safety appliances and devices. The employer's foreman directed Crowe to aid in making a "cold cut," which it seems

was a process of cutting a piece of steel with a cold chisel and sledge hammer. Crowe was not provided with goggles or any other safety device. During the course of cutting the piece of steel a sliver flew off and struck Crowe in the left eye, injuring it so badly that it had to be removed. The injury also impaired the sight in the other eye. A verdict in the sum of \$4,800 was returned for Crowe and the employer appealed. In affirming the decision the court said in part:

It is contended by appellant that the words, "every device, care, and precaution," are general, and following, as they do, the specific words that such owner shall "require that all appliances, tools, all contrivances, and everything whatsoever used therein, are carefully selected, inspected, and tested so as to detect and exclude defects and dangerous conditions * * * and that all dangerous contrivance, tools, * * * are securely * * * covered or otherwise protected, with safety arrangements and appliances to the fullest extent possible," must be construed to mean, under the doctrine of ejusdem generis, guards, precautions, and safety devices about machines and tools of the same or of similar character to those enumerated, and not goggles, or mere appliance attached to, or worn upon, the person of the employee.

The doctrine involved here has been so thoroughly discussed in the case of *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69, that further discussion is needless. From a study of the act involved, as a whole, it clearly appears that the purpose of the lawmaking body was to provide a general plan for the safety and health of factory laborers, and to that end, having specifically named machinery, appliances, tools, etc., terms intended to cover everything within the plant, as included in the class that must be safe, and safely guarded, thereby exhausting the class, it goes further, and by a blanket mandate says that the owner or operator must use "every device, care, and precaution" which it is practicable and possible to use for the protection of the employee. Whether the failure to use some device, not included in those specifically named, goggles, for instance, is negligence, is a question of fact for the jury. We hold that the first paragraph of complaint states a cause of action, and that the demurrer thereto was properly overruled. In the second paragraph of complaint it is averred that appellee's injuries were received while performing a service which he was ordered and directed to perform, by his foreman, whose orders he was bound to obey, and that he was unacquainted with the nature and character of the work, and he had never prior to said time engaged or assisted in said work and had no means of knowing and did not know of the dangers and hazards of such work, and that appellant's foreman well knew of such dangers and hazards. Appellant contends that the danger to which appellee was subjected by obeying appellant's orders was a matter of common knowledge, and that therefore he was entitled to no warning from appellant. Granting the assertion, still appellant certainly owed it to its own protection to warn appellee, for it is expressly provided in section 8020b, Burns' R. S. 1914, that the fact that

hazards and dangers inherent or apparent contributed to the injury is not a defense, and further that the injured employee shall not be held guilty of negligence or contributory negligence where the injury resulted from such employee's obedience to any order or direction which he was under obligation to obey, and by section 8020c such employee does not assume the risk by such obedience to orders or directions. If the danger was inherent and apparent, and well known to appellant, and yet unknown to and not assumed by appellee, certainly it was negligence on the part of appellant to order and direct performance without giving warning of such danger to appellee. The second paragraph of complaint states a cause of action, and the demurrer thereto was properly overruled.

Finally, the appellant contends that the amount of damages was excessive, citing in support thereof the Acts of 1915, page 400, being the workmen's compensation act, by which it appears by appellant's computation that the appellee would have received under this act the sum of \$594; but it must be kept in mind that the compensation provided for in this act is only for the loss of earning capacity and does not include damages for any loss of any member of the body or any damages for pain or for suffering. (*Centlivre Beverage Co. v. Ross*, 124 N. E. 220, decided at this term.) The workmen's compensation act can not be a criterion by which the damages in this case can be measured, and we can not say, as a matter of law, that the damages were excessive. There was sufficient evidence to sustain the verdict, and it was not contrary to law.

The judgment is affirmed.

EMPLOYERS' LIABILITY—FELLOW SERVANTS—VICE PRINCIPALS—
DUAL CAPACITY—*Morin v. Rainey et al.*, *St. Louis Court of Appeals*.
Missouri (Jan. 7, 1919), 207 *Southwestern Reporter*, page 858.—*Morin* was a Croatian and unable to speak the English language and was injured by reason of the negligence of *Rainey* while in the employ of the codefendant, the American Car & Foundry Co. The foundry company was engaged in making car wheels and used electric motor trucks operated upon tracks to transport the molten metal to the molds. *Morin* had been engaged in skimming molten metal, when *Rainey*, who operated the electric trucks from a platform by means of a controller, directed him to devote his time to adjusting the position of the pots upon the trucks and in which the molten metal was transported. *Morin* was under the direction of *Rainey*, although both were under a common foreman. *Rainey* directed *Morin* to adjust a pot upon a truck, which *Morin* proceeded to do. It was necessary that *Morin* go between the trucks to do this, and while he was there *Rainey* without giving warning started the trucks, with the result that *Morin* was injured and lost a leg. The defendant company claims that *Rainey* was a fellow servant, and that therefore it is not liable, and that even if *Rainey* was a vice principal he was

also a fellow servant so far as Morin was concerned. The opinion of the court is in part as follows:

If one servant is clothed with power to direct and control other servants or another servant in the performance of some branch of the master's work, the master is liable for negligence on the part of such superior servant in the exercise of such power and authority conferred upon him.

The "dual-capacity doctrine" has long been recognized in this State. And it has long been settled that where one servant is injured by the negligent act of another servant occupying a dual capacity, it is the character of the act and not the rank of the servant that determines the question of the master's liability for such negligence. (See *English v. Rand Shoe Co.*, 145 Mo. App. 450, 122 S. W. 747.)

In our view of the facts plaintiff's injury was due to the negligence of Rainey as a vice principal (the master's negligence) combined with his negligence as a fellow servant. And it is well settled that when the negligence of the master is combined with that of a fellow servant in producing the injury, the negligence of neither being the sole, efficient cause, both the master and the fellow servant are liable, and the injured servant may maintain his action against either or both.

But there is another view of the case which in our judgment leaves no room for doubt as to the liability of the defendant. When plaintiff went upon the track between these trucks he did so, not of his own initiative, but in obedience to the express command of the master then and there issued by the vice principal Rainey; and having thus sent the plaintiff into this position to perform the work in question it became the personal, nondelegable duty of the master to exercise ordinary care to keep safe the place where the plaintiff was thus required to work. And the plaintiff was entitled, within reason, to rely upon the implied assurance that this duty would be performed. This is a duty which the defendant can not shift to or put upon others so as to exculpate himself from liability when an injury happens by reason of its nonperformance. If the master deputizes such a duty to a servant, no matter how low the latter may be in rank or scale of employment, as to that duty the acts of such servant become in law the acts of the master.

EMPLOYER'S LIABILITY—FELLOW SERVANTS—RELATIONS OF COWORKERS—VOLUNTEERS—*Gulfport & M. C. Traction Co. v. Faulk*, Supreme Court of Mississippi, Division A (Jan. 13, 1919), 80 Southern Reporter, page 340.—Faulk was employed by the traction company and was put to work with a man named Chambers as a "trouble shooter." Chambers had been with the company a long time, was an experienced chauffeur, and was provided with a Ford automobile for the purpose of riding along the company's tracks in his occupation of "trouble shooter." Faulk and Chambers sometimes worked together and at other times worked alone. Chambers assumed authority over

Faulk when they were together, although he was being paid less. On one occasion while working together Chambers indicated to Faulk at the completion of the work that he, Faulk, was to crank the machine, which Faulk proceeded to do. The machine kicked and Faulk was injured and sued for damages. In reversing the judgment of the lower court in Faulk's favor the court said in part:

There was no testimony whatever to show that Chambers was a superior agent of the appellee or had the right to direct or control his services. They were merely fellow servants of equal dignity. It is well settled that the authority of an agent to bind his principal rests upon the powers conferred upon him by the principal. (*Milling Co. v. Phillips*, 117 Miss. 204, 78 South. 6.)

The assumption of authority of one servant to control another, and the acquiescence of the second servant to this control, does not render the employer liable in the absence of authority conferred upon the servant by the master.

It was no part of the appellee's duties to crank or have anything whatever to do with this automobile except to ride in it. In attempting to crank it he was a mere "volunteer," and the appellant is not responsible for his injury.

EMPLOYERS' LIABILITY—MINE REGULATIONS—VIOLATION—OPERATING ELECTRIC TROLLEY SYSTEM IN GASEOUS PORTION OF MINE—*Jaras v. Wright et. al.*, *Supreme Court of Pennsylvania* (Feb. 10, 1919), 106 *Atlantic Reporter*, page 798.—The defendants, receivers of the Merchants Coal Co., operated an electric trolley haulage system in the Oreanda mine at Boswell. On August 9, 1915, a portion of the mine became gaseous and was closed. On August 20 work was again resumed. On the morning of August 31 Dip Entry No. 8 was found by the fire boss to be gaseous, and he erected a barricade and posted danger notices to prevent men from working in that entry. Later in the morning the barricade and signs were removed and Jaras and others went to work in the entry. Thereafter the electric locomotive was run into that portion of the mine and an explosion was caused from a spark made by the running of the trolley pole along the trolley wire. Jaras was killed. Jaras's widow sued for damages, and the jury rendered a verdict for \$7,500. Notwithstanding this, the court rendered judgment for the defendants, and the plaintiff appealed. On the appeal the decision was reversed and judgment in accordance with the verdict directed, the court saying in part:

Plaintiff's statement of claim sets forth as her cause of action, inter alia, a violation of article 11, section 6, of the act of June 9, 1911 (P. L. 798), which provides that —

"Electric haulage by locomotives operated from a trolley wire is not permissible in any gaseous portions of mines, except upon intake air, fresh from the outside."

At the trial evidence was produced to show that this portion of the mine was gaseous; that it was not supplied with intake air fresh from the outside, but by air contaminated by being brought through other gaseous portions of the mine; and that the explosion resulted from a spark caused by the running of the trolley pole along the trolley wire.

In its opinion entering judgment for defendants non obstante veredicto, the court below states that the facts were as hereinbefore set forth, but holds that "the removal of the fence, turning on the current, and operation of the locomotive was the proximate cause" of the injury. With that conclusion we can not agree. The removal of the barricade was not the proximate cause, for the explosion would have occurred even though it had then been in place. The turning on of the current of electricity was not the proximate cause, for the electric current could have been run indefinitely over the trolley wire and no explosion take place; so the evidence shows, and so everyone knows who watches at night a trolley wire of one of our electric railways. Nor was the gaseous condition of the mine, or the presence or absence of intake air fresh from the outside, the proximate cause, for either or both could have existed in that mine and no explosion have occurred. It follows that the proximate cause must have been the running of the trolley pole along the highly charged trolley wire, just as the evidence shows and the jury found; and as it was so run in a gaseous portion of the mine, where there was no intake air fresh from the outside, defendants violated an express statutory duty which they owed to decedent, and, the jury having found that he had not been guilty of contributory negligence, they are liable to plaintiff for their dereliction of duty.

EMPLOYERS' LIABILITY—NEGLIGENCE OF PHYSICIAN—NEGLIGENCE IN SELECTION OF PHYSICIAN—*Smith v. Buckeye Cotton Oil Co., Supreme Court of Arkansas (May 19, 1919), 212 Southwestern Reporter, page 88.*—Smith was employed by the defendant company. He was directed to wipe an engine and while doing so got his fingers caught and crushed in the machinery. He was then directed to go to a physician employed by the company to treat its injured employees. The company's physician treated Smith's injuries in such a way that it became necessary for all of the fingers on his injured hand to be amputated. This suit was brought against the company for the negligent treatment of plaintiff's injuries by the company's physician. Judgment was awarded in favor of the defendant on a directed verdict. The judgment on appeal was affirmed. In stating the law of the defendant's liability in such a case the court said:

We have a case, therefore, in which the pleadings and proof show only that an injured employee was directed to, and placed in charge of, a physician who was guilty of negligence in his treatment of the case. But this allegation and this proof did not make a case for the jury. Where the employer owes his employee the duty of furnishing medical attention, or undertakes to discharge that duty, he does not

become liable for the physician's negligence or lack of skill, but is liable only when he fails in the discharge of his duty to exercise ordinary care to select a physician possessing the requisite skill and learning and one who would give the patient the attention and treatment which the case requires. This is the doctrine of the case of *Ark. Midland Ry. Co. v. Pearson*, 98 Ark. 399, 135 S. W. 917, and of *St. L., I. M. & S. R. Co. v. Taylor*, 113 Ark. 445, 168 S. W. 564.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—CONSTITUTIONALITY OF STATUTE — OFFICE EMPLOYEES — *Seamer v. Great Northern Ry. Co., Supreme Court of Minnesota (May 16, 1919), 172 Northwestern Reporter, page 765.*—Sarah O. Seamer was employed by the defendant railway company as a clerk in its offices, which were located in a building several blocks from the railroad. She was injured in the course of her employment through the negligence of a fellow servant as she was entering a passenger elevator in the building, and sued to recover damages under a State law relating to railroads. The defendant, after attacking the constitutionality of the law, alleged that the act under which Seamer sued did not include her or persons performing her class of work. The railway also sought to maintain that the statute violated the United States Constitution in that it denied it the equal protection of the laws. The lower court granted judgment in favor of the defendant on a motion for judgment on the pleadings; a motion by the plaintiff for a new trial was also denied, whereupon she appealed. The supreme court reversed the order denying a new trial, holding the law constitutional and applicable to such a case.

The first contention related merely to the title of the act, which the court held sufficient. The next was as to the application of the law to a person in the position of the plaintiff—i. e., not connected directly with the operation of trains. The act provides first of all:

That every company, person, or corporation owning or operating, as a common carrier or otherwise, a steam railroad or railway in the State of Minnesota, shall be liable in damages to any employee suffering injury while engaged in such employment. * * *

The court recognized that an earlier law had been held to apply only to those employees who were subject to railroad hazards, due to the thought that "unless so limited it was unconstitutional as class legislation. Such reason, as will be noticed later, is not persuasive now."

The court then recited the development of ideas as to classification, and concluded:

We think we are in harmony with the State courts generally, and with the Supreme Court of the United States, in its consideration of

State legislation claimed to be in violation of the fourteenth amendment, when we hold as we do that the act of 1915, when applied to one employed by a common carrier steam railroad and working as was the plaintiff, does not offend the State or Federal Constitution. This is the only constitutional question before us.

Order reversed.

EMPLOYERS' LIABILITY — RAILROAD COMPANIES — FEDERAL STATUTE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—DEFECTIVE TOOL—*Pryor et al. v. Williams, United States Supreme Court (Nov. 8, 1920), 41 Supreme Court Reporter, page 36.*—Allega Williams, who had been reared on a farm, became employed by the Wabash Railroad for which Pryor and another were the receivers, his employment continuing from August to November, 1915, when he was injured. Williams was engaged in tearing down a bridge on the line of the railroad. He had been given a clawbar by his employer and directed to draw some bolts. He made only a hasty and casual inspection of the top side of the clawbar and thus did not notice that on the bottom side the claws "had become so rounded and dull by long usage that they could not be made to grab the shank securely." When he proceeded to use the clawbar it slipped from the bolt, causing him to lose his balance and fall 12 feet to the ground. He brought suit for damages under the Federal employees' liability act, as the railroad was engaged in interstate commerce. The defendant charged him with negligence, assumption of risk, and contributory negligence. The verdict was for Williams in the sum of \$5,000, and an appeal was taken to the Kansas City Court of Appeals. This court regarded the defect as so obvious in the simple tool that the employee "must be held to have appreciated the danger and to have voluntarily assumed it." It therefore reversed the judgment, but on account of an objection by one judge referred the case to the supreme court of the State, which ruled that the company was negligent in furnishing the defective tool and the employee only negligent in using it, so that under the Federal law recovery was not barred but only reduced in amount. The award of damages was therefore affirmed, and the company took the case to the Supreme Court of the United States on a writ of certiorari.

Here it was held that the supreme court of the State had erred in classing the act of the employee as contributory negligence, and that the question should have been submitted to the jury with an instruction as to assumption of risk that made possible a denial of all liability on the part of the employer. The judgment of the trial and supreme courts was therefore reversed and the case remanded.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—INJURY TO SWITCHMAN—*Chicago, R. I. & P. Ry. Co. et al. v. Ward, Supreme Court of the United States (Mar. 1, 1920), 40 Supreme Court Reporter, page 275.*—Fred Ward was employed by the Chicago, Rock Island & Pacific Railway Co. as a switchman and was injured while engaged in interstate commerce. Ward was working with Carney, an engine foreman, and was on the top of a box car ready to apply the brakes after the string of cars, of which his was one, was uncoupled. Through the negligence of Carney the cars were not uncoupled at the proper time, but the engine was ordered to slow down in such a way that when the slack in the couplings was taken up Ward was thrown from the top of the car on which he was working and sustained injuries for which he brought suit under the Federal employers' liability act. He was awarded a judgment by the trial court, which decision was affirmed by the Supreme Court of Oklahoma (173 Pac. 212), and the defendants bring certiorari to the United States Supreme Court. The defendants claim that the trial court erred in charging the jury that Ward did not assume the risks of employment. The court, in ruling on this point, considered the evidence and came to the conclusion that the situation in which Ward found himself was an emergency and the question of assumption of risk should not have been brought up. The opinion as rendered by Mr. Justice Day is, in part, as follows:

The Federal employers' liability act places a coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of the assumption of risk.

The testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. For the lack of proper care on the part of the representative of the railroad company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representative's negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed had opportunity to know and appreciate it and therefore assume the risk.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—SAFE PLACE TO WORK—*Kansas City, M. & O. Ry. Co. v. Roe, Supreme Court of Oklahoma (Apr. 15, 1919), 180*

Pacific Reporter, page 371.—Roe was in the employ of the defendant railway as a foreman of a switching crew, and while fulfilling his duties he was killed, by reason of the engine on which he was riding becoming derailed and turning over, the escaping water and steam scalding him. Roe had been sent to Clinton to have his engine cleaned. The orders under which he was sent there included both a running order and a slow order. The slow order was given because the tracks were in very poor repair; the tracks were also covered with snow. On the return trip from Clinton to Altus running orders were given, but no slow order was given, and it was on this trip that the accident occurred. Action for damages was brought and a judgment for plaintiff's administrator followed, whereupon the defendant appealed, alleging assumption of risk. In affirming the judgment against the railway, the court said in part:

The law applicable to the defense of assumption of risk, under the Federal employers' liability act, is that of the common law as it existed prior to the passage of that act, except where the common carrier has violated some section enacted for the safety of employees. Since plaintiff does not contend that the evidence in this case shows that there has been any violation of any such statute, the defense of assumption of risk, as it existed at common law, is open to the defendant.

On the issue of the assumption of risk by a servant who has sustained injuries where the evidence is harmonious and consistent and the circumstances are such that all reasonable men must reach the same conclusion, the question whether plaintiff assumed the risk is one of law for the determination of the court; but, where the facts are controverted or are such that different inferences may be drawn therefrom, the question as to the assumption of risk should be submitted to the jury under proper instructions from the court.

The undisputed evidence in this case is that the defendant company's roadbed was in a bad state of repair, which created an extraordinary risk attributable to the negligence of the company.

It can not be said that, merely because the deceased and the engineer on the switch engine had a slow order on the trip to Clinton, this fact imputed to the deceased knowledge that there were rotten and broken ties and other defective conditions under the snow.

There is also evidence in the record from experienced railroad men that, when an order is given on one trip, it spends its force when the trip is completed, and, if they are directed to return over the same route without the order being renewed or another given, they have a right to assume that the bad places have been repaired; but, notwithstanding the fact that they did not have a slow order, the engineer, Trumbo, testified that he was proceeding slowly over the place of the accident, and, as he thought, with perfect safety. It is well settled that a railroad company is liable to an employee for an injury to said employee proximately resulting from the negligence of the railway company in permitting its tracks to get out of repair and remain in an unsafe condition.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—BAGGAGE AGENT AT STATION—WORKMEN'S COMPENSATION LAW—*Carberry v. Delaware, L. & W. Ry. Co., Court of Errors and Appeals of New Jersey (Nov. 17, 1919), 108 Atlantic Reporter, page 364.*—Carberry was employed by the defendant company as a baggage agent at a station in New Jersey. His duties consisted in meeting all trains, both State and interstate, stopping at the station, receiving from them mail and baggage, and delivering such baggage and mail as was to be put aboard outbound trains. He met a train from Binghamton, N. Y., and received some letters and papers. As the train started he grabbed a handrail, and while running alongside the train speaking to a trainman he struck a snow bank and fell under the train and was killed. His administratrix brought action for compensation under the workmen's compensation act and was granted an award, which on appeal was reversed by the supreme court on the ground that Carberry, when killed, was engaged in interstate commerce, and that the case was governed by the Federal employers' liability act. The administratrix appealed. In affirming the decision the court said, in part:

We agree with the supreme court that the proofs demonstrated conclusively that the decedent was engaged in interstate commerce at the time of his injury and death.

It seems to have been argued in the supreme court that he was not engaged in an act of "interstate commerce," because it is not shown that any of the articles delivered or received came from out of the State or was going out of the State, or that the conversation was upon an interstate matter. But that is not the test. It was plainly part of his interstate duty to meet the train and see if anything of an interstate character had to be done as respected that particular stop, and such interstate relation to the train continued as long as the communication between him and the train was kept up. It can not be said that he was engaged in intrastate commerce for the instant he might be receiving a piece of intrastate baggage, and changed to interstate commerce with the next piece.

Since the decedent at the time he was killed was engaged in interstate commerce, compensation can not be awarded his administratrix under the New Jersey workmen's compensation act, the Federal employers' liability act being exclusive in such case. (*Rounsaville v. Central Railroad Co.*, 90 N. J. Law 176, 101 Atl. 182; *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556 [Bul. No. 246, p. 265].)

The judgment of the supreme court will be affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—COOK INJURED IN CAMP CAR—*Philadelphia, B. & W. R. Co. v. Smith, United States Supreme Court (May 19, 1919), 39 Supreme Court Reporter, page 396.*—Smith was employed by the railway company as a mess cook for a gang of bridge car-

penters. He worked in a camp car, which was moved from place to place over an interstate road as the needs of the bridges on which the carpenters were employed demanded. While at work in the camp car Smith was injured by the negligent act of a locomotive engineer in striking a car next to the camp car, both of which were on a siding. Smith sued under the Federal employers' liability act and recovered judgment. The case was appealed, and the Maryland Court of Appeals affirmed the judgment, holding that the work Smith was doing when injured was interstate commerce work and that he properly sued under the Federal employers' liability act. (Bul. No. 258, p. 75.) Subsequently appeal was again taken, to the United States Supreme Court, and the decision was again affirmed, the court unanimously holding that Smith was employed, as the carpenters were, in interstate commerce, within the meaning of the employers' liability act. Mr. Justice Pitney saying in part:

Taking it to be settled by the decision of this court in *Pedersen v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85], that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. Hence he was employed, as they were, in interstate commerce within the meaning of the employers' liability act.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CROSSING FLAGMAN—*Chicago & A. R. Co. v. Industrial Commission et al.*, Supreme Court of Illinois (June 18, 1919), 124 *Northeastern Reporter*, page 344.—This was a proceeding brought by the administrator of one Clark, deceased, for compensation for his death under the provisions of the Illinois workmen's compensation act. Clark was employed as a crossing flagman on Sangamon Avenue in the city of Springfield where the Chicago & Alton Railroad and Chicago, Peoria & St. Louis Railroad converged and crossed the public highway. An ordinance of the city of Springfield required that the two railways maintain a flagman at this crossing, and pursuant to an agreement between the railroad companies the Chicago & Alton Railroad employed Clark. The tracks were

used indiscriminately by both interstate and intrastate trains. Clark was killed by an interstate train, and his employer claims that he was at the time of his injury engaged in interstate commerce and therefore no recovery could be had under the workmen's compensation law, but that the Federal employers' liability act applied. In reversing the award for compensation and holding that Clark had been engaged in interstate commerce the court said in part:

Several questions are raised and argued in the briefs. It is first necessary to consider and decide whether there can be a recovery in this cause under the Illinois workmen's compensation act (Hurd's Rev. St. 1917, c. 48, secs. 126-152i), or whether the cause is comprehended within the meaning and scope of the Federal employers' liability act (act Apr. 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St., pp. 8657-8665). It is contended by the plaintiff in error that the deceased was employed in interstate commerce and if this position is sustained it will be unnecessary to consider the other questions involved.

The Federal employers' liability act makes it clear that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in interstate commerce under conditions set forth in the act.

In the instant case deceased was engaged in the maintenance of the good order of the tracks of plaintiff in error—one of the instrumentalities used by it in the transportation of goods in interstate commerce.

It has been contended by defendant in error that while the deceased may have been killed by a train engaged in interstate commerce he was not killed by a train of the plaintiff in error; therefore he was not engaged in interstate commerce of his employer. We cannot agree with this view. If an employee is engaged in protecting the instrumentalities of the interstate commerce of his master and is killed in the course of this employment, his injuries arise out of his employment, and the cause is one within the scope of the Federal employers' liability act, regardless of who inflicts the injury causing the death.

We therefore conclude that Thomas Clark, deceased, was at the time of his injury employed in interstate commerce, and that the liability of the plaintiff in error is entirely fixed and governed by the Federal employers' liability act. It follows that the industrial commission did not have jurisdiction of this proceeding, and the circuit court erred in not quashing the proceedings, record, and award of the industrial commission.

The judgment of the circuit court is reversed and the cause remanded.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ELECTRIC STREET RAILWAYS—*Nelson v. Ironwood & B. Ry. & Light Co.*, *Supreme Court of Michigan* (Dec. 27, 1918), 170 *Northwestern Reporter*, page 45.—Nelson was employed

as a motor man by the defendant company, which operated a street railway system between Bessemer, Mich., and the village of Giles, Wis. The railway ran through the city of Ironwood, Mich., where Nelson began his run, which extended to the village of Jessieville, a suburb of Ironwood, and return. When he returned, he turned the car over to another crew, which took it to Hurley, Wis. It will be noticed that the company's business was interstate and Nelson's car was engaged in such business, although Nelson himself did not leave the State of Michigan on his own run. On the day of the accident Nelson had taken his car to Jessieville and was returning when his car's trolley flew off and he was compelled to go to the rear of the car between the tracks to replace it. While manipulating the rope to replace the trolley another car, approaching at a high rate of speed and without warning, struck Nelson's car and caught him between the two cars, injuring him severely. Neither party had elected to come under the workmen's compensation act. Nelson brought action at common law and the defendant company opposes this, claiming that action should be brought under the Federal employers' liability act. Nelson contended that electric street railways did not come under the Federal act and that he was not at the time of his injury engaged in interstate commerce. The court, in holding that the Federal law applied, rendered its decision, in part, as follows:

In our opinion, it must be said that it was the intent of Congress by the act in question to include street railways that were engaged in interstate commerce, and therefore, if it can be said that plaintiff was engaged in interstate commerce at the time of the accident, his action should have been brought under the Federal act.

It is the contention of the plaintiff that, even if it should be held that the defendant, in the operation of its street railway, was under the Federal act, plaintiff was not at the time of the accident engaged in interstate commerce, and was not, therefore, subject to the provisions of that act. With this contention we can not agree. In the instant case the street car on which the plaintiff was employed was an instrumentality clearly engaged in interstate commerce and the case comes within the test laid down in *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, 36 Sup. Ct. 188 [Bul. No. 224, p. 97], where it is stated that the question is:

"Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

The car upon which the plaintiff was employed went from one State into the other, and, the plaintiff being employed thereon, the case is clearly within the test above set forth, and it must therefore be said that he was engaged in interstate commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—FILLING IN ROADBED—*Kinzell v. Chicago, M. & St. P. Ry. Co.*, *United States Supreme Court (May 19, 1919)*,

30 *Supreme Court Reporter*, page 412.—Kinzell was injured while in the employ of the defendant railway company, and he brought action for damages under the Federal employers' liability act. The railway company contends that the work Kinzell was doing was not interstate commerce work according to the statute. The railway company was engaged in filling in a gulch with earth and stones. The gulch was bridged by a trestle and interstate trains passed over it daily. The work had reached such a stage that when earth was dumped alongside the track some of it would sometimes fall back on the rails and between them, necessitating the use of a "bulldozer," which was a contrivance for pushing the earth from the rails and spreading it. Kinzell was employed about this "dozer," and also with a shovel in removing earth and stones from between the tracks. He was injured as a result of the negligent use of the "dozer." The opinion of the court is in part as follows:

With these facts before it, the Supreme Court of Idaho, in its judgment which we are reviewing, reversed the judgment of the lower court in Kinzell's favor solely upon the ground that he was not employed in interstate commerce at the time he was injured, and gave this as the reason for its conclusion:

"We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

It being admitted that the railway company was engaged in interstate commerce, the only question for decision is whether the petitioner was employed in such commerce within the meaning of the act as construed by this court.

In *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85], it is stated that a guide to a decision of such a case as we have here may be found in the questions: Was the work being done independently of the interstate commerce in which the company was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?

He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or as the superintendent of the railway company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it. Thus the case falls plainly within the scope of the decisions which we have cited, *supra*, and, regardless of what might have been said of the fill before, it had clearly become a part of the interstate railway when the petitioner was injured, for it had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and integral part of, the conducting of interstate transportation over the bridge.

We can not doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is therefore reversed and the case remanded for further proceedings not inconsistent with this opinion.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—LOCAL COAL TRAIN—WORKMEN'S COMPENSATION ACT NOT APPLICABLE—*Philadelphia & R. Ry. Co. v. Hancock, United States Supreme Court (June 1, 1920), 40 Supreme Court Reporter, page 512.*—Hancock was killed while working as a trainman for the Philadelphia & Reading Railway Co. His widow brought action for compensation and an award was made in her favor, which on appeal was affirmed by the Supreme Court of Pennsylvania. The company appealed to the United States Supreme Court, declaring that as deceased had been engaged in interstate commerce at the time of his death recovery of damages by his widow must be had under the Federal employers' liability act and not under the State workmen's compensation law. The Supreme Court accepted this view and reversed the decision affirming the award of compensation. The decision of the court as rendered by Mr. Justice McReynolds is in part as follows:

If, when the accident occurred, the husband was employed in commerce between States, the challenged judgment must be reversed, and he was so employed if any of the cars in his train contained interstate freight. (Employers' liability act, Apr. 22, 1908, c. 149, 35 Stat. 65, Comp. St. 8657-8665 [cases cited].)

The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap colliery to Locust Summit yard, two miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number and contained certain code letters indicating that such car with its load would move beyond the State.

Pursuing the ordinary course these cars were hauled to Locust Summit yard and placed upon appropriate tracks; there the duties of the first crew in respect of them terminated. Later, having gathered them into a train, another crew moved them some 10 miles to Shamokin scales, where they were inspected, weighed, and billed to specifically designated consignees in another State. In due time they passed to their final destinations over proper lines. Freight charges at through rates were assessed and paid for the entire distance beginning at the mine.

Respondent maintains that the coal in cars ticketed for transportation as above described did not become part of interstate commerce until such cars reached Shamokin scales and were there weighed and billed. But we think former opinions of this court require the contrary conclusion. The coal was in the course of transportation to another State when the cars left the mine. There was no interruption of the movement; it always continued toward points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another State.

The judgment of the State court was therefore reversed and the cause remanded for a new trial.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—OPERATION OF WATER-PUMPING STATION—*Erie R. Co. v. Collins*, *United States Supreme Court* (May 17, 1920), *40 Supreme Court Reporter*, page 450.—William M. Collins was employed by the Erie Railroad Co. in the operation of a signal tower and a water tank at the town of Burns, N. Y. In the signal tower he set signals for trains engaged in both interstate and intrastate commerce and at the water tank he pumped and supplied water to both interstate and intrastate trains. The water tank was equipped with a gasoline pumping engine. The engine was defective and blew up, seriously injuring Collins and greatly disfiguring him. He brought suit for damages under the Federal employers' liability act and was awarded a verdict by a jury and granted judgment by a Federal district court. The railroad company then appealed to the circuit court of appeals, where the judgment was affirmed, whereupon the company brought the case to the Supreme Court on a writ of certiorari. The sole contention was whether or not Collins was engaged in interstate commerce. The Supreme Court, in holding that he was so engaged, and affirming the decision of the trial court, reviewed the cases cited and concluded:

These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the difference between them is easily recognized and expressed, but, as we have also said, whether at a given time particular instrumentalities or employment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

In the *Pedersen* case (229 U. S. 146, 33 Sup. Ct. 642 [Bul. No. 152, p. 85]) it was said that the questions which naturally arise: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" Or as said in *Shanks v. D., L. & W. R. R. Co.* (239 U. S. 556, 36 Sup. Ct. 188 [Bul. No. 224, p. 97]) was the "work so closely related to it (interstate commerce) as to be practically a part of it?"—The answer must be in the

affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes therefore within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied.

Another case (*Erie R. Co. v. Szary*, 40 Sup. Ct. 454) was decided on the same grounds as the above, where a workman who was engaged in drying sand for engines engaged in both interstate and intrastate commerce was injured while getting a drink of water. It was declared that he was engaged in interstate commerce when injured.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REMOVING OLD RAILS FROM ROADBED—*Kusturin v. Chicago & A. R. Co.*, *Supreme Court of Illinois* (February 20, 1919), 122 *Northeastern Reporter*, page 512.—Kusturin was in the employ of the defendant railroad company which was engaged in interstate commerce. Near Romeo the railroad maintains four tracks, two main and two passing tracks, which are ballasted. Two weeks previous to the accident the rails of these tracks were removed and new ones put in their places. The old rails were allowed to lie upon the roadbed. Kusturin and his fellow employees were engaged in retamping the ties and removing the old rails. While loading an old rail on a flat-car under the supervision of a foreman one end of the rail was thrown too soon causing the rail to fall upon Kusturin's foot and crushing it. He brought action under the Federal employers' liability act for damages and the railroad contested his right to bring the action on the ground that he was not at the time he was injured engaged in interstate commerce. Judgment was allowed to Kusturin and on appeal to the appellate court the judgment was affirmed (209 Ill. App. 55) and the defendant brought error. In affirming the judgment the court said in part:

The law governing the facts of the case considered often presents a close question in this class of cases, and its application to such facts by courts at times seems subtle; but, having in mind that Congress has no power to deal with the question, except under its power to regulate interstate commerce, it will be seen that precision in applying the provisions of the Federal employers' liability act is perhaps justifiable. As this is a Federal question, the views held by the Federal court of last resort are therefore controlling. That court, in the case of *New York Central & Hudson River Railroad Co. v.*

Carr, 238 U. S. 260, 25 Sup. Ct. 780 [Bul. No. 189, p. 92], states the doctrine underlying this class of cases as follows:

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

The court, after reviewing the various cases holding both with and against its decision, continued as follows:

It will thus be seen from this late case that the Federal court took the view that an employee is within the Federal employers' liability act if the employment in which he is engaged at the time of his injury is an incident to interstate commerce, even though it might likewise be an incident to intrastate commerce. In the case at bar the scope of the employment of the plaintiff was that of repairing of tracks. Such repair work is, as we have seen, so connected with interstate commerce as to be a part thereof. The work of loading these old rails, while not the actual work of bolting in new rails, was yet a part of the cleaning-up process made necessary by putting in new rails. This work could not be said to in any way be an incident to intrastate commerce. This case is therefore to be distinguished from those cases where the employment is changed from work which is a part of interstate commerce to that which is a part of intrastate commerce.

We are of the opinion that the removal of such old rails was a part of the general work of repairing the track. The fact that if those old rails remained on the right of way they would not have interfered with the use of the track in interstate commerce is not controlling in determining the question of whether the work of removing them was practically a part of the repairing of the road. As we view the matter, the removal of these old rails was an incident to such repairing and necessary to a proper upkeep of the track. To hold that such work was not a part of repairing the track would be analogous to holding that while the building of a scaffold which surrounds a house under construction is a necessary part of the work of construction, the removal of such scaffold when the house is finished is not. A house surrounded by a scaffold could, no doubt, be used without such scaffold being taken down; but no one would contend that it was not properly a part of the work of completing such a house to remove the scaffold when its presence is no longer necessary. So, in the repairing of the track, the removal of the old rails is analogous to the removing of the tools used in making such repairs or the removal of the hand car on which the materials were conveyed to the place where the work was done. It was within the scope of the work necessary to keep the track and roadbed in that condition which good railroading demands, whether such railroading be interstate or intrastate.

We are therefore of the opinion that defendant in error at the time of his injury was engaged in interstate commerce and therefore came within the purview of the act.

For an opposite conclusion on identical facts, see *Perez v. Union Pacific Co.* (Utah Sup. Ct.), 173 Pac. 236, Bul. No. 258, p. 77.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SAFETY APPLIANCE ACT—INJURY TO SWITCHMAN—*Delaware, L. & W. R. Co. v. Peck, United States Circuit Court of Appeals, Second Circuit (Dec. 11, 1918), 255 Federal Reporter, page 261.*—R. G. Peck was employed as a switchman by the railroad company, and while he was setting a brake on an open coal car at Delawanna, N. J., which was being switched from one siding to another, he was injured, losing his left arm and leg. The coal car had come from Pennsylvania and was consigned to the Thomas A. Hart Co. at Delawanna. When the car arrived this company directed the car to be placed on the stub end of the "old switch," but later they directed that the car be switched from the "old switch" to "Hart siding," and it was during this operation that Peck was injured. Peck brought action under the Federal employers' liability act and recovered judgment, and the railroad brings writ of error to this court on the ground that Peck at the time of his injury was not engaged in interstate commerce. Peck contends also that the Federal safety appliance act was violated in that the brake and brake step of the coal car were defective. In reversing the judgment of the lower court in favor of Peck, the court rendered, in part, the following decision:

Upon the undisputed facts we think the plaintiff was not engaged in interstate commerce, and that the interstate journey had ended at least when the car was placed by the direction of the Hart Co. at the stub end of the old switch, and that the judge should have so held as a matter of law. All switching thereafter in the yard for the convenience of the consignee was intrastate commerce. This is in accordance with our understanding of the decision of the Supreme Court in *Lehigh Valley Railroad Co. v. Barlow*, 244 U. S. 183, 37 Sup. Ct. 515 [Bul. No. 246, p. 95], reversing the decision of the Court of Appeals of the State of New York.

But it is contended that, even if the plaintiff were engaged in intrastate commerce, the defendant is absolutely liable under the Federal safety appliance act, without regard to any question of negligence, because the car was not equipped with an efficient hand brake and proper brake step. This act laid down requirements as to railroad equipment with which all carriers engaged in interstate commerce must comply under the penalty of \$100 for each and every violation. Of course, one of the class intended to be protected by the act injured by the failure of a carrier to comply with it is entitled to recover damages (*Texas & Pacific Railway Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482), but not under the Federal employers' liability act, unless he were at the time engaged in interstate commerce, which this plaintiff was not.

At this point the court stated that the injury was received in the State of New Jersey, in which the status of employer and employee is fixed by the workman's compensation law, "which we regard as

excluding all other jurisdictions,"¹ thus also precluding a common-law action, capable of being brought wherever the defendant could be found. Section II of the compensation law regulates elective compensation, which is presumed in the absence of positive action to the contrary. Proceeding, the court said:

The answer sets up this act as a defense and alleges that there was no provision in the contract that section II should not apply, and that the plaintiff had given no notice to the defendant before the accident; wherefore he could not maintain the action. At the trial the defendant offered to prove these allegations, but the court refused to permit it, and the defendant excepted. We think this was error. The New Jersey act creates a system to be enforced by the court of common pleas of the county of New Jersey which would have jurisdiction in a civil case. The employee is required to give notice of the injury to the employer within a fixed time. The compensation to be paid for the loss of a leg or a hand is a fixed proportion of the employee's daily wages for a fixed number of weeks, and this compensation may be commuted by the court of common pleas into one or more lump sums. That court is also to settle at the request of either of the parties any dispute about compensation. For these reasons we are of the opinion that the plaintiff can not maintain this action in the District Court for the Southern District of New York. There are some decisions of the courts of New York to a similar effect. The judgment is reversed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—SWITCHMAN—*Wangerow v. Industrial Board, Supreme Court of Illinois (Dec. 18, 1918), 121 Northeastern Reporter, page 724.*—William Wangerow was employed by the Chicago Junction Railway Co., which was engaged in the business of switching cars for meat packers in the vicinity of the Union Stock Yards in Chicago. Wangerow went to work one morning and assisted in switching a train of cars containing some interstate business. His engine then proceeded without any cars to get water and another train also containing interstate shipments, and while so proceeding he was thrown from the front fender of the engine and was run over, sustaining injuries which resulted in his death. His widow brought proceedings under the workmen's compensation act of Illinois, but the industrial board refused to grant an award, whereupon she applied for a writ of certiorari and the case was certified to the supreme court. In affirming the decision of the industrial board the court said in part:

The question to be decided is whether the workmen's compensation act of Illinois or the Federal employers' liability act applies.

¹ An opposite conclusion is reached in *Ross v. Schooley*, p. 138. See also the case of *Texas etc. R. Co. v. Rigsby* (cited above), Bul. No. 224, pp. 206, 207.

If Wangerow was engaged in interstate commerce at the time of his injury, then the Federal act applies and there is no liability under the Illinois workmen's compensation act.

Whether the work done is interstate or intrastate depends upon the immediate purpose for which such work is done.

In the case at bar the crew of which Wangerow was a member was at the time of the accident moving the engine, with no cars attached, from the work of setting the Laurel Street train, containing interstate cars, back toward Ashland Avenue for the purpose of there moving the State Line train, also containing interstate cars. In each case the moving of these trains was an act of interstate commerce. The only purpose in crossing over the tracks where the injury occurred was to move the engine from the point of completion of one act of interstate commerce to the point of commencement of another act of interstate commerce. That purpose controls, and Wangerow was engaged in interstate commerce at the time of the injury. This being true, the workmen's compensation act of Illinois did not apply.

EMPLOYER'S LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—WORK ON POWER LINE SUPPLYING ELECTRICITY TO INTERSTATE TRAINS—WORKMEN'S COMPENSATION—*Southern Pacific Co. v. Industrial Accident Commission of California et al.*, *United States Supreme Court* (Jan. 5, 1920), *40 Supreme Court Reporter*, page 130.—A lineman by the name of William T. Butler was killed by an accident arising out of and in the course of his employment with the Southern Pacific Co. Butler was engaged in wiping insulators on a steel tower which supported electric wires that supplied the company's electric trains when he received a shock and was thrown from the tower, receiving injuries from which he later died. The company's trains were engaged in both interstate and intrastate commerce, and the electric wires from which Butler received the shock were on the main line and supplied this traffic with power. The only point in dispute is whether the work Butler was performing was a part of interstate commerce, and thus without the scope of the workmen's compensation act of California (Stat. 1917, p. 831). The California Supreme Court affirmed the award of the industrial commission holding that the work Butler was performing when he was killed was not in interstate commerce (171 Pac., 1071, Bul. No. 258, p. 221). In arriving at this decision the State court relied on *Chicago, B. & Q. R. Co. v. Harrington* (241 U. S. 177, 36 Sup. Ct. 517, Bul. No. 224, p. 105), where the United States Supreme Court held that the removing of coal from a storage track to a loading shed for the use of interstate trains was not work in interstate commerce. The Southern Pacific Co. brought certiorari, and the judgment of the Supreme Court of California was reversed. The decision is in part as follows:

Generally when applicability of the Federal employers' liability act is uncertain the character of the employment in relation to commerce may be adequately tested by inquiring whether at the time of the injury the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. (*Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 151, 33 Sup. Ct. 648 [and other cases cited].)

Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation and an essential part of it.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIABILITY OF THIRD PARTY—JOINDER OF PARTIES—*Cott v. Erie R. Co. et al.*, *Supreme Court of New York, Appellate Division, Fourth Department* (Dec. 5, 1919), 179 *New York Supplement*, page 488.—The Buffalo Creek Railroad Co. connected the railway lines of the Erie Railroad with those of the Lehigh Valley Railway and was operated under a lease jointly by both railroads. Cott was employed by the Lehigh Valley Railroad Co. and was killed in the course of his employment while engaged in interstate commerce. The accident occurred on the Buffalo Creek Railroad and was due to the negligent act of leaving open a switch connecting the main track with a lumberyard spur. Cott's administratrix brought action against both the Erie and the Lehigh Valley Railroads, against the Erie at common law and against the Lehigh Valley under the Federal statute, and recovered judgments against both. The Erie Railroad Co. claims that the court erred in not permitting the Federal employers' liability act to be applied to it. The decision of the court affirming judgment is in part as follows:

The duty of keeping the track and switch in proper condition for use rested upon the Lehigh and Erie companies jointly as lessees and operators of the Buffalo Creek Railroad Company, but plaintiff's intestate being at the time an employee of the Lehigh and engaged with it in interstate commerce the liability of the Lehigh is governed exclusively by the Federal employers' liability act, and the negligence relied on and submitted to the jury is by reason of a "defect or insufficiency" in its "tracks and roadbed" being one of the grounds of liability in section 1 of the Federal act. But as the relation of master and servant did not exist as between the Erie Company and plain-

tiff's intestate, the Federal act does not apply or affect the liability of the Erie Company, which is governed by the common law.

In behalf of the Erie Company it is urged on this appeal that plaintiff's sole remedy is under the Federal employers' liability act, and that, recovery under that act having been had by the jury's verdict against the Lehigh, there can be no further recovery against the Erie. It is quite true that the Federal act is controlling in cases where it applies, and that the liability imposed by that act is exclusive of all other liability as between an injured employee and his employer, but the act has no application whatever to an injury inflicted upon an employee engaged in interstate commerce by a third party who is not an employer.

The judgments were therefore affirmed.

On this hearing the point was raised that the joinder of the common-law and statutory actions was improper. The court admitted that it was subject to demurrer to the complaint, but no action having been timely taken the question could not now be raised.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—LIABILITY OF THIRD PARTY—JOINDER OF PARTIES—EMPLOYER AND FELLOW SERVANT—*Lee v. Central of Georgia Ry. Co. et al., Supreme Court of the United States (Mar. 1, 1920), 40 Supreme Court Reporter, page 254.*—Lee was injured while in the employ of the Central of Georgia Railway Co., being at the time engaged in interstate commerce. He claimed that his injuries were the result of the joint negligence of the employer and an engineer. He sued both of them jointly to recover damages from the company under the Federal employers' liability act (Comp. St., secs. 8657-8665) and from the individual defendant under the common law. Lee stated his cause of action in a single count against both defendants. The defendants demurred on the ground of misjoinder of causes of action, but the demurrers were overruled and judgment was rendered for the plaintiff, whereupon the defendants appealed. The Georgia Court of Appeals certified the case to the State supreme court, which declared the joinder not permissible. The court of appeals then reversed the decision of the trial court, and Lee appealed to the United States Supreme Court, declaring that he was being deprived of his rights under a Federal law. The United States Supreme Court affirmed the decision reversing the trial court. The following is in part the opinion handed down by Mr. Justice Brandeis:

The Federal employers' liability act does not modify in any respect rights of employees against one another existing at common law. To deny to a plaintiff the right to join in one count a cause against another employee with a cause of action against the employer in no way abridges any substantive right of the plaintiff against the employer. The argument that plaintiff has been discriminated

against because he is an interstate employee is answered, if answer be necessary, by the fact that the Supreme Court of Georgia has applied the same rule in *Western & Atlantic R. R. et al. v. Smith*, 144 Ga. 737, 87 S. E. 1082 (22 Ga. App. 437, 96 S. E. 230), where it refused under the State employers' liability act (Civ. Code 1910, 2782 et seq.) to permit the plaintiff to join with the employer another railroad whose concurrent negligence was alleged to have contributed in producing the injury complained of. If the Supreme Court of Georgia had in this case permitted the joinder, we might have been required to determine whether, in view of the practice prevailing in Georgia, such decision would not impair the employer's opportunity to make the defenses to which it is entitled by the Federal law. For, as stated by its supreme court in this case (147 Ga. 428, 431, 94 S. E. 558, 560):

"If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, section 4512 (providing for verdicts in different amounts against the several defendants), is not applicable to personal torts."

But we have no occasion to consider this question. Refusal to permit the joinder did not deny any right of plaintiff conferred by Federal law.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SAFETY APPLIANCE ACT—GRAB IRONS ON CARS—*Boehmer v. Pennsylvania R. Co.*, *United States Supreme Court* (Apr. 19, 1920), 40 *Supreme Court Reporter*, page 409.—Boehmer was employed by the defendant company as a brakeman. While working about his train at night he became injured. The injury occurred when Boehmer attempted to board a car which had grabirons only on diagonal corners, he having in the darkness reached for a grabiron on a corner of the car where there was none, under the mistaken belief that the car was equipped with grabirons on all four corners. He claimed that the car was improperly equipped and sued under the Federal safety appliance act. In affirming the judgment of the circuit court of appeals in favor of the defendant (252 Fed. 553, 165 C. C. A. 3), Mr. Justice McReynolds, expressing the opinion of the court, said in part:

Section 4 of the safety appliance act of 1893 (27 Stat., 531 Comp. St. 8608), provides:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure

grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Petitioner insists that the act of 1893 was designed for the safety of employees and specified grabirons or handholds in the end and sides of each car as one of the essential requirements. That while it did not specifically command that these should be placed at all four corners, this was the obvious intent. But the courts below concurred in rejecting that construction, and we can not say they erred in so doing. Section 4 must be interpreted and applied in view of practical railroad opinions; and having considered these the courts below ruled against petitioner's theory.

Likewise, we accept the concurrent judgment of the lower courts, that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. (*Chicago Junction Railway Co. v. King* 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173.)

The judgment is affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—INTERSTATE COMMERCE—REPAIRING LOCOMOTIVE—*Chicago, R. I. & P. Ry. Co. v. Cronin*, *Supreme Court of Oklahoma* (Dec. 10, 1918), 176 *Pacific Reporter*, page 919.—Cronin, who was employed as a coach cleaner by the railroad company, was directed to aid in jacking up an engine. He and one other man proceeded to do this, but were unsuccessful owing to the fact that it was too heavy for them. Cronin's assistant let go without notice and the lever came down with a jerk, striking Cronin and injuring him. The engine was one regularly used in interstate commerce, but was at the time in a roundhouse for repairs. The court, in affirming a judgment in favor of Cronin in an action brought under the State employers' liability act, said in part:

It is contended that the judgment must be reversed for the reason that the trial court tried the cause as governed by the laws of the State and not the Federal liability act; the theory of the company being that Cronin was engaged in interstate commerce because he was working on an engine which, when in service, pulled an interstate passenger train. The engine had been taken out of service and placed in the shop for repairs. It was not being used in commerce of any kind; it was "dead." The fact that the repairs had been made and the engine placed back in service in time to make its regular trip from Sayre, Okla., to Amarillo, Tex., does not necessarily mean that the engine was not out of service in the meantime. We can not agree with the plaintiff in error (railway company) that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was "dead," undergoing the repairs necessary to placing it in commerce.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCE ACT—INTERSTATE COMMERCE—EFFECT OF STATE COMPENSATION ACTS—*Ross v. Schooley, United States Circuit Court of Appeals, Seventh Circuit (Jan. 7, 1919), 257 Federal Reporter, page 290.*—Schooley, an employee of the defendant (appellant here), met his death in Illinois by reason of defective car couplers. Ross is the receiver for the Toledo, St. Louis & Western Railroad Co. Schooley's administratrix omitted to aver and prove that at the time of the accident he was engaged in interstate commerce. Because of this Ross contends that Schooley's exclusive right and remedy were under the Illinois workmen's compensation act. The railroad on which Schooley was working was an interstate railroad engaged in interstate business, but at the time of the injury Schooley was working on intrastate cars. On the question of the necessity that the plaintiff, in order to recover under the Federal safety appliance act, must have been himself engaged in interstate commerce at the time of the injury, the court, affirming the decision of the lower court in favor of the plaintiff, said in part:

Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the safety appliance act, no State legislature can alter or impair the Federal right by passing compensation acts.

It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employees and travelers, regardless of their participation in interstate commerce. A State legislature therefore has no more power to curtail the Federal right of an employee than of a traveler.

What effect a State compensation law has upon the right under the safety appliance act of an employee, who was injured through defective appliances while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result that would make the operativeness of the act dependent upon legislative wills of the several States, and which aligns that act with the employers' liability act in substantive and procedural effect, is supported by our understanding of *Schlemmer v. Buffalo etc. Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407 [Bul. No. 71, p. 385]; *New York etc. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546 [Bul. No. 246, p. 260].

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—SAFETY APPLIANCE ACT—POWER BRAKES—*Hodgman v. Sandy River & B. L. R., Supreme Judicial Court of Maine (June 18, 1919), 107 Atlantic Reporter, page 30.*—This was an action for damages by the widow of Hodgman for the death of her husband who had been an engineer in

the employ of the defendant. Hodgman's death occurred by the derailment of a locomotive which he was operating. It appears that although the locomotive had been equipped with a device to make it balance more evenly on its springs, the Federal safety appliance act of 1893 (ch. 196, 27 Stat. 531), requiring that locomotives engaged in interstate commerce must be equipped with power driving wheel brakes, had not been complied with. The defendant railroad in appealing claims that it had made a substantial compliance with the safety appliance law and that the deceased had been negligent in running the engine too fast. In deciding the points the court said in part:

The defendant's counsel frankly admits that "technically the defendant was in violation of the safety appliance act" (U. S. Comp. St., secs. 8605-8612) and argues that improvements were made which amount to a substantial compliance with the statute, but we find no warrant for saying that a mechanical contrivance for equalizing the distributing of the weight on the springs, an improvement in no way affecting the speed of any engine, is a substantial compliance with the statute requirement that the engine shall be equipped with a power-driven wheel brake.

Counsel further argues that an additional and vital question was, "Did the absence of the driver brakes from the engine contribute in whole or in part to the speed of the train?" and insists that it did not. This, like all the other questions here noted, was the subject of very careful inquiry both in the examination in chief and in cross-examination, and was necessarily, from the very nature of the case, a leading question, and as necessarily associated with all the other questions submitted to the jury. That it was submitted to the jury with proper instruction is apparent.

In our view there can be no such thing as substantial compliance shown to relieve the defendant from strict compliance with the statute.

The judgment was therefore affirmed.

EMPLOYERS' LIABILITY—RELEASE—EFFECT OF RELEASE AS TO SURGEON CHARGED WITH MALPRACTICE—*Hooyman v. Reeve, Supreme Court of Wisconsin (Jan. 7, 1919), 170 Northwestern Reporter, page 292.*—The plaintiff Hooyman was injured while in the employ of the Appleton Coated Paper Co. and Dr. Reeve was employed as physician and surgeon of the company to attend his injuries. Some time after the injuries were sustained Hooyman executed a release to the Appleton Coated Paper Co. for the consideration of \$3,000 by which he acknowledged full satisfaction and discharge of all claims, accrued or to accrue, in respect to all injuries or injurious results, direct or indirect, arising from or to arise from the injuries sustained by him. This action is now brought by Hooyman for the malpractice

of the doctor, Reeve. The defendant Reeve claims that the release to the paper company operates as a release as to him also. The lower court granted the plaintiff judgment. On appeal this court reversed the lower court, speaking in part as follows:

Now it seems clear from the facts stated in the answer including the release that the plaintiff accepted the payment mentioned in the release in full satisfaction for all injuries sustained, including the injuries caused by the alleged malpractice. The plaintiff being paid for all damages which he sustained, has no cause of action against the defendant for the same claim or any part of it.

The receipt is very broad, and manifestly was intended to cover all damages sustained by plaintiff, as well for the alleged malpractice as for the original injuries. The receipt acknowledges "full satisfaction and discharge of all claims, accrued or to accrue, in respect to all injuries or injurious results, direct or indirect, arising or to arise from" the accident in question. The plaintiff obtained satisfaction for injuries sustained, and is entitled to but one satisfaction.

We are convinced that the answer set up a good defense, and that the demurrer (to it by plaintiff) should have been overruled.

EMPLOYERS' LIABILITY—RELEASE—EFFECT OF RELEASE AS TO SURGEON GUILTY OF MALPRACTICE—*Purchase v. Seelye, Supreme Judicial Court of Massachusetts (Dec. 30, 1918), 121 Northeastern Reporter, page 413.*—Edward R. Purchase was injured while in the employ of the Boston & Albany Railroad. His injury was a rupture in his right groin and he went to the defendant physician for treatment. Dr. Seelye, the defendant surgeon, performed an operation on the plaintiff's left side. When the plaintiff called the surgeon's attention to this fact the surgeon said that he had mistaken him for another patient who had hernia in his left side. Later Purchase, the plaintiff, executed a release to the railroad company "of all claims and demands" he might have against it as a result of the injury sustained while working on the road "arising or which may arise out of said injury." He then brought action for damages against the surgeon for negligent treatment and recovered judgment, which on appeal was affirmed. The defendant surgeon claimed that the release to the railroad company operated as a release to him also. The court below adopted this view, and the plaintiff excepted. The supreme court sustained the exceptions, saying in part:

The railroad company could not be held liable because of his mistaken belief that he was operating upon some other person other than the plaintiff; such a mistake was not an act of negligence which could be found to flow legitimately as a natural and probable consequence of the original injury, and a ruling in effect to the contrary could not properly have been made. The fact that the mistake made

by the defendant might possibly occur is not enough to charge the railroad company with liability; the unskillful or improper treatment must have been legally and constructively anticipated by the original wrongdoer as a rational and probable result of the first injury. This is the true test of responsibility, and it can not be extended to cover the facts in the present case as shown by the record.

We are of the opinion that the act of the defendant in operating on the wrong side was a wholly wrongful, independent, and intervening cause for which the original wrongdoer was in no way responsible.

If we assume that the release is valid and a bar to any claim which the plaintiff had against the railroad company, still a majority of the court are of the opinion, for the reasons stated, that it is not a defense to the present action and was not admissible in evidence.

The finding of the court below that the release was a bar to the suit against the surgeon was therefore overruled.

EMPLOYERS' LIABILITY—RULES OR ORDERS OF EMPLOYERS TO EMPLOYEES—COMPLYING WITH COMMAND CAUSE OF INJURY—*Fillippon v. Albion Vein Slate Co., United States Supreme Court (May 19, 1919), 39 Supreme Court Reporter, page 435.*—The action was brought by Donato Fillippon, a former employee of the defendant, for damages for the loss of his right arm. Fillippon was employed as a "rubbish man" or general laborer by the defendant company about its slate quarry. When large blocks of slate were blasted loose it became necessary to block them up in order that chains might be placed around them. It was customary when it was necessary to push a wedge or block far under the block to do so with the aid of a stick. Fillippon was placing some wedges under a large block of slate when it became necessary to use a stick. He requested permission from the foreman to get a stick, but was commanded to place the wedge under the block with his hand. While he was doing this the rock slipped and fell upon his arm, crushing it so that it had to be amputated. The circuit court of appeals affirmed a judgment of the trial court, which had refused to allow damages on the ground that he was guilty of contributory negligence. In reversing this decision and sending it back for further proceedings the court rendered an opinion in part as follows:

The case was governed by the law of Pennsylvania, where the injury was received and the trial took place. (Rev. Stat., sec. 721 (Comp. St., sec. 1538).) The law of that State, as it stood when the cause of action arose, is expressed in repeated decisions of its court of last resort to the following effect:

"Where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much

so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

In the present case the trial judge recognized this to be the applicable rule of law when originally instructing the jury, for he said:

"Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous."

But this was neutralized and the jury probably led astray, when in the supplementary instruction they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the heavy block of slate with his hand, he fully appreciated the attendant danger and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent, that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to "go ahead, go ahead"; and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous.

The judgment refusing damages was therefore reversed and the case remanded for a new trial.

EMPLOYERS' LIABILITY—SAFE APPLIANCES—DEFECTIVE TOOL—*Arkansas Cent. R. Co. v. Goad*, *Supreme Court of Arkansas* (Nov. 18, 1918), 206 *Southwestern Reporter*, page 901.—Goad was an experienced railroad section hand. He was employed by the defendant railroad company in that capacity and was put to work nipping ties while other employees spiked the rails to the ties. To do this work one placed an iron bar, called a lining bar, under the tie and raised it up so that it rested firmly against the rail. Goad was given an old and worn lining bar with which to perform the service. The tool had been in use for over 20 years and had never been inspected or repaired, and as a result it was worn smooth and defective. While nipping a tie Goad's bar slipped and he fell 3 or 4 feet against a jack, injuring his side and resulting in traumatic pneumonia. Goad

brought this action for damages and recovered in the lower court. On appeal the judgment was affirmed, the court saying in part:

Counsel for the company invokes what is commonly called the "simple-tool doctrine," and cites in his brief cases from other courts holding that certain tools are of a nature so simple as that no duty of inspection or repair is due the servant from the master, and we are asked to say as a matter of law that the lining bar which the appellee was using at the time of his injury was a tool of this character. We are, however, unable to accept this view. We said in the case of *Arnold v. Doniphan Lbr. Co.*, 130 Ark. 486, 198 S. W. 117, that the simple-tool doctrine, as such, had never had recognition by this court, and in the case of *C. R. I. & P. Ry. Co. v. Smith*, 107 Ark. 512, 156 S. W. 166, we said that no hard and fast rule could be laid down by which the courts could determine in a given case whether or not a tool or appliance furnished a servant for his use was of a nature so simple that the master, exercising ordinary care in furnishing his servants reasonably safe tools with which to perform their work, should have inspected it. We think that the case of *Railway Co. v. Smith*, supra, is similar in principle to the instant case, and announces the doctrine which is controlling here. That was a case in which the defective tool was a hammer, and it was there insisted (as here insisted) that no duty of inspection was owing to the servant. We there said that:

"Neither can we say, as a question of law, that under all the facts and circumstances adduced in evidence that an unskilled laborer of ordinary intelligence should have known that the hammer was defective and should have known and appreciated the dangers that he was exposed to by reason thereof."

EMPLOYERS' LIABILITY—SAFE INSTRUMENTALITIES—GUARDS FOR COGWHEELS—AGRICULTURAL WORK—CORN SHELLER—*Hainer v. Churchill*, *Supreme Court of Iowa*, (Sept. 16, 1919), 173 *Northwestern Reporter*, page 882.—The defendant Churchill owned a steam-traction engine, which he used for corn shelling, road grading, threshing of grain, and similar work. He employed Hainer to operate the engine and assist in the work performed. While engaged in shelling some corn Hainer was seriously injured by having his hand caught in the exposed cogs of the sheller and so crushed that the hand had to be amputated. Hainer sued for damages under a statute (Iowa Code Supp., sec. 4999a2) providing in part as follows:

It shall be the duty of the owner, agent, superintendent, or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and * * * all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded.

He was allowed damages and the defendant appealed, claiming that a proper interpretation of the phrase "manufacturing or other establishment" would exclude his work from the scope of the law, because he was not engaged in manufacturing or any similar work. The court refused to take this view, declaring that the statute should be given a broad interpretation, but ruled, however, that the statute was not intended to cover agricultural machinery and reversed the decision. The opinion in part is as follows:

In these days there are very few lines of human labor in which the aid of machinery is not more or less common. In agriculture, in which, until more recent years, other motive power than that of man and his domestic animals was unknown, the employment of steam, gas, and electricity is becoming increasingly common, and the machinery for farm work becomes more and more varied. So, too, the agricultural laborer who serves others for hire is able often to equip himself with machines and power appliances by which he accomplishes larger results in materially less time than was possible under more primitive conditions.

But there is a material distinction which every one recognizes between employments in agriculture and employments in manufacture, mechanics, and other industrial pursuits having no immediate connection with or dependent upon the cultivation of the soil. The distinction is clear, though there may be and are border-line instances, where it may become confused in application. The reason for the statutory protection afforded by Code Supp., p. 4999a2, is very persuasive as relates to the latter class, but is by no means so apparent in the former. In the former, machinery is much more universally employed; it is much more complicated and employees in vastly greater numbers work about it and are exposed to its dangers. This distinction is impliedly recognized in the statute, and in so far as machinery and employees are engaged in strictly agricultural or farm labor we are of the opinion the law to which we have referred has no application. That corn shredding by machinery falls within the class of agricultural or farm labor has already been decided by this court. (*Slycord v. Horn*, 179 Iowa, 936, 162 N. W. 249.) And there is no sound reason for otherwise classing the work of corn shelling. The job which defendant undertook to perform for Augustine was a farm labor, and plaintiff in assisting therein was engaged in an agricultural employment, and he has no right of action under the provisions of Code Supp., p. 4999a2.

EMPLOYERS' LIABILITY—SAFE PLACE—FIRE ESCAPES—CONSTITUTIONALITY OF STATUTE—*Dotson v. Louisiana Central Lumber Co.*, Supreme Court of Louisiana (Nov. 4, 1918), 80 Southern Reporter, page 205.—This action is a suit for damages by Bertha Dotson for the death of her husband while in the employ of the defendant company. Dotson had been employed by the lumber company as a saw filer and was put to work on the third floor of the company's mill. The mill was not provided with fire escapes and there was

only one method of egress from the third floor, which was an internal stairway. A fire broke out between the first and second floors which was accompanied by a dense smoke which ascended some hand-saw shafts and speedily enveloped the building. Dotson was caught on the third floor and was presumably asphyxiated and burned to death. The company defends itself on the ground that the plaintiff failed to allege the particular facts from which she deduces that the fire originated through defendant's negligence; and on the ground that the fire escape law which it had violated is unconstitutional. Judge Leche, in affirming the judgment of the lower court in favor of the plaintiff, said in part:

In the present case the deceased, an employee of the defendant, was carrying out the duties of his employment in the place provided by his employer for the performance of such duties when he was overwhelmed and lost his life by a fire which was kindled out of his sight, in appliances under the control and in the presence of defendant's agents. Under these circumstances, such an unusual fire must be presumed to have originated through defendant's fault, and its cause is certainly more properly within the knowledge of defendant than of the plaintiff. We are therefore of the opinion that the doctrine of *res ipsa loquitur* most aptly applies to this case, and that the burden is upon the defendant to clear itself of imputed negligence.

Defendant's attack upon the constitutionality of act 171 of 1914 rests on the assertion that it creates a civil liability by one person or class of persons in favor of other persons, that no mention thereof is made in the title, and therefore that the provision creating such liability contravenes the provisions of article 31 of the constitution. Defendant further contends that said act is not self-operative and not alleged to have been made operative by the State labor commissioner or the State fire marshal, and therefore that its provisions can not be invoked against it in this case.

The purpose of the act, as clearly stated in its title, is to preserve the safety of persons from the dangers of fire and panic in certain buildings. The several provisions in the body of the act make it the duty of owners of buildings having more than two stories to erect fire escapes, and the specifications for such fire escapes are minutely detailed. The duty to erect such fire escapes is mandatory except where the State labor commissioner finds that such fire escapes are not necessary. We do not understand the act to say or to mean that the duty to erect fire escapes only arises or comes into existence after notice by the State labor commissioner or fire marshal has been served upon the owner of the building, though it may be that before an owner may be criminally prosecuted such notice may be served upon him. We are therefore clearly of the opinion that the duty to erect fire escapes is imposed upon owners of such buildings by the law itself, without action or intervention either by the State labor commissioner or the fire marshal, and to that extent the act is self-operative. The nonperformance of that duty then becomes negligence *per se*. It seems equally clear to us that the provision

of section 4 of the act, which does not create but only recognizes a right of action for damages, is constitutional and not in contravention of article 31 of the constitution. If the last paragraph of section 4 were effaced and eliminated from the act, defendant's alleged liability, resting upon the provisions of article 2315, C. C., would not be thereby affected or lessened.

Judge O'Niell concurred in the decree but disagreed that the doctrine of *res ipsa loquitur* should apply to the case, stating that in his opinion the violation of the fire escape law was sufficient to uphold the plaintiff's case.

EMPLOYERS' LIABILITY—SAFE PLACE—SCAFFOLDING—*Propulonris v. Goebel Const. Co., Supreme Court of Missouri, Division No. 2 (July 5, 1919), 213 Southwestern Reporter, page 792.*—Propulonris was a common laborer in the employ of the defendant company. He and three other workmen were working on a scaffold suspended by chains from the roof of the building in which they were working on some concrete forms when the scaffold or platform gave way and precipitated the men to the floor below. Plaintiff was injured in this fall and upon bringing suit therefor recovered damages. The defendant employer appealed claiming the plaintiff was required and had failed to prove any specific act of negligence on its part. The court affirmed the judgment in favor of Propulonris and said in part:

However, was it necessary to prove a specific act of negligence as the cause of the falling of the scaffold? Where the statute imposes a duty to provide safety appliances of any kind for protection of persons from injury, the failure of the duty imposed is negligence per se.

It is contended by the defendant that besides the mere fact that the platform gave way there would have to be some proof of a specific defect in it. The statute, section 7843, requires that the structure "shall be well and safely supported * * * and so secured as to insure the safety of persons working thereon." The use of this language would indicate that a collapse or giving way of such platform and consequent injury would raise a *prima facie* presumption that the employer had failed of his duty and would place the burden upon him to show that it gave way without any negligence on his part.

EMPLOYER'S LIABILITY—SAFE PLACE—WARNING TO WORKMEN—POISONING FROM HANDLING CREOSOTED TIES—*Collins v. Pecos & N. T. Ry. Co., Commission of Appeals of Texas (May 28, 1919), 212 Southwestern Reporter, page 477.*—While in the employ of the defendant railway company and at work in charge of a section gang of laborers which was engaged in unloading some railroad ties which had been

treated with a preservative known as "creosote" and which were still wet, Collins, the plaintiff, got his face and hands poisoned as a result of contact with the wet "creosote." The poison caused constitutional disorders in Collins, so that he was permanently injured. Judgment was awarded to plaintiff, but on appeal the decision of the lower court was reversed by the court of appeals on the ground that "creosote" not having been known by chemists or physicians to cause constitutional disorders before, such effect on Collins could not have been foreseen so as to require the defendant company to warn him of the danger. In reversing the court of appeals and affirming the judgment of the trial court in favor of Collins, the commission of appeals said in part:

We believe that the correct rule for determining negligence is that where there is reason to anticipate, from the character of the services required and the manner of their performance, some injury may result to the servant the duty is incumbent to exercise such care demanded by the relationship as will prevent the injury, and the failure so to do becomes actionable in the event injury follows the breach of duty. We are not willing to subscribe to the rule that requires the master to anticipate all ensuing results which flow from the breach before duty arises to exercise care to prevent the consequences. Anticipation is applied in the determination of negligence vel non. If no injury may be anticipated, no duty is breached by a failure to exercise care; but if anticipated injury may result, then the duty arises. Negligence rests primarily upon two elements: First, reason to anticipate injury; and, second, failure to perform the duty arising on account of that anticipation. Negligence may exist abstractly, but to render it actionable it must be concretely incorporated into some injury.

In the instant case defendant's negligence caused anticipated injury. The testimony is conflicting as to whether the permanent injuries flowed from that negligence naturally and were the proximate consequences of same. There is evidence in the record requiring the submission of this question to the jury, and upon which it was authorized to find that issue for the plaintiff.

EMPLOYER'S LIABILITY—WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASES—*Zajkowski v. American Steel & Wire Co., United States Circuit Court of Appeals, Sixth Circuit (Dec. 5, 1918), 258 Federal Reporter, page 9.*—Mike Zajkowski was employed by the defendant company and for two years had been intrusted with the operation of a rolling mill. The rolls he operated were used to turn out a high grade of steel sheets, which before coming to the mill were treated with various oils and chemicals and upon leaving the mill were very shiny and glossy, "almost as bright as a mirror." Plaintiff was compelled in the performance of his duties and the inspection of his work to strain his eyesight more and more as time went on. This

was due to the glare of strong lights reflected from the bright metal. Finally the combined action of the chemicals used to treat the metal and the excessively bright lights reflected into his eyes caused plaintiff to lose his eyesight and his health, so that he was no longer able to work. He sued defendant for damages. Judgment was rendered in favor of the employer on the ground that under the workmen's compensation act of the State (Ohio), it was immune from any right of action. In reversing this judgment the court held, in part:

In the view of the learned trial judge, the workmen's compensation act (102 Ohio Laws, p. 524) gave to defendant immunity from any right of action that might otherwise have accrued to plaintiff under the facts alleged in his petition. Laying that act to one side for the present, we think the petition states facts constituting a cause of action for damages due to an occupational disease which was incident to the work plaintiff was performing. Diseases of occupation have been the subjects of much concern and investigation both abroad and in our own country. Such diseases, of course, signify causes and conditions, whether natural or artificial, which attend the performance of work and injuriously affect the persons exposed.

The case set out in the petition falls well within principles of the common law. The general rule is that where an employer places and continues an employee for a substantial length of time in the regular performance of work and under conditions which, in the absence of preventive means and precautions, are calculated to engender in the employee a disorder of serious and injurious character, regardless of the name by which the disease is known, it is the duty of the employer to warn and instruct the employee as to the dangers and to furnish him with reasonably effective means to avoid them, and where as the direct result of failure to perform this duty an employee in the exercise of reasonable care suffers injury through a disorder so contracted, he is entitled to recover. (*Wiseman v. Carter White Lead Co.*, 100 Nebr. 584, 160 N. W. 985; *Thompson v. United Laboratories Co.*, 221 Mass. 276, 108 N. E. 1042; *Fox v. Peninsular etc. Works*, 84 Mich. 676, 48 N. W. 203; *Wagner v. Jayne Chemical Co.*, 147 Pa. 475, 23 Atl. 772; *Meany v. Standard Oil Co.* (N. J.), 55 Atl. 653; *Pigeon v. Fuller*, 156 Calif. 691, 105 Pac. 976.)

Furthermore, recognition of the right of recovery upon facts such as are stated in the instant case is found in both constitutional and statutory provisions of Ohio. By amendment of September 3, 1912, to article 2 of the Ohio constitution (Page's Annotated Constitution, ed. 1913, pp. 171 to 217, p. 35), provision was made looking to the compensation of "workmen and their dependents, for death, injuries, or occupational disease, occasioned in the course of such workmen's employment," through laws to be passed by the general assembly; section 35 providing, however, that—

"No right of action shall be taken away from any employee when the injury, disease, or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health, and safety of employees."

The court then noted an act of the Ohio Legislature of May 6, 1913 (sec. 6330-1 of the Code), which provides that:

Every employer shall, without cost to the employees, provide reasonably effective devices, means and methods to prevent the contraction by his employees of illness or disease incident to the work or process in which such employees are engaged.

Continuing, the court said:

We thus come to the ruling below. In considering the petition the district judge said:

"If it does not state a cause of action under the workmen's compensation law and within the exception of the workmen's compensation law, it does not seem to me that the petition states any kind of cause of action."

We are, however, convinced that this act has no bearing upon the instant case. The act, as the name usually given to it indicates, provides for the collection of a State insurance fund and its disbursement among employees. According to the title of the act, the fund is designed "for the benefit of injured and the dependents of killed employees" (103 Ohio Laws, 72, approved Mar. 14, 1913). Section 13 defines employers to whom the act is applicable. Section 22 provides for employers' payments of premiums. Section 23 is, in part, as follows:

"Employers who comply with the provisions of the last preceding section shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of any employee, wherever occurring, during the period covered by such premium so paid into the State insurance fund. * * *

The saving clause so referred to is found in section 29, which in substance provides that "where a personal injury is suffered by any employee or where death results to an employee from personal injury * * * while in the course of employment," an employer who has paid his premiums shall not be liable unless such injury or death shall have arisen from the "willful act" of the employer or from the employer's failure to comply with any "lawful requirement for the protection of the lives and safety of employees," but in either of the latter events "nothing in this act contained shall affect the civil liability of such employer."

It is to be observed that the act is limited to compensation for "injury" or "death" of employees; it makes no provision in that behalf for disease. We have seen that the constitution permits the passage of laws providing compensation for employees or their dependents in cases of "death, injuries, or occupational disease."

It results, in view of the controlling authority of these decisions, that the compensation act is inapplicable, and it need not be said that the exemption from liability given by section 23 of the compensation act to employers who comply with the provisions of section 22, and the exceptions contained in section 29 in relation to employers who are open to the charge of willful acts or failure to perform any lawful requirement within the meaning of that section, are not of present importance. It can not be that the compensation act was designed to take away any right of action as respects a claim, like the one here involved, which the act does not purport to include or to allow to be paid out of the insurance fund. Any view to the contrary must ascribe to the general assembly at once a pur-

pose to frustrate the power vested by the Constitution in respect of occupational disease and a lack of purpose through section 6330-1 to grant relief of any character to employees contracting such disease. That statute was passed after the compensation act, and, as already shown, was intended to create and preserve rights of action where the duty it imposes is violated.

The industrial commission act was approved March 18, 1913 (103 Ohio Laws, 95, 110), while, as we have said before, section 6330-1 was approved the following May 6 (Id. 819, 824), and no reference was made in the last statute either to the compensation act or the industrial commission act. Section 6330-1 stands alone as the latest expression of the legislative will; it is in terms both complete and imperative; it should be given effect.

When it is remembered that plaintiff's action is based upon alleged negligence of defendant and freedom from fault of his own, the conclusion must follow that it was error to deny a right of recovery, both under the common law and section 6330-1.

Accordingly the judgment is reversed with costs and the case is remanded for further proceedings not inconsistent with this opinion.

EMPLOYMENT OF WOMEN—SEATS FOR FEMALES EMPLOYED IN RESTAURANTS—CONSTITUTIONALITY OF STATUTE—*Glanges v. State, Court of Criminal Appeals of Texas (Mar. 24, 1920), 220 Southwestern Reporter, page 95.*—Glanges ran a restaurant and having failed to comply with a law requiring him to provide seats for his female employees who were not engaged in active duties he was indicted and found guilty for a violation of the law. He appealed, alleging that the act was unconstitutional. The court reversed the judgment of conviction for other reasons, but upheld the constitutionality of the act. The opinion on this point is in part as follows:

In motion to quash the indictment, attacks are made upon the validity and constitutionality of the law. We are furnished with no brief or citation of authorities supporting the criticism, and we are aware of no reason why the act is not a lawful exercise of legislative authority. The right of the legislature, in the exercise of the police power, to pass laws to safeguard the health of women employees has so often been affirmed by the courts that it can not now be considered an open question. (Ruling Case Law, vol. 16, 480; *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324 [Bul. No. 75, p. 631]. We find nothing in the provision questioned in the present law which would condemn it as unreasonable. In a statute of the State of Indiana requiring employers of coal miners to furnish washing facilities, the same principle was involved. This statute was upheld by the Indiana courts (*Booth v. State*, 179 Ind. 405, 100 N. E. 563), and by the Supreme Court of the United States (*Booth v. Indiana*, 237 U. S. 391, 35 Sup. Ct. 617 [Bul. No. 189, p. 171]).

Restaurants, by the terms of the statute, are in a separate class from merchandise establishments, and are not included in the clause in the statute which exempts from its operation mercantile establishments in towns in which the population is 3,000 or less. (Ex parte Brown, 21 S. D. 515, 114 N. W. 303.)

EMPLOYMENT OFFICES—EMIGRANT AGENTS—LICENSE FEES—CONSTITUTIONALITY OF STATUTE—*State v. Reeves, Supreme Court of South Carolina (July 14, 1919), 99 Southeastern Reporter, page 841.*—The Criminal Code, section 896, of South Carolina prohibits anyone from carrying on the business of an emigrant agent without having first obtained a license, for which he must pay the sum of \$2,000 per year. Reeves, without securing a license, hired about 10 laborers to be employed beyond the limits of the State. He was indicted and found guilty of the violation of the above act and appealed on the grounds that the law was unconstitutional in that (1) it undertook to prohibit an act recognized to be lawful and (2) that it placed upon a business a license fee which was not a graduated fee but a prohibitory and discriminatory fee. In affirming the judgment of conviction and upholding the constitutionality of the act the court said in part:

When the doing of an act comes within the police power, the legislature has the authority to prohibit it entirely or to enact such regulations as it may deem advisable. If it undertakes to regulate such an act by requiring a license, the object is the protection of the public, and it is not intended for the benefit of the licensee. The defendant, therefore, has no right to complain, even though the statute may be regarded as prohibitory in its effect.

The statute now under consideration was construed by the court in the case of *State v. Napier*, 63 S. C. 60, 41 S. E. 13 [Bul. No. 42, p. 1110] and all the grounds then urged against its constitutionality, including the provision as to uniformity of taxation in section 1, art. 10, were overruled. The question now presented was not, however, before the court in that case. It was not the intention of the Constitution to require that the license tax on occupations, falling within the police power, should be graduated. Such a requirement would not be of any benefit to the public, but would limit the power of police, which has been defined as the State's right of self-defense. (*State v. Aiken*, 42 S. C. 222, 20 S. E. 221.)

EMPLOYMENT OFFICES—LICENSES—APPLICATION OF ORDINANCE—*Wilson v. City and County of Denver, Supreme Court of Colorado (Jan. 6, 1919), 178 Pacific Reporter, page 17.*—O. C. Wilson had been engaged in the business of running an employment bureau, which was called the Interstate Business Exchange Corporation, and which only found positions for technical, executive, or clerical applicants, but did not find positions for artisans, laborers, or domestic servants. The city of Denver passed an ordinance requiring private employment agencies to secure licenses, and providing that such licensed agencies could not charge as a fee for their services more than 5 per cent for males and 3 per cent for females of one month's wages and board. It is Wilson's contention that because of the use

of the words "wages and board" it was clear that the ordinance did not apply to him or his business, and that the license fee paid by him under protest was not properly assessed. Wilson had been convicted of a violation of the ordinance by charging more than the limited 5 per cent. The court in reversing the lower court and declaring that the ordinance did not apply to such businesses as defendant's said in part:

When we consider the use of the term "board" in connection with "wages" in that part of the ordinance which prescribes fees to be charged, and the only part which mentions the compensation, it is clear that it was not intended to apply to persons seeking technical or clerical positions. These terms must be held to limit the application of the general language of the ordinance; and we come to this conclusion more readily because, as stated by the New York court above mentioned (*People v. City of Buffalo*, 57 Hun, 577, 11 N. Y. Supp. 314), men in the class just mentioned do not need the protection in question; and, that being so, to include them in this limitation of the right to contract freely would be an unnecessary, and therefore unauthorized, exercise of the police power.

The right to carry on a legitimate business is a property right, and it can not be taken away or abridged by an exercise of the police power unless it appears:

"First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals." (*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499.)

This ordinance does not meet either of said requirements.

FACTORY REGULATIONS—SPRINKLER SYSTEM—CONSTITUTIONALITY OF STATUTE—*People ex rel. Cockroft v. Miller et al.*, Board of Appeals, Supreme Court of New York, Appellate Division, First Department (May 2, 1919), 176 New York Supplement, page 206.—The defendants, Miller and others, constituting the board of standards and appeals, sustained three orders of the fire commissioner of New York City requiring Cockroft to provide, among other things, a sprinkler system in the Cockroft Building. Cockroft brought a writ of certiorari to the appellate division. In so far as the order of the fire commissioner relating to the sprinkler system was concerned the decision was affirmed. Cockroft claimed that the law requiring a sprinkler system (sec. 83b of the labor law, Consol. Laws, ch. 31) did not apply to employers or to stenographers and office employees, and that the law was unconstitutional. In refuting these allegations the court said in part:

The next and more serious question is the construction of the provision referring to a factory building in which "more than 200 people are regularly employed above the seventh floor." The con-

tention of the appellant is that this means "employees" in the sense in which that term is defined in section 2 as above quoted—that is to say, mechanics, workingmen, or laborers—and accordingly all employers and nonfactory employees, such as accountants, clerks, stenographers, and the like, should be excluded in making the count of persons to determine the necessity for installing a sprinkler system. * * * The legislature has with evident intention omitted to make the number of "employees" the measure of the requirement to install a sprinkler system, and has made the measure, instead, the number of "people regularly employed."

While it may be generally true that the act was passed in the interest of workingmen, and many of the provisions specifically refer to them, the intent of this "sprinkler section" was to protect human life from fire perils. The number of persons working on a given floor of a building, or working above the seventh floor obviously has a direct relation to such a fire peril as panic. It therefore seems reasonable to conclude that the legislature meant to make the measure of this particular requirement for sprinklers the presence of more than 200 people who are regularly employed above the seventh floor, giving the usual and ordinary interpretation to the words "people employed." As there were 254 persons employed and engaged at work above the seventh floor of this building, exclusive of the 100 employers, we are of the opinion that the building came within the requirements of section 83b, governing the installation of automatic sprinklers.

Finally, it is claimed that section 83b of the labor law is unconstitutional, if held applicable to such a building as the Cockroft Building, occupied mainly by manufacturing jewelers, who do not work with or upon inflammable materials and whose offices present no fire risk whatever, and because there was no testimony and no data before the factory investigating commission with respect to the type of building here involved. We have already held the act constitutional as applicable to such a building as this. (*Cockroft v. Mitchell*, 173 N. Y. S. 903.)

The order as to the installation of automatic sprinklers was therefore affirmed.

FACTORY REGULATIONS—WASH ROOMS—RAILROAD ROUNDHOUSES—CONSTITUTIONALITY OF STATUTE—*People v. Cleveland, C. C. & St. L. Ry. Co.*, Supreme Court of Illinois (June 18, 1919), 123 *Northeastern Reporter*, page 579.—The defendant railway company was prosecuted for the violation of a law requiring certain establishments to maintain wash rooms. Section 1 of this act (Laws of 1913, p. 359) is as follows:

SECTION 1. That every owner or operator of a coal mine, steel mill, foundry, machine shop, or other like business in which employees become covered with grease, smoke, dust, grime, and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing will endanger their health or make their condition offensive to the public, shall provide and maintain a suitable and sanitary wash

room at a convenient place in or adjacent to such mine, mill, foundry, shop, or other place of employment for the use of such employees.

The defendant was found guilty and fined. It then brought certiorari to the supreme court on the grounds that the act was unconstitutional and that it did not apply to railroad roundhouses. The constitutionality of the act was upheld but its application to roundhouses such as defendant's was denied and the judgment was reversed. The decision in part is as follows:

The purpose of the act as declared by the title is to protect the health of employees and secure the public comfort, and it was enacted under the police power, with suitable provisions against liability to disease or offense to those with whom the employees come in contact after leaving their places of employment. The act applies to all places of employment where the prescribed conditions exist, and as a police regulation and applied to such conditions it is constitutional and valid. (*People v. Solomon*, 265 Ill. 28, 106 N. E. 458 [Bul. No. 169, p. 115].) The conditions so prescribed are that the employment is one in which employees become covered with grease, smoke, grime, and perspiration to such an extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing will endanger their health or their condition be offensive to the public. If the evidence showed that these conditions existed in the place of employment provided and maintained by the plaintiff in error, the judgment was right; if it did not, the judgment was wrong.

The act does not apply to every place of employment in which men become dirty or perspire, but only to those where they become covered with grease, smoke, dust, grime, and perspiration to the extent specified in the act. In warm weather all persons perspire, whether at work or play, and there are numerous kinds of employment in which the employees get grease on their clothing or become dirty with smoke or dust, but not to the extent specified in the act. Neither their health nor the public comfort is involved. That is true of the ordinary blacksmith shop, the garage, or the supply house for farm machinery. There was no justifiable inference to be drawn from the evidence that the employees of the plaintiff in error were in such a condition after leaving their work that without washing and cleansing their bodies and changing their clothing their health would be endangered or their condition be offensive to the public. This is not saying that there must be opinion or expert evidence of such probable consequences, nor that a jury may not determine that question from the facts proved in the light of common experience, but the evidence must be sufficient to justify the inference of fact. The evidence did not bring the roundhouse and machine shop within the terms of the statute.

HOURS OF LABOR—FACTORY EMPLOYEES—TEN-HOUR LAW—EMPLOYEE NOT WORKING ABOUT MACHINERY—*Handy v. Mercantile Lumber Co.*, *Supreme Court of Mississippi* (Feb. 9, 1920), 83 *Southern Reporter*, page 674.—Handy was employed by the Mercantile Lum-

ber Co. in unloading carloads of lumber which other employees transported to the mill, where it was planed. It was not required of Handy that he work at or anywhere near the machinery. He had been permitted to work all day and all night continuously. At 4 o'clock a. m., while descending from the railroad car in which he had been working, to locate his fellow employees, he lost his grip and fell between the cars, breaking his leg and sustaining other injuries. He claims that he fell because of his fatigued and weakened condition resulting from long hours of continuous labor. He brought suit for damages for personal injuries, alleging the violation of the State law, which makes it "unlawful for any person, firm, or corporation engaged in manufacturing or repairing to work their employees more than 10 hours per day," with exceptions as to emergencies (ch. 239, Acts of 1916).

Handy's complaint was dismissed by the lower court on demurrer, and he appealed. The supreme court affirmed the decision, saying in part:

The particular work performed by the plaintiff on the night of his injury was that of unloading cars by giving the lumber to other servants on a platform, and these other servants then loaded the lumber on two-wheeled carts and rolled the lumber then into the planing mill near by. From the declaration it will thus be seen that the plaintiff was not engaged in working with the machinery, that he was not working about the machinery, that his work had nothing to do with the starting or stopping of the machinery, that his movements did not have to conform to the movements of the machinery. He could have unloaded the car while the machinery was not running. On the other hand, the machinery could be running while plaintiff was idle. There is no such connection between the work of the plaintiff and the operation of the machinery that brings the plaintiff within the protection of this law. It was not necessary for the plaintiff to go where the machinery was running. So far as the declaration shows, he may have been many feet away from any part of the machinery. Such an employee does not come within the protection of this law.

HOURS OF LABOR—PUBLIC EMPLOYEES—EMPLOYEES ON "PUBLIC WORKS"—CITY FIREMEN—*Danielson v. City of Bakersfield et al.*, Supreme Court of California (Oct. 27, 1920), 193 Pacific Reporter, page 242.—Under the constitution of the State of California "laborers, workmen, or mechanics" on public works may not be required to work more than eight hours per day. Danielson was a paid fireman for the city of Bakersfield and was required to work more than eight hours per day. He accordingly brought suit against the city. The trial court rendered judgment in favor of the defendant city and plaintiff appealed. In affirming the decision the supreme court handed down the following decision:

The only question in this case is whether or not a paid fire department, maintained by a municipal corporation in this State, comes within the provisions of several laws establishing an eight-hour day. The constitution (art. 20, sec. 17) provides that the time of service of all "laborers, workmen, or mechanics" employed upon any public works by the State, a county, or a municipality is eight hours only. We think it is perfectly obvious that a fireman is not either a laborer, workman, or mechanic as referred to in that section. Section 3245 of the Political Code contains the provision that eight hours constitutes a legal day's work in all cases where the same is performed under the authority of the State, or of any city or county within the State, and that a stipulation to that effect must be made a part of all contracts to which the State, county, or city is a party. Section 653c of the Penal Code provides that the time of service of any laborer, workman, or mechanic employed upon any public works, or upon any works for the State, shall be limited to eight hours a day, and imposes a penalty upon anyone violating this provision. Section 142 of the Bakersfield charter provides that the time of service of any laborer, workman, or mechanic employed upon any public works or upon work done for the city, shall be limited and restricted to eight hours a day. All of these provisions have substantially the same meaning.

It is the opinion of the court that they do not refer to or include firemen in a paid fire department of a city, but, on the contrary, refer to persons engaged as workmen of some kind upon public work, or employed by some city or other public authority, and actually engaged in labor. The court below correctly held that they do not apply to firemen of the city of Bakersfield.

HOURS OF LABOR—RAILROADS—ADAMSON LAW—EFFECT OF AGREEMENT BETWEEN RAILROAD AND ITS EMPLOYEES—*Fort Smith & W. R. Co. et al. v. Mills et al.*, *United States Supreme Court (June 1, 1920)*, *40 Supreme Court Reporter*, page 526.—The Fort Smith & Western Railroad Co. went into the hands of a receiver, Arthur Mills, the defendant. The company had an agreement with its employees regulating wages and hours of labor with which both parties were satisfied, and by which, though insolvent, the road was able to continue operation. Upon the passage of the Adamson eight-hour law by Congress, the receiver, by reason of threats of prosecution thereunder by the district attorney, proposed to substitute another agreement containing the much more onerous terms of the act. This action in equity was thereupon brought to prevent the receiver from complying with the act and to prevent the district attorney from prosecuting him. It was declared that if the act was permitted to apply to this case it was void under the fifth amendment to the Constitution, as taking property without due process of law. The district court dismissed the case, and upon appeal to the Supreme Court it was decided that the law did not apply to cases of this kind.

The opinion of the court as expressed by Mr. Justice Holmes is in part as follows:

The act in question, known as the Adamson law, was passed to meet the emergency created by the threat of a general railroad strike. It fixed eight hours as a day's work and provided that for some months, pending an investigation, the compensation of employees of railroads subject to the act to regulate commerce should not be "reduced below the present standard day's wage," and that time in excess of eight hours should be paid for pro rata at the same rate. The time has expired long since but the rights of the parties require a decision of the case.

In *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 [Bul. No. 224, p. 144], it was decided that the act was within the constitutional power of Congress to regulate commerce among the States; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroad to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law.

But the bill in *Wilson v. New* raised only the general objections to acts that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss. See *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396, 40 Sup. Ct. 183. It was not decided that there might not be circumstances to which the act could not be applied consistently with the fifth amendment, or that the act in spite of its universal language must be construed to reach literally every carrier by railroad subject to the act to regulate commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to this act. But the statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required or to have been intended to make trouble rather than to allay it. We can not suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before, and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads.

But that is the present case. An insolvent road has succeeded in making satisfactory terms with its men, enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allega-

tions of the bill and must assume that the men were not merely negatively refraining from demands under the act, but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson law has in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed import an exception in a case like this.

HOURS OF LABOR—RAILROADS—ADAMSON LAW—SWITCH TENDER NOT COVERED—*Coke v. Illinois Cent. R. Co., United States District Court, Western District of Tennessee (Jan. 17, 1919), 255 Federal Reporter, page 190.*—H. P. Coke was employed by the railroad company as a switch tender. The duties of a switch tender are to open or close switches to facilitate the movements of trains and are given to one man in order to relieve the train crews of this work. Coke brought this action for \$274, claiming that he was hired for \$75 per month and that he was required to work 12 hours per day and that as a result of the Adamson law he was entitled to compensation for overtime. The Adamson law referred to provides that:

Beginning January 1, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad * * * and who are now or who may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads.

District Judge McCall in rendering judgment in favor of the employer gave in part the following opinion:

Broadly speaking, the act might be construed to include every employee of such railroad from president down to section hand, who was in any capacity actually engaged in doing those things necessary to the operation of trains, such as directing their operation in a supervisory way, maintaining the roadway, lining up switches for their operation, or aboard the trains manually operating them, etc.

Assuming, but not deciding, that plaintiff was actually engaged in some capacity in operation of trains, the question arises: Did Congress intend by the Adamson Act to include and provide for employees engaged in the work the plaintiff was doing? It is too much to say that the terms of the act are clear and unambiguous. In such circumstance it is well settled that in determining the scope, intention, and meaning of the acts of Congress, to give effect to them courts may properly have recourse to public documents and proceedings in Congress had pending the piece of legislation in question, and it may properly look at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

The court feels warranted in saying that it is of common knowledge derived from the message of the President pressing the prompt enactment of the law in question, delivered orally to the Congress, from the Congressional Record, as well as from all the great newspapers and periodicals of the day, that the Adamson law was enacted at the instance of four bodies of organized railway employees, to wit, Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen. The members of these four organizations were all employees whose duties were discharged aboard railway trains, such as conductors, engineers, firemen, and railway trainmen, which latter term would include all those whose duties were performed "on the engines and on the cars." While it was thought by the four brotherhoods mentioned that the legislature provided for their best interest, and they demanded it, yet it is fair to say, judging from the Congressional Record, that it was enacted by Congress primarily to prevent a calamity to the country which was thought sure to follow in case it was not enacted, if the brotherhoods, in case it was not enacted, should carry into effect their declared purpose to call a strike and thus stop trains moving in interstate commerce and tie up the commercial interests of the country.

The validity of the act was before the Supreme Court of the United States in *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 [Bul. No. 224, p. 144], wherein it was held to be constitutional. The point was made in that case that the act was void for unlawful inequality and arbitrary classification, in that it only included employees actually engaged in the operation of trains, and did not include other railroad employees. The Supreme Court sustained the classification on the ground that only those actually engaged in the operation of trains (not including switchmen) were threatening to strike, and that it was therefore proper to pass legislation which affected only those who were so threatening, apparently meaning thereby to say that the legislation applied only to the Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen.

Clearly the Adamson law does not apply to all employees of railroads engaged in interstate commerce, nor does it apply to all those who are actually engaged in doing some of the things necessary for the operation of trains. It would seem, therefore, reasonable and proper to follow the line of cleavage which the Congress intended to establish, as gathered from the contemporaneous history of events attending the consideration and passage of the law. When the act is thus considered in the light of the utterances of the President, the Congressional Record, the hearings before the Committee on Interstate Commerce, and the report of the Wage Commission, it appears that Congress was dealing with the four brotherhoods only, and intended the legislation to apply only to those doing the work performed by the brotherhoods. That is to say, to trainmen who worked "on the engines and in the cars." This conclusion is greatly strengthened by the language of the Supreme Court of the United States in *Wilson v. New*, supra.

HOURS OF LABOR OF WOMEN—EMPLOYMENT IN LAUNDRIES—COLLECTING STATIONS—*District of Columbia v. Marshall, Police Court of the District of Columbia (Jan. 27, 1920), 48 Washington Law Reporter, page 86.*—The District of Columbia brought a criminal charge against the defendant, who is the owner of a laundry, for the violation of sections 1, 4, and 5 of an act of Congress approved February 24, 1914, and entitled "An act to regulate the hours of employment and safeguard the health of females employed in the District of Columbia." This law limits the hours of labor of all female employees "employed in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in the District of Columbia" to eight per day or forty-eight per week. In addition to his plant, the defendant also maintains nine substations or branches at which soiled clothing is received and the cleaned clothing returned, but at which no washing or cleaning of any kind is engaged in. An employee in one of these substations was required or permitted to work longer than eight hours in one day, whereupon this prosecution was brought against the employer for the violation of the aforementioned act. He contended that the act being penal should be strictly construed, and so construed could not be held to include such employments as that at the collecting station. The court differed with this contention, and held that the act was a remedial statute and should therefore be liberally construed, but notwithstanding this attitude it held that the employment did not come within the purview of the law, the post of the employment not being in any true sense of the term a laundry.

HOURS OF LABOR OF WOMEN—HOTEL EMPLOYEES—EXEMPTION OF RAILROAD HOTELS AND EATING HOUSES—CONSTITUTIONALITY—*Dominion Hotel (Inc.) v. State of Arizona, Supreme Court of the United States (Mar. 24, 1919), 39 Supreme Court Reporter, page 273.*—Under a prosecution brought by the State of Arizona against the Dominion Hotel (Inc.) for the violation of a law of the State prohibiting the employment of women in hotels for longer periods than eight hours and providing also that said eight hours of service must be performed within a period of twelve hours, the defendant was found guilty. This decision was sustained by the State supreme court, and a writ of error was brought to the Supreme Court of the United States on the ground that the provision in the statute exempting railroad hotels from the application of the law denied to the defendant the equal protection of the laws, and was therefore under the fourteenth amendment of the Federal Constitution unconstitu-

tional. The Supreme Court in refusing to declare the statute void said in part:

The fourteenth amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State "may be determined by degrees of evil or exercised in cases where detriment is especially experienced." (*Armour & Co. v. North Dakota*, 240 U. S. 510, 36 Sup. Ct. 440.) It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were mathematically exact. The only question is whether we can say on our judicial knowledge that the Legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. (*Hebe Co. v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 125.) Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we can not know.

Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important distinction between such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree, and the constant business of the law is to draw such lines.

We can not pronounce the statute void.

Judgment affirmed.

HOURS OF LABOR OF WOMEN—MEALTIME INCLUDED IN WORKING HOURS—ABSENCE FROM WORK—*Haddad v. State, Court of Criminal Appeals of Texas* (Feb. 4, 1920), 218 *Southwestern Reporter*, page 506.—Haddad was convicted for the violation of article 1451h of the Penal Code, which prohibits an employer from permitting his female employee to work more than 9 hours per day, or 54 hours per week. Haddad operated a café and required his waitresses to work from 8 a. m. to 1 p. m. and from 3 p. m. to 7 p. m. each day for every day in the week. He appealed from the decision of conviction, declaring that the court should have deducted from the weekly working hours one hour per day, which was alleged to have been consumed by the employee in eating her meals, and also that the time taken off by the employee when she was absent from her work should be deducted from the weekly working period. The court rejected the first of these

contentions, but agreed with the second and reversed the decision. The opinion is as follows:

It is contended that the time she used in eating her meals, or practically one hour a day, should be discounted from the nine hours if she only worked one day, or the one hour per day should be discounted from the 54 hours. If this is correct, then her employer was entitled to a discount as against the 54 hours of 7 hours; that he should not be charged under the allegation or theory of 54 hours with the time that she was visiting about the town and the one or two evenings when she failed to present herself in her employment and was absent. We are of the opinion that the time she occupied at meals should not be discounted from her terms of employment; that she was in the cafe and was ready to discharge her duties, and sometimes was called from her meals while eating to wait upon customers. This we think shows that she was in the employ of her employer, and he was not entitled to credit as against the 54 hours for such time. But we are further of opinion that her absence on other occasions above mentioned should be deducted from the 54 hours. She was not working under employment, was absent from it, and was not subject to the calls of duty of her employer, but she was in position where she could not work nor be required to work. This was voluntary on her part. She was not rendering any service or in position to do so. This became a serious issue on the trial of the case.

The court then considered the refusal of the trial judge to charge the jury in accordance with the foregoing views, to which the defendant had excepted, and the judgment was reversed and the cause remanded.

HOURS OF SERVICE—RAILROADS—INTERSTATE COMMERCE—COMMON CARRIER WITHIN MEANING OF ACT—*United States v. Brooklyn Eastern District Terminal*, Supreme Court of the United States (Mar. 24, 1919), 39 Supreme Court Reporter, page 283.—The United States brought action against the defendant company for the violation of the hours of service act of March 4, 1907 (ch. 2939, 34 Stat. 1415), which prohibits any common carrier by railroad engaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period than 16 consecutive hours, and the trial court entered judgment against the defendant company. Upon appeal the circuit court of appeals (239 Fed. 287) reversed this judgment and the Government brought the case to the Supreme Court on a writ of certiorari, and the judgment was again reversed and the defendant adjudged guilty of having violated the statute. The defendant company is engaged in providing terminal facilities and a depot for the accumulation of goods to be shipped either to or from the New York Harbor for some 10 railroads and several steamship companies with which it has separate contracts. It does business for no other concerns. Its facilities consist of a number of barges and

ferries and about a mile of railroad for switching purposes, over which it transports both intrastate and interstate goods to and from its union freight station. It is the contention of the defendant company that inasmuch as it operates under contracts and does not accept business from concerns with whom it has no contract it is not a common carrier. Mr. Justice Brandeis delivered the opinion of the court, which is in part as follows:

The hours of service act declares (in the first section) that, "the term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease." Hence, neither the character of the terminal's railroad nor its independent ownership excludes it from the scope of the act. But the terminal contends that it is not subject to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform.

The services rendered by the Terminal are public in their nature, and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the 10 railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the hours of service law. The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer and exempts the Terminal, because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employees and the public.

But a common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another. The relation of agency may preclude contractual obligations to the shippers, but it can not change the obligations of the carrier concerning the physical operation of the railroad under the hours of service act.

The judgment of the court of appeals was therefore reversed, and that of the district court, holding the company guilty, was affirmed.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR—INTER-STATE COMMERCE—*United States v. Atlanta Terminal Co., United States Circuit Court of Appeals, Fifth Circuit (Oct. 15, 1919), 260*

Federal Reporter, page 779.—The Atlanta Terminal Co. was incorporated as a railroad company and maintained a railroad terminal wholly within the State of Georgia. It owned railroad tracks and owned and operated switches and signal towers, but it did not own any engines or trains nor did it employ engineers, conductors, or brakemen. It also maintained offices through which telegraphic messages and train orders were transmitted. The railroad trains which used the terminal were engaged in interstate commerce, and the passengers moving to and from the city through the terminal were transported from and to other States. The United States brought a civil suit to recover a penalty from the defendant for the violation of the hours of service act. The employee concerned was a telegraph operator who transmitted the train orders for the movement of the trains using the terminal. The defendant denied it was a common carrier within the meaning of the law and denied that it was engaged in the transportation of passengers or property. The district court directed a verdict for the defendant. In reversing this decision the court of appeals said in part:

That the defendant, under the facts stated, was a common carrier of passengers and baggage, has been settled by the decisions of the Supreme Court, notably the cases of *United States v. Union Stockyards*, 226 U. S. 286, 33 Sup. Ct. 83, and *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 Sup. Ct. 283 [above]. In the latter case the hours of service act was held to apply to a terminal company, which performed similar duties and in a similar manner to those performed by the defendant under the facts stipulated.

Direction and control are as much a part of transportation as are the physical acts of running the engine or handling the train. It is also true that trains, in motion, could only enter and leave the terminal tracks through switches thrown by signal men of defendant, and upon signals given the train crews by defendant's signal men. These acts were acts of transportation, and the defendant was engaged in transportation of passengers and baggage, upon a railroad, while doing them. The fact that the railroad company engaged jointly with defendant in the transportation does not change the conclusion reached.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR—MEAL-TIME—*Chicago, R. I. & P. Ry. Co. v. United States*, *United States Circuit Court of Appeals, Eighth Circuit* (Oct. 28, 1918), 253 *Federal Reporter*, page 555.—The United States brought action against the railway company for the violation of the hours of service act and from a judgment for the United States the defendant brings error. Circuit Judge Hook, in affirming the judgment, rendered the following opinion:

The railway company was held by the trial court to have violated section 2 of the hours of service act of March 4, 1907 (34 Stat. 1415, c. 2939; Comp. St. 1916, sec. 8678), by requiring or permitting a telegraph operator in one of its day and night stations to remain on duty more than 9 hours in a 24-hour period. On November 25, 1913, the operator went on duty at 2 p. m. and left at 11.40 p. m., but in the meantime had been absent an hour for supper. The question in the case depends upon the conditions of his absence for supper, and is whether the time should be deducted from the 9 hours and 40 minutes or whether he was still on duty within the intent of the statute.

The usual daily service of the operator was from 2 p. m. to 11 p. m., with an hour for rest and his evening meal. The hour, generally from 6 o'clock to 7, was not definitely fixed, but depended upon the requirements of the work. The understanding between him and the company, and the practice, was that, though at some time he should have his hour off, it was alterable and adjustable to the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law.

It is enough to cite *Missouri, Kansas & Texas R. Co. v. United States*, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144 [Bul. No. 152, pp. 128, 129].

The judgment is affirmed.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATOR—STATION CONTINUOUSLY OPERATED NIGHT AND DAY—*United States v. Baker, United States District Court, Southern District of Texas (November 10, 1919), 261 Federal Reporter, page 703.*—The United States by a complaint containing 10 counts brought a criminal action against James A. Baker, receiver of the International & Great Northern Railway, for the violation of the hours of service act (Mar. 4, 1907, ch. 2939, 34 Stat. 1415), which prohibits employees of railroads serving as telegraph operators, train dispatchers, etc., from being required or permitted to work longer than 9 hours in a 24-hour period in stations operated continuously night and day. The law permits 13 hours' work in offices operated only in the daytime.

The defendant as receiver of the railway operated a station at Navasota, Tex., where a telegrapher, M. Menger, was required to work from 7 o'clock a. m. to 6 o'clock p. m. When the time came to close the office, if he had any train messages which had not been delivered owing to the nonarrival of the trains before 7 o'clock p. m., Menger was required to take such undelivered messages to the Houston & Texas Central Railroad Co.'s operator at the Santa Fe tower at Navasota. In the morning on coming to work Menger would go over to the tower and get any messages which the tower

operator had not delivered. During the period when Menger was off duty the station was closed and train messages were transmitted to the tower operator under an agreement between the Houston & Texas Central Railroad and the defendant. Baker admits all these facts, but claims that the station was only a "day station" and that the facts do not show that it was operated continuously night and day. The court held that the transmission of messages under an agreement with another road during a part of the 24-hour period did not serve to make the station a day station, and a judgment of conviction was entered. The decision is in part as follows:

The question of whether or not the defendant had any control or authority over the operatives of the H. & T. C. who handled the messages pertaining to the receiver's road during the absence of the regular operator is wholly immaterial. The slightest reflection upon the scope and purpose of the act will satisfy any candid mind that the law is concerned not with the method by which messages are accepted and received, but merely with the fact of prohibiting the employment at work for more than 13 hours of any operator at an office operated continuously night and day. If the contention of the defendant that the fact that for a part of the 24-hour period its messages were handled by persons employed not by itself, but by another company, makes the station a daytime station only, were sound, the act could be nullified throughout the length and breadth of the United States wherever conditions of joint operation existed, as at Navasota, by one company running its office 12 hours, the other 12 hours, and interchanging service with each other during the period that the respective operators hired by each were off duty.

Such a result, if reached by design, would not be tolerated; nor does the fact that the result is reached without design in anywise change the legal effect of the situation. What the law is concerned with in this case is not the method by which the receiver provides for the handling and transmission of his messages during the night hours, but with the fact that during some period of the 24 hours he obliges his operator to remain on duty more than 9 hours. What the precise nature of the arrangements the receiver made with the Houston & Texas Central was is wholly immaterial in this case, since the fact is undisputed that the receiver did have arrangements at the place, Navasota, for receiving messages day and night, and did for a part of the time at that place have an operator working more than nine hours.

Judgment for \$100 was therefore rendered on each of the 10 counts.

HOURS OF SERVICE—RAILROADS—YARD MOVEMENTS OF TRAINS—*Pennsylvania R. Co. v. United States, United States Circuit Court of Appeals, Third Circuit (May 24, 1920), 265 Federal Reporter, page 609.*—Lathero was employed by the railroad company as a car dropper and as a brakeman. He worked in the company's yards at

Hollidaysburg, Pa., as a car dropper, where he rode cars which were being moved about the yards in the process of distribution to make up full trains. Later in the day he would go to Altoona, where he acted as a brakeman in connection with an engine which was engaged in making up trains in the yards. None of his duties required him to work on the main line of the railroad, but all movements were performed in the yards. These duties occupied more than 16 hours in the aggregate during a 24-hour period. The United States brought action against the railroad for the violation of the hours of service act of March 4, 1907 (34 Stat. 1415, 8 Comp. Stat. 1916, p. 9448), and recovered judgment. In affirming the decision the court said in part:

The railroad company's sole insistent is that the act applies only to movements of trains over main-line tracks, and not to mere yard movements, such as were made in this case. In construing the act it must be borne in mind that its purpose, as expressed in its title, was to promote the safety of employees, as well as travelers, upon railroads. Of course in carrying out this purpose, the mischief sought to be avoided was the mental and physical exhaustion of employees liable to result from permitting or requiring them to remain on duty for excessive lengths of time. The act provides that the term "railroad," as used in the act, shall include "all the road in use by any common carrier operating a railroad."

As is well pointed out in the opinion of the learned judge of the court below, no train is excluded from the provisions of the act, except wrecking or relief trains, and there is no limitation as respects the kind of movement or the place in which it shall be made. In this situation, bearing in mind the purpose of the legislation and appreciating that men may as easily become exhausted by overwork in the movement of trains in and about yards as they may in so-called main-line movements, and thus imperil their own, as well as the safety and lives of others, we would have no hesitation, even if we considered this a case of first impression, in holding that Lathero, while at work in the Altoona yards, was engaged in or connected with the movement of a train, and hence that the railroad company is subject to the penalty prescribed in the act for a violation thereof. As was said by Mr. Justice Lurton in *Chicago, Ind. & L. Ry. Co. v. Hackett*, 228 U. S. 559, 564, 33 Sup. Ct. 581, 584 (57 L. Ed. 966), in construing a statute of Indiana, to hold that yard movements such as were made in the Altoona yard were not movements of a train "would be to make the act meaningless as to the most dangerous class of work which falls to the lot of railroad employees."

INVENTIONS BY EMPLOYEES—"TIME OF EMPLOYMENT"—*Moore v. United States, Supreme Court of the United States (Apr. 14, 1919), 39 Supreme Court Reporter, page 322.*—David F. Moore was employed by the United States as a wood calker in a navy yard, and during the period covered by this employment he perfected an inven-

tion known as a reefing iron for use on the decks, sides, and bottoms of vessels where wood calking is done. An act of Congress of June 25, 1910 (36 Stat. 851, ch. 423), provides that where the Government uses a patent without obtaining a license for such use from the patentee he shall be compensated therefor, but this act does not apply where the device was discovered or invented by an employee of the United States "during the time of his employment or service."

Moore's invention was extensively used by the United States, and he requested compensation, which was refused. The Court of Claims rejected the claim, so this appeal was taken to the Supreme Court, which affirmed the position taken by the Court of Claims. Moore claimed that he had been at work on his invention for a number of years, from 1903 to 1914; furthermore, that he had expended no time on it during the hours of his employment by the Government, but only while at home during his absence from duty in the navy yard. It was held, however, that the statute clearly covered the full time of his employment, the concluding sentences of the decision rendered by Mr. Justice Clarke being as follows:

No matter what the appellant may have done prior to May, 1914, it was in that month, he avers, that he completed his invention, and during the whole of that month he was in the employment or service of the Government. To give the effect contended for to the allegation that the appellant confined his work on his invention to the hours when he was not actually on duty, but while he was in the Government employ, would be to amend the statute, not to construe or interpret it.

LABOR DISPUTES—INSTIGATION—CONSPIRACY TO RESTRAIN TRADE—SHERMAN ANTITRUST LAW—STRIKES TO RESTRAIN COMMERCE—CLAYTON ACT—*Lamar et al. v. United States, United States Circuit Court of Appeals, Second Circuit (June 4, 1919), 260 Federal Reporter, page 561.*—This action was a criminal prosecution by the United States against various defendants under the Sherman Act (July 2, 1890, ch. 647, 26 Stat. 209) for a conspiracy "to restrain foreign trade and commerce" and to "restrain, hinder, and prevent the transportation" of munitions of war manufactured in the United States in said foreign trade and commerce. Three of the defendants, Rintelen, Lamar, and Martin, were found guilty, convicted, and sentenced. Lamar and Martin brought a writ of error to review the judgment.

Rintelen was a German, who came to this country provided with funds to the extent of \$500,000, for the purpose of preventing the United States from manufacturing or shipping supplies to the belligerent nations at war in Europe in 1915. To accomplish this pur-

pose his plan was to instigate strikes and create labor difficulties in the plants and factories manufacturing "munitions of war." Lamar and Martin were associated with him in this endeavor. Although he parted with much of his money for this purpose, he was unsuccessful in producing any results. Circuit Judge Hough in presenting the opinion of the court affirming the judgment of conviction said in part:

So far as the lack of success of the plaintiffs in error is relied on, it is enough to point out what was specifically held in the Nash case, 33 Sup. Ct. 780, that conspiracy under the Sherman Act is proved by proving the forbidden meeting of minds; it is like a common-law conspiracy, not like those denounced by section 37, Criminal Code (act Mar. 4, 1909, ch. 321, 35 Stat. 1096, Comp. St., p. 10201), where an overt act is a necessary ingredient of crime. Likewise, any lack of intent to violate the statute can not be relied on here. Personal intent usually, and certainly here, means no more than an intention to do what was done; therefore, if (as the jury found) defendants intended to hinder and restrain export trade in war munitions, the fact that they had no suspicion of thereby violating the Sherman Act is a matter of no importance, and is immaterial.

It is further contended that, assuming everything covered by the evidence as proven and all the legal rules above adverted to as correct, it still remains true that the only suggested means or method of restraining trade was to strike—to induce laborers to peacefully quit work; and such acts are lawful under the statute of October 15, 1914, commonly known as the Clayton Act (38 Stat. 730, ch. 323). It is said to follow that, if doing this lawful act should produce restraint of trade, the later statute prevents the operation of the earlier.

Whether the Clayton Act has to the extent indicated nullified the Sherman Act is a question that need not be discussed; but we do hold it as clear that no change has been wrought in the law of conspiracy as applicable to this case. It may be that, where the intent of those who foment strikes or themselves quit work after and as a result of agreement with their fellow workmen is to advance their own wage interests, or otherwise improve their conditions of life, the Clayton Act produces legality by forbidding legal interference with their doings. This may be admitted for argument's sake, without expressing opinion. But we do hold that where it is charged (as here) that the intent was solely to restrain foreign trade, and where it is proved (as here) that the proposed instigation of strikes bore no relation whatever to the welfare of the strikers, then at most and best the strike becomes nothing more than an instrument or means, legal in itself, but used only for an illegal end.

The argument for plaintiffs in error confounds the means with the end. The end or object of the proven conspiracy was not to call strikes, but to restrain or rather suppress foreign trade. That object is as illegal as ever; the Clayton Act assuredly does not legalize it. If that be granted, the elementary rules of law apply, and legality of means can not excuse illegality of purpose or object.

LABOR DISPUTES—INVESTIGATION AND ADJUSTMENT—COURT OF INDUSTRIAL RELATIONS—KANSAS—CONSTITUTIONALITY OF STATUTE—*State ex rel. Court of Industrial Relations et al. v. Howat et al., Supreme Court of Kansas (July 19, 1920), 191 Pacific Reporter, page 585.*—The Kansas Court of Industrial Relations was investigating conditions existing in the mining industry in Cherokee and Crawford Counties. Howat and three other persons were subpoenaed by the district court to appear before the court of industrial relations and testify as to conditions prevailing in that locality. This they refused to do, whereupon they were adjudged guilty of contempt of court and ordered confined. This action is a proceeding for a writ of habeas corpus designed to secure their release. They argue that the law creating the court of industrial relations is unconstitutional and that they are therefore being unlawfully imprisoned. In upholding the constitutionality of the law and remanding the petitioners to custody the court said in part:

Most of the constitutional objections raised by the defendants are directed to provisions of the act creating the court of industrial relations, the validity or invalidity of which can have no possible bearing upon the disposition of the present case. The statute makes the new body the successor of the Public Utilities Commission, the functions of which are devolved upon it. (Laws 1920, ch. 29, 2.) It therefore has a legal existence, unless that commission was a nullity, which is not suggested. The legislature has undertaken to grant it, among other additional powers, those of investigating certain controversies relating to the operation of various industries, including coal mining, and of taking evidence and making findings thereon. (Section 7.) Its proceedings are required to be reported to the governor. (Section 27.) It is clear that it would be competent for the legislature to authorize an administrative tribunal to make such investigations, findings, and reports even if no further purpose were to be accomplished than to give publicity to existing conditions and provide data upon which subsequent legislation might be based. The act also undertakes to empower the court to make orders with reference to the conduct of the industry—among other things to regulate wages. (Section 8.) Whether or not the legislature could confer all the powers so attempted to be given—for instance, that to which specific reference has just been made—we have no doubt whatever that it could invest the industrial court with some of them. The legislature may, of course, enact statutes designed (for example) to protect the health and safety of miners, and may authorize an administrative body to make rules in that connection having the force of laws. (Richards v. Coal Co., 104 Kans. 330, 179 Pac. 380; 12 C. J. 847-853.) Regulations of that kind would be within the scope of the act under consideration. Inasmuch as the police power extends to the protection of the welfare and convenience as well as the health, safety, and morals of the public, it may manifestly be invoked, as in the present instance, to prevent the interruption in the production of a commodity so vitally necessary to the people of this State as coal, so long as the means employed are not for some special reason obnoxious to con-

stitutional provisions. There is abundant field for the operation of the act under consideration, even if every portion of it to which a specific objection has been urged were entirely eliminated.

It is quite clear that the part of the act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference to the effect of partial invalidity. However one section of it reads as follows:

"If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court." (Laws 1920, ch. 29, sec. 28.)

The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced, notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the legislature desired the unobjectionable part to become a law irrespective of the validity of the remainder. Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative extent, and requires the court to give effect to all portions of the statute that do not in themselves violate some constitutional provision.

The occasion for the aid of the district court being invoked to require the attendance of witnesses before the court of industrial relations arises from the well-understood fact that the latter body, in spite of its name, is an administrative and not strictly a judicial tribunal and is therefore regarded as incapable of enforcing its own process. (Cases cited.) The defendants argue that the district court, under the statute, is without authority to compel the attendance of a witness before any other tribunal than itself. The industrial court act, however, contains this provision:

"In case any person shall fail or refuse to obey any summons or subpoena issued by said court (of industrial relations) after due service then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena." (Laws 1920, ch. 29, sec. 11.)

We interpret this language as authorizing the procedure here followed—the issuance and service of an order by the district court requiring the defendants to appear before the court of industrial relations and their commitment for contempt for refusing to obey that order. The district court, being one of general jurisdiction, is obviously a proper tribunal to which to apply for the proper aid, and the method pursued is one naturally adapted to the end sought. The constitutionality of the provision quoted has not been challenged except by an objection relating to the title, which will be mentioned later. A similar feature of the Federal law relating to the attendance of witnesses before the Interstate Commerce Commission has been upheld against the contention that the action of a court in requiring a witness to appear before an administrative body was non-judicial. (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.)

The title of the act under consideration reads:

"An act creating the court of industrial relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act."

The contention is made that this is insufficient, and the provision of the State constitution with reference thereto (art. 2, sec. 16) is therefore violated because the title refers to a court, and the body undertaken to be created is not judicial in its character. The word "court" is often employed in statutes otherwise than in its strict technical sense and is applied to various tribunals not judicial in their character.

A number of the objections offered were then recited, the court concluding that none of them was involved in the present case. The final contention was that the Federal Congress had acted in the field, so that the State was without power to legislate. As to this the court said that while Federal action might in some respects limit the field of operations of the State law, the State still had power to conduct investigations along at least some of the lines named in the act, and nothing appeared to indicate a restriction on the court's powers as involved in the case in hand. The judgment of the court below was therefore affirmed.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — INJUNCTION — DRAYAGE AND HAULING—*Auburn Draying Co. v. Wardell et al., Court of Appeals of New York (July 15, 1919), 124 Northeastern Reporter, page 97.*—The Auburn Draying Co. was engaged in the hauling and trucking business in the city of Auburn and employed from 30 to 45 men, the greater number of whom did not belong to a labor union. In Auburn there existed 22 labor unions, each representing a trade or occupation. These unions were members of a larger organization called the Central Labor Union, all being unincorporated. The defendant, Teamsters Union No. 679, was a member of the Central Labor Union. Its representatives approached the plaintiff and demanded that it compel its workmen to join the union or employ only men who did belong to the union. This the plaintiff refused to do, stating that its men could do as they chose and that they were free to join the union if they wished. The defendant, Teamsters Union No. 679, thereupon passed a resolution declaring the plaintiff an unfair employer and notified the Central Labor Union, which passed a like resolution. The unions thereupon brought pressure to bear on plaintiff's customers by threats of labor difficulties, strikes, etc., so that, in fear for their own businesses, they refused to permit it to do their hauling for them. In consequence of this boycott against plaintiff, it was seriously and materially damaged. In a suit for an injunction against

the defendants, the plaintiff was twice successful and the defendants appealed. In affirming the judgment in favor of the plaintiff, the court of appeals said, in part:

The defendants, in concerted actions and measures, interfered with the property rights and the property of the plaintiff. As a part of its property was the right to be employed by, to do work for, to transact business with, and to receive compensation from all those who voluntarily sought or desired to thus engage with it. Personal liberty or the right of property embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor and the employment of one's individual and industrial resources. The right is not and can not be absolute. It is subject to the condition that its exercise in the particular transaction shall not be inconsistent with the public interests or hurtful to the public order or detrimental to the common good. Moreover, it is common and reciprocal to all citizens. An unrestrained and unlimited exercise on the part of some persons would clash with and encounter the exercise of a similar freedom on the part of others. The question then arises whether the interference with the action of the one is justified by the exercise of some right of the interfering other. The right of the citizen to effectuate his desire or judgment without interference or compulsion must always be exercised with reasonable regard for the conflicting rights of others. The law recognizes the right, and holds and enforces that an invasion of it, without a cause or reason which the law deems essential or useful in the existence or betterment of organized society, is a legal and actionable wrong which may be compensated or restrained. The action and measures initiated and sustained by the defendants worked serious injury to the property of the plaintiff, in consequence of which it sustained substantial damages.

The rights, in virtue of which the defendants would justify the interference and the injury, are: (a) That of laborers to associate; (b) to bring within the labor organizations as members all laborers; (c) through the coherent and solidified power and influence flowing from association and united efforts to secure for all laborers higher wages, shorter hours, arbitration of labor disputes, and better working conditions. Beyond question those rights exist. Labor unions are, and for a long time have been, recognized by the courts of this country as a legitimate and useful part of the industrial system. Associations of laborers, to accomplish lawful objects by legal means, have been always recognized and protected by the law of this State. The law does not tolerate inequality in the existence and enforcement of rights or the definition and redress of wrongs, and the first condition of individual freedom and opportunity is servitude of law. In the instant case the contest did not arise because the members of union No. 679, or members of the same occupation and of other unions, chose not to work for the plaintiff or for or with men who did engage in business with it, or sought to persuade, in an orderly and proper manner, persons generally to abstain from business transactions with it. It did not arise in the ordinary and natural exercise by the unions of the right to control their own labor and of the right of association. It arose because the defendants, constituting the entire union population of the city of Auburn, inaugu-

rated and carried on, affirmatively and aggressively, through the agencies of fear and coercion, a comprehensive exclusion of the plaintiff from the business of the community, in order to compel it to unionize its business. On the part of the defendants there was organized coercion of the plaintiff into compliance with the demand of the unions that it compel its employees to join union No. 679, by combining to compel third persons to refrain from having any business relations with it. The defendants were an organized combination, with a unified intent and purpose, causing irreparable damage to the business and property of the plaintiff. Financial pressure, loss of business, interference with freedom of action were imposed by them in order to force the unionization. The law should be, and is, that the means were unjustifiable and unlawful, and the defendants should be enjoined from using them.

LABOR ORGANIZATIONS—BOYCOTT—CONSPIRACY—INJUNCTION—SECONDARY BOYCOTTS—CLAYTON ACT—PENDING SUITS—*Duplex Printing Co. v. Deering et al.*, *United States Supreme Court* (Jan. 3, 1921), *41 Supreme Court Reporter*, page 172.—The Duplex Printing Press Co. is a Michigan corporation engaged in the manufacture of large and complicated printing presses such as are used for printing daily newspapers. The company maintained a plant at Battle Creek, Mich., at which they employed about 200 machinists, in addition to an office force, and a field force, which supervised the erection of the presses, in all about 250 persons. The International Association of Machinists called a strike of these employees for the purpose of effecting recognition of the union, but only 11 factory workers and 3 field supervisors adhered to the call and struck. The defection of so small a number did not seriously interfere with the continuation of the operation of the factory or the sales and shipment in interstate commerce. The International Association of Machinists, having a membership of more than 60,000, thereupon adopted and carried out an elaborate country-wide plan for enforcing a boycott of the Duplex Co.'s presses. The methods adopted to enforce this boycott, as expressed in the language of the court, were as follows:

The acts embraced the following, with others: Warning customers that it would be better for them not to purchase, or, having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they

assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses. In some cases the threats were undisguised, in other cases polite in form but none the less sinister in purpose and effect.

This boycott campaign centered around New York City. The Duplex Co. brought action against Deering and Bramby, individually and as business agents of district No. 15 of the International Association of Machinists, for an injunction to restrain the boycott. The defendants contended that the Clayton Act prevented the United States District Court for the Southern District of New York from granting an injunction against a labor union. The court adopted this view, dismissing the bill (247 Fed. 192). On appeal to the circuit court of appeals this decision was upheld (252 Fed. 722), and the Duplex Co. again appealed. In reversing the decision of the lower courts and granting an injunction to restrain the acts above noted Mr. Justice Pitney, delivering the majority opinion of the court, said in part:

The jurisdiction of the Federal court was invoked both by reason of diverse citizenship and on the ground that defendants were engaged in a conspiracy to restrain complainant's interstate trade and commerce in printing presses, contrary to the Sherman Antitrust Act of July 2, 1890 (ch. 647, 26 Stat. 209). The suit was begun before, but brought to hearing after the passage of the Clayton Act of October 15, 1914 (ch. 323, 38 Stat. 730). Both parties invoked the provisions of the latter act, and both courts treated them as applicable. Complainant relied also upon the common law; but we shall deal first with the effect of the acts of Congress.

The judges agreed that the interference with interstate commerce was such as ought to be enjoined, unless the Clayton Act of October 15, 1914, forbade such injunction.

That act was passed after the beginning of the suit, but more than two years before it was brought to hearing. We are clear that the courts below were right in giving effect to it, the real question being whether they gave it the proper effect. In so far as the act (*a*) provided for relief by injunction to private suitors, (*b*) imposed conditions upon granting such relief under particular circumstances, and (*c*) otherwise modified the Sherman Act, it was effective from the time of its passage and applicable to pending suits for injunction. Obviously this form of relief operates only in futuro, and the right to it must be determined as of the time of the hearing.

The Clayton Act, in section 1, includes the Sherman Act in a definition of "antitrust laws," and in section 16 (38 Stat. 737) gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the antitrust laws under the conditions and principles regulating the granting of such relief by courts of equity.

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act.

Looking first to the former act, the thing declared illegal by its first section (26 Stat. 209) is: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means.

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott," that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

Mr. Justice Pitney then quoted from two earlier decisions of the court, and continued:

It is settled by these decisions (*Loewe v. Lawler*, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622], *Eastern States Lumber Assn. v. U. S.*, 234 U. S. 600, 34 Sup. Ct. 951 [Bul. No. 169, p. 53]), that such a restraint produced by peaceable persuasion is as much within

the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the circuit court of appeals was divided; the majority holding that under section 20, "perhaps in conjunction with section 6," there could be no injunction. As to section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred.

The principal reliance is upon section 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases with respect to (a) the terms and conditions of the relief and the practice to be pursued, and (b) the character of acts that are to be exempted from the restraint; and in the concluding words it declares (c) that none of the acts specified be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment."

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no such restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, * * * involving or growing out of a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context and mean only that those acts are not to be so held when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the antitrust and other laws of the United States to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the circuit court of appeals appear to have entertained the view that the words "employers and employees," as used in section 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong"; and that, as

there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of the machinists' union in calling a strike at the factory—section 20 operated to permit members of the machinists' union elsewhere—some 60,000 in number—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce—and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war.

Nor can section 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of section 20, which contain no mention of labor organizations, so as to produce an inconsistency with section 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization.

To instigate a sympathetic strike in aid of a secondary boycott can not be deemed "peaceful and lawful" persuasion. The majority of the circuit court of appeals, very properly treating the case as involving a secondary boycott, based the decision upon the views that it was the purpose of section 20 to legalize the secondary boycott "at least in so far as it rests on or consists of refusing to work for anyone who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this.

In the case of the Clayton Act the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now section 20. But they contain extracts from judicial opinions and a then recent textbook sustaining the "primary boycott," and expressing an adverse view as to the secondary or coercive boycott, and on the whole are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The ques-

tion whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative. The subject, he declared in substance or effect, was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confining boycotting to the parties to the dispute, allowing parties to cease to patronize and to ask others to cease to patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law, and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added.

Reaching the conclusion, as we do, that complainant has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or local statutes, there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

There was a dissenting opinion by Mr. Justice Brandeis, with whom concurred Justices Holmes and Clark, in which it was declared that in interpreting the Clayton Act the restrictive provisions should be made to apply to all employers and to all workingmen, whether in the employ of the former or not. They also stated that they believed the course of action of the union and its members was justified at common law.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — INTERFERENCE WITH EMPLOYMENT — DAMAGES — *Clarkson v. Laiblan et al.*, St. Louis Court of Appeals, Missouri (Dec. 2, 1919), 216 Southwestern Reporter, page 1029.—Clarkson was a journeyman roofer by occupation and as such belonged to Local Union No. 1, International Brotherhood of Composition Roofers, Damp and Waterproof Workers, of St. Louis and vicinity. After working as a roofer from 1903 to 1906, Clarkson became a contracting roofer and thereby lost his membership in the union. In 1909 he sold out his business to the St. Louis Roofing Co. and secured employment with that company as a journeyman roofer. The union demanded that Clarkson be discharged and not again employed by the company until all the union employees of the company who were out of work were re-employed. This demand was made under a threat of calling a

strike of the company's workers and for that reason was complied with. Clarkson then applied for membership in the union on two separate occasions, but was each time wrongfully refused readmittance to the union. Thereupon Clarkson undertook by contract to fulfill certain of the St. Louis Roofing Co.'s roofing contracts. When this was discovered by one Garvey, who was the business agent of the union, he went to the company and again threatened to call a strike of the company's employees unless the company annulled its contracts with Clarkson. The company complied with the union's demand as made by Garvey, who reported what he had done to the members of the union.

This action is brought by Clarkson against members of the union for damages for the interference with his contracts with the roofing company. The defendants demurred to the complaint but the demurrer was overruled and a decision was rendered by the St. Louis circuit court in favor of Clarkson. The union members appealed, and in affirming the decision the court of appeals said in part:

It is alleged that said roofers' union and its officers and agents, being these defendants, did willfully and maliciously conspire together and with each other to prevent plaintiff from following his trade as a roofer, and have willfully and maliciously conspired together and with each other to cause plaintiff to lose his employment and contracts with said St. Louis Roofing Co., and that the said acts were malicious, and that by reason thereof plaintiff has been caused to lose his said employment and contracts with St. Louis Roofing Co., to his loss and damage.

We think the demurrer was well ruled, and that, where the defendants, through their agent, as alleged, resorted to methods which in effect deprived the St. Louis Roofing Co. of its free will in the matter of carrying out the contract with plaintiff which it desired to do, in that case the acts of the defendants would be considered the proximate cause of the damage, and therefore as giving a cause of action. (*Clarkson v. Laiblan et al.*, 178 Mo. App. 708, 161 S. W. 660; *Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997.)

While the evidence in the record is conflicting as to the rules, customs, and usages of the union and also as to Business Agent Garvey's authority, we think there is sufficient evidence in the record to uphold the verdict of the jury in behalf of plaintiff.

While it is true that there is no specific by-law of the union which conferred authority upon Garvey, the business agent, to order a strike, it does appear clearly from the evidence that it was his duty to visit the union shops at regular intervals to see that none but union men were employed, and according to the testimony of Mr. Laiblan, the president of the union, he (Garvey) was to use his own judgment.

As the evidence tended to show that these acts on the part of Garvey were within the scope of his authority as business agent of the union, the officers and members of the union, being these defendants, were bound thereby.

It follows from this that there was evidence in the case tending to support the allegations of the petition, and that the court did not err in failing to give defendants' peremptory instruction to the effect that plaintiff could not recover.

Defendants make the further point that the punitive damages assessed are excessive. The verdict was for the sum of \$1,200 punitive damages and \$55 compensatory damages. It appeared that this cause has been before three juries, and that each of the juries rendered a verdict in behalf of the plaintiff, and in each case for damages in sums larger than was given in the present verdict. The acts of the defendants, through Garvey, the business agent, were necessarily humiliating and annoying to the plaintiff. There are eight defendants to bear the burden of this verdict. We do not think that the verdict under the circumstances is excessive.

We rule that the case was fairly tried under proper instructions. Finding no reversible error in the record, the commissioner recommends that the judgment be affirmed.

This case is based upon the same facts as to the suit for injunction as in *Clarkson v. Laiblan et al.*, 178 Mo. App. 708, 161 S. W. 660 (Bul. 169, p. 313), reference to which was made in the foregoing decision.

LABOR ORGANIZATIONS—BOYCOTT—CONSPIRACY—MONOPOLY—RESTRAINT OF INTERSTATE COMMERCE—SWITCHBOARD MANUFACTURERS—
Boyle et al. v. United States, United States Circuit Court of Appeals, Seventh Circuit (Apr. 4, 1919), 259 Federal Reporter, page 803.—Michael Boyle and various other members of labor unions together with certain manufacturers were indicted, tried, and convicted of unlawful conspiracy and violation of the Sherman Antitrust Act (July 2, 1890, ch. 647, 26 Stat. 209).

Prior to 1909 manufacturers of electrical switch and panel boards outside of both Chicago and Illinois sold and shipped their appliances in interstate commerce, finding a market in Chicago. In 1910 the employees and the electricians of employers located in Chicago and engaged in the manufacture of switch and telephone panel boards organized and struck to unionize the businesses. Some employers held out, others gave in. The employers protested against the union wage scale, declaring that if adopted they could not meet competition with outside firms which employed nonunion labor. Thereupon certain employers and the labor unions entered into an agreement whereby the former were to adopt the union wage scale and the latter were to undertake to bring about a condition which would make it impossible for any but union-made switchboards and panels to be installed in Chicago. In furtherance of this agreement the labor unions caused the destruction of switchboards brought into the State and made by nonunion labor; they also refused to install any

but union-made appliances or to operate them. The result was that it became impossible for switchboards and panels not made in Chicago and by union labor to be installed or used. The defendants appealed from the judgment of conviction. In affirming the judgment of the district court the court of appeals said in part:

Section 1 of the antitrust act reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal."

That the parties entered into a combination, that they reduced their agreement in part to writing is conceded. That the parties combined to restrain the shipment of commodities from points outside of the State of Illinois to the city of Chicago is fairly inferable from a part of the written agreement. The employers were anxious to avoid competition from nonunion shops. The employees desired to unionize the shops. They agreed that:

"This increase in scale is to go into effect only in case the party of the second part has succeeded before October 1, 1911, in bringing about a condition which will permit of none but union label switchboard work to be installed in the city of Chicago."

While the practices by which the second party was to bring about this result were not set forth, it is at least inferable even from this agreement alone that outside made switchboards would not be installed in the city of Chicago.

The reasons which actuated the parties to thus conspire and combine may have been and doubtless were quite different. The manufacturer was induced to enter into the agreement because of a desire to eliminate competition. He also wanted to settle his labor problem. The representatives of the unions were actuated by a different motive. But it was not the motive, but the common and concerted action of the parties for the unlawful purpose of restraining interstate commerce for which plaintiffs in error were indicted and convicted.

Nor was the Government barred by the statute of limitations. Plaintiffs in error were not tried for entering into the written contract of April 1, 1911, but were convicted of the unlawful conspiracy to restrain trade which was a continuing conspiracy or combination. While the parties entering into such unlawful combination might have withdrawn from such combination and thereby have relieved themselves from further liability, and the statute of limitations would have begun to run from the time of such withdrawal, yet it required some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created.

Complaint is also made because of the admission of evidence over objection. The Government introduced testimony showing that plaintiff in error Boyle on various occasions made builders pay him considerable sums of money under threat of a strike or a boycott. For example, one witness testified that he had paid Boyle \$500 to get a certain switchboard installed; another, that Boyle exacted of him \$3,000 in order that he might install a certain switchboard; and still another testified that Boyle required a church to pay \$200 as a penalty for installing certain electrical apparatus. Still another witness

testified that Boyle exacted a payment of \$20,000 in order to get immunity from strikes, etc., and at a time when there was no difficulty whatever between the builder and the employees. Plaintiffs in error contend that this evidence was not only inadmissible but highly prejudicial to their cause.

That such testimony, if erroneously admitted, was prejudicial must be conceded. For it requires no stretch of the imagination to conceive of a jury taking a prejudice against a party who is thus pictured in the rôle of a blackmailer, a highwayman, a betrayer of labor, and a leech on commerce. But the test of admissibility does not turn upon its effect upon the jury, but on its relevancy to the issues made by the charges set forth in the indictment.

The Government charged a conspiracy or combination to restrain interstate commerce. A prima facie case of conspiracy was established. Boyle was one of the coconspirators. As the object of the conspiracy, switchboards and panel boards made outside of Chicago were not to find a market in the city of Chicago. This object—this interference with interstate commerce—was to be brought about by threatened strikes, by boycotts, or by the exaction of graft to prevent strikes and boycotts. What more direct or immediate restraint upon the sale and installation of switchboards and panel boards made outside of Chicago than a burden of \$3,000 or \$5,000 upon the builder who sought to install them? It was as effective a means of preventing their installation in Chicago as threatened strikes. The testimony was receivable as an act of one of the coconspirators in furtherance of the object of the conspiracy.

The judgment is affirmed.

LABOR ORGANIZATIONS — BOYCOTT — CONSPIRACY — MONOPOLY — RESTRAINT OF INTERSTATE COMMERCE—TILE DEALERS' COMBINATION—
Belfi et al. v. United States, United States Circuit Court of Appeals, Third Circuit (June 18, 1919), 259 Federal Reporter, page 822.—
 The tile industry has been divided into three classes, (1) the manufacturer, (2) the dealer, and (3) the tile setter. In Philadelphia about 90 per cent of the tile dealers formed themselves into a trade combination known as the Philadelphia Tile, Mantel & Grate Association. The tile setters in Philadelphia and vicinity were organized as a labor union and had in its membership nearly all the tile setters in the vicinity.

The dealers' association entered into a written agreement with the labor union covering hours of labor, wage scales, etc. It was also agreed, but not in writing, that the dealers would employ none other than union tile setters and that the union members would not set tiles for dealers who were not members of the association, and furthermore they agreed not to set the tiles of any manufacturer who sold tiles to a nonmember dealer. All the tile manufacturers except one were located outside of Pennsylvania. The dealers and the members of the labor union were charged and convicted of unlawful conspiracy in restraint of interstate trade under the Sherman Antitrust

Act (July 2, 1890, ch. 647, 26 Stat. 209), and they appealed. In affirming the judgment the court said in part:

The defendants, who are tile dealers engaged in the retail tile business in Philadelphia and vicinity, had joined together and associated themselves in a trade organization known as the Philadelphia Tile, Mantel & Grate Association, ostensibly for the correction of trade abuses and evil practices and the promotion of sound business policies. This association, though admittedly a trade combination, was not regarded by the trial court to be in and of itself a combination violative of the Federal statute against unlawful restraints and monopolies. The controversy, therefore, concerns not the unlawfulness of the combination but the unlawfulness of the conduct of some of its members in carrying out its conceivably lawful purposes. This conduct consisted, as it is alleged by the indictment, in excluding trade competitors from membership in the association, in the refusal of association dealers to buy tiles from manufacturers that sold tiles to nonmember dealers, and in entering into agreements with a tile setters' labor union, whereby association dealers obtained from the union, first, preference over nonmember dealers in the employment of union tile setters, and, second, a promise by the union to supply no tile setters to tile dealers outside of the association, thereby creating a boycott of nonmember tile dealers by making it impossible for them to get materials for their business and labor with which to carry it on.

As all tile manufactories in the country save one are located in States other than the State of Pennsylvania, an interference with commerce caused by the refusal of tile setters to set tile and of tile manufacturers to sell tile is necessarily interstate in character. The jury having found that the defendants had by their acts restrained commerce, and that restraint being of commerce that was interstate in character, the only question for us to decide is whether the restraint to interstate commerce thus occasioned by the defendants was so indirect and remote that the trial judge should have declared as a matter of law that it was not such restraint as is contemplated by the statute.

It is sufficient to say that we believe the acts charged against the defendants named in the judgment now under review—over and beyond the articles of association by which they were bound and the written contract with the labor union into which their association had entered—were such, if committed, as did have a direct and immediate effect upon interstate commerce in tiles, resulting in its unlawful restraint.

The judgment of the court below was therefore affirmed, with costs, except as to two defendants, as to whom the judgment was reversed and a new trial granted, there being an apparent lack of evidence to sustain their conviction.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—BREACH BY EMPLOYEES—DAMAGES—*Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores and Longshoremen's Benev. Soc. et al., United*

States District Court, Eastern District of Louisiana (Apr. 6, 1920), 265 Federal Reporter, page 397.—This is an action in the form of a libel in personam for damages for the breach of a contract brought by the plaintiff (better known as the Holland-American Line) against the Stevedores and Longshoremen's Benevolent Society and the Longshoremen's Protective Union Benevolent Association. The two defendants are labor unions, one composed of white men and the other of colored men. The two unions entered into a contract with all ship agents and employing stevedores at the port of New Orleans for a period of three years, fixing the hours of labor and the price per hour, with provisions for extra pay for certain cargoes, overtime, night work, and Sunday labor. Labor was to be divided equally between the two unions and nonunion labor was to be employed only when union labor could not be had. The stevedores' foremen were all to be union members. The regular rate for ordinary cargoes was 80 cents per hour. A steamship of the plaintiff, the steamship *Amsteldijk*, put into port with an ordinary cargo of kainit, an ingredient used in making fertilizers. Union men started to unload the vessel at the usual rate of 80 cents per hour for such cargoes and quit at the regular time on Saturday. On Monday morning, however, contrary to the provisions of their contract, they refused to return to work unless they were paid 90 cents per hour. The presidents of the unions could not make the men return to work and nonunion men would not work where union men were striking. The ship was delayed in unloading for seven days, when finally the union men returned to work. The Holland-American Line is suing for damages for demurrage. In awarding judgment in the plaintiff's favor District Judge Foster rendered the following decision:

The contract is inartificially drawn and in terms imposes no obligation on respondents to furnish labor. It must be given a reasonable construction, however, and so as to maintain its validity, if possible. The contract absolutely binds all of the ship agents and employing stevedores of the port of New Orleans to employ none but members of the respondent unions, if they are available. By it the respondents establish the principle of collective bargaining, obtain the closed shop, 44-hour week, extra rates of pay for overtime, and their own working conditions, all that union labor, so far, has ever contended for. I think the contract is valid and imposes the reciprocal obligation on respondents to work according to the contract in good faith. There is no doubt the action of the men was arbitrary and amounted to a breach of the contract.

It is shown that the officers of the unions have no control whatever over the members. There is no provision in the by-laws by which they may be suspended, or expelled, or disciplined in any way, for refusing to abide by the contract. The contract and the award of the national adjustment commission were not accepted and did not become binding on the unions until ratified by general meetings of all

the members. It is shown that some of the men who quit work did not seek employment elsewhere, but remained in the vicinity of the vessel. The foreman, a member of the union, did not seek to employ nonunion men. He testified nonunion men will not work when union men are on strike. The action of the union men in this case had all the elements of a strike. Considering the control exercised over the nonunion men, the fact that the foreman was a member of the union, whom the stevedore was forced to employ, and that union men were available, though unwilling to work, I think the testimony of the foreman is conclusive, though there is some testimony of a general character that nonunion men might have been secured. Under these conditions the respondents are responsible for the action of a considerable number of their members, as here shown.

This brings up the question of damages. Undoubtedly the ship was delayed and demurrage accrued; but this might have been avoided by paying the extra wages demanded. The recovery should be confined to what it would have cost for additional wages to unload the ship at the rate demanded. As the evidence is not certain on that point, the case will be referred to a commissioner to ascertain the damages. Libellant to have a decree for that amount, with interest at 5 per cent from date of decree until paid. Respondents to pay all costs, to be divided between them equally.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—DECISION OF WAR LABOR BOARD—RETROACTIVE PAY—*Parker et al. v. First Trust & Savings Bank et al.*, United States Circuit Court of Appeals, Ninth Circuit (Sept. 7, 1920), 266 Federal Reporter, page 961.—The motormen and conductors of the Spokane & Inland Empire Railroad Co., Washington, belonged to the Amalgamated Association of Street and Electric Railway Employees, a union and a corporation. The employees worked under an agreement made in July, 1918, with the railroad by which the scale of wages, etc., were fixed and which provided that the contract could be terminated upon 30 days' written notice. On July 8, 1919, the employees gave notice that they wanted the agreement reopened to fix a new wage scale. The company refused to increase the wages and the employees submitted the case to the War Labor Board, but the railroad refused to appear before or have any dealings with that board. The board recommended an increase in wages, but the company would not grant the increase. Later it made a flat increase in wages, but would not make it retroactive. The railroad went into the hands of a receiver, and the employees filed this claim against it for their "back pay" on the basis of the award of the War Labor Board. The claim was disallowed and the employees appealed. In affirming the decision the court said, in part:

We find it impossible to arrive at the conclusion that the contract of employment between the association and the railroad company

was terminated upon the expiration of the 30 days' notice, and that from the expiration of such notice the men became entitled to recover as upon a quantum meruit. Even though the course pursued under prior similar contracts was that, when differences arose, adjustments of wages operated retroactively in favor of the men, the evidence as to this particular contract affirmatively shows that one of the parties positively refused to yield to any relinquishment, and stated as a ground inability to pay increased wages.

Nor can it be held that the railroad company was bound by the decision of the War Labor Board, for it is proven beyond all question that the representatives of the company always declined to submit the question of wages to the War Labor Board. The circumstance that the company refused to appear before the board, and that it refrained from having any communication with it, but strengthens the conclusion that the railroad company did not intend to subject the matter to the arbitrament of that board. And as further evidence that the contract was kept alive we have the circumstance that the men continued to work, accepted wages provided for under the scale embodied in the contract of February 10, 1918, and never made any agreement for increased wages with the company.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—LEGALITY—
“POLICY OF UNION”—CLOSED SHOP—*Shinsky v. O'Neil et al.*, Supreme Judicial Court of Massachusetts (Feb. 4, 1919), 121 North-eastern Reporter, page 790.—David Shinsky, who is a shoe laster, was expelled from the United Shoe Workers of America and from the local union of that association in the city of Lynn. He thereafter sought employment in that city. He was refused employment by two employers on the ground that they had made agreements with the United Shoe Workers whereby they agreed to hire only union labor so long as the union could supply the requisite help. A third one, after employing him, discharged him upon learning that he did not belong to the union; the reason given was that it had a price-list agreement with the union and was not desirous of displeasing the union and causing a strike. Shinsky brought action against the members of the union; the case was submitted to a master, who reported, whereupon the superior court dismissed the bill. The master's report was not excepted to. He found that the policy of the union was to secure all the work possible for its members rather than have it go to unaffiliated workers and to obtain the highest possible prices for their work. It was also declared to be the policy of the union to secure and increase the number of closed shops. It was also found that the union endeavored to make members such workmen as were employed but who were not already members. If they were unsuccessful, they notified the employer. In

affirming the decree dismissing the bill the court, speaking through Judge Loring, said in part:

The plaintiff's contentions on these findings is that the master has found that a part of the general policy of the union is legal and part illegal; that it follows from this that the policy as a whole is illegal.

We are not able to accede to this contention of the plaintiff. It is established that workmen can combine to get the advantage of bargaining for their common benefit in respect to the terms and conditions upon and under which they should work. It is further established that if they are successful in getting the bargain they wish they can insert in the agreement setting forth that bargain a clause providing that all work of the employer shall be given to them or that a preference shall be given to them in the employment of workmen. So much is established. Workmen can not hope to secure the advantages of bargaining for the common benefit unless their combination, their organization, their union (call it what you please) is a large and a strong one. If any member of the combination or union were to testify that he did not wish "to enlarge and strengthen the union organization," no one would believe him. No one would believe that a member of a union organized to secure the advantages of bargaining for the common benefit could hope to succeed unless all the members of the union did their best "to enlarge and strengthen the union organization." So far as this finding of the master is concerned we are of the opinion that the policy of the United Shoe Workers of America "to enlarge and strengthen the union organization" is an incident, and a necessary incident, to a successful combination to secure the advantages of bargaining for the common benefit. What we have said with respect to this finding of the master is equally true of the other finding relied upon by the plaintiff, namely, "a part of the policy of the union is to secure and increase in number what are sometimes called 'closed shops.'" We understand by this that the master means that it is the policy of the United Shoe Workers of America "to secure and increase in number" shops where the employer agrees to give all the work to members of the union, or at any rate to make a preference in their favor in employing workmen.

A union which has an agreement with an employer providing (inter alia) that all the work shall be given to the members of the union or that a preference shall be given to members of the union in employing workmen would open itself to serious criticism if it refused to admit to membership men qualified to perform the work done by members of the union in question. By having as a part of its policy "the custom" of not refusing membership to workmen who wish to join such a union avoids subjecting itself to this criticism. We are of the opinion that the finding of the master here relied upon can not be taken to mean anything more than this.

and Appeals of New Jersey (Mar. 1, 1920), 109 Atlantic Reporter, page 367.—Edward Reihing was employed by George R. Royce as an electrician. The defendant union had entered into agreements with the greater number of master electricians in the city of Newark, of whom Royce was one, whereby the unions agreed to furnish and the master electricians to employ only such persons as were members of the union. The agreement was in effect a written understanding of collective bargaining. The sections of this contract which are of particular interest in this case are as follows:

Section 7, which provides:

“No man not a member of the I. B. E. W. (the defendant) and holding a working card or permit from this local union, shall be employed at any time by the party of the first part (the contractor) at electrical work, except work covered and controlled by another local union of the I. B. E. W.”

“Section 9. Labor shall not be furnished to any one not a regular electrical contractor unless the prevailing rate for labor charged by the electrical contractor is paid for the same.”

“Section 11. Any firm, corporation, or individual engaged in the electrical contracting trade refusing to sign this agreement will be considered unfair by this local union.”

Reihing applied for membership in the union and was given a temporary card. Upon his failure to pass the necessary entrance examination this card was withdrawn from him and he was refused membership in the union. Reihing claims that the union interfered with his employment and that Royce discharged him because he did not belong to the union, but the court found that proof of this “manifestly failed.” He also claimed that the contract between the union and Royce was in violation of P. L. 1913, p. 25, ch. 13, which is the New Jersey antimonopoly law. The trial court entered a judgment of nonsuit against the plaintiff and he appealed. In affirming the decision the appeals court said in part:

The statute in question is one of those popularly known as the “seven sisters” or “antitrust laws.” The title is an act to define trusts, and to provide criminal penalties and punishment of corporations, to promote free competition in commerce and all classes of business, etc. It speaks in terms of business or commerce, produce, merchandise, or commodity. It provides for a penalty. The offense is a misdemeanor. In addition to such punishment provided on conviction of a misdemeanor, the charter of an offending corporation may be revoked by the attorney general of the State. It does not provide for the recovery of damages by a civil action. It is quite clear that the case under consideration is not brought within the terms or spirit of that statute. This is the only point considered or decided by the court. The statute in question, therefore, does not help the plaintiff’s case.

It is urged, even though the above statute is not applicable, the case is controlled by our decision in the case of *Brennan v. United*

Hatters, 73 N. J. Law, 729, 65 Atl. 165, and by the case of *Connors v. Connolly* in the Supreme Court of Errors of Connecticut, 86 Conn. 641, 86 Atl. 600, and under those cases a right of action can be maintained under the common law. This case is clearly distinguished from those cases on essential points. They are not applicable. In the former, the gist of the action was the damage caused to the plaintiff by an unwarranted interference with him, in his employment as a hatter. That case is cited with approval in the *Connors* case.

We conclude that it was not error for the trial court to enter a judgment of nonsuit. The judgment is therefore affirmed, with costs.

LABOR ORGANIZATIONS—COLLECTIVE AGREEMENTS—STRIKES—REFUSAL TO WORK—LIABILITY ON SURETY BOND—*Uden v. Schaefer et al.*, Supreme Court of Washington (Mar. 22, 1920), 188 Pacific Reporter, page 395.—The contracting plumbers of Seattle, Wash., were associated together under an organization known as the Seattle Plumbing and Heating Engineers' Association. Schaefer, the defendant, was a member in good standing in this association. The association had agreed with the plumbers' unions not to employ any plumbers who were not members of the union, and the unions agreed that none of their members would work for anyone who was not a member of the association.

One Uden was building an apartment house and called for bids from members of the association to install the heating and plumbing. All the bids were too high. Schaefer afterwards reduced his bid from \$19,000 to \$17,000 and came to an understanding with Uden. In accordance with the usual custom Schaefer furnished a surety bond for the penal amount of \$3,000, which Uden accepted. The surety was the Maryland Casualty Co. Among other things the bond provided that "the surety shall not be liable for any damages resulting from so-called strikes or labor difficulties, or from mobs, riots, fire," etc.

For the manner in which Schaefer procured his contract with Uden he was suspended from membership by the engineers' association. When this became known to the unions, Schaefer's plumbers left him and he was unable to secure other plumbers, either union or nonunion. As a result of this condition he forfeited his contract and Uden sued him and his surety for the difference between the price in Schaefer's contract and the lowest price by which the job could be done under a new contract. The Maryland Casualty Co. contends that it is not liable because the failure to fulfill the contract was due to a strike or labor difficulty. The court held the surety liable, saying in part:

In our opinion, the facts do not exonerate the appellant from the obligations of its bond. In the common acceptation of the term, it is not a "strike" for the workmen of an employer to quit his employment and go elsewhere, without any intention of returning; nor is it

a "strike" for workmen to refuse to enter into the employment of a particular contractor. A "strike," in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body when they quit without intention to return to the work, whatever may be the reason that moves them to do so. It is a matter of common knowledge that during the late war period many employers of labor, because of the great demand for labor had difficulty in employing and keeping a sufficient number of workmen. Many of such employers lost workmen in considerable numbers, who had long been in their employment, and for a time had practically to suspend operations. No one, however, supposed that the quitting of these workmen constituted a "strike." Schaefer's situation here was not different. By his own act he had placed himself in a position where certain workmen could not remain in or enter into his employment without violating their agreement, and others he could not obtain, and in no sense can this be denominated a strike.

The addition of the phrase "labor difficulties" to the term "so-called strikes" does not enlarge the meaning of the latter. It is rather definitive than expansive of it. In other words, the phrase is but explanative of the meaning of the word "strike," and any act of the workmen which would not constitute a strike would not constitute a labor difficulty.

The judgment is affirmed.

LABOR ORGANIZATIONS—CONSPIRACY—EXTORTION—BLACKLISTING OF EMPLOYERS—*People v. Curran et al., Supreme Court of Illinois (Dec. 18, 1918), 121 Northeastern Reporter, page 637.*—The defendants were members and business agents of labor unions—the Painters' District Council, the Glaziers' Union, the Wood Finishers' Union, and the Fixtures Hangers' Union. The facts in the case as found by the court were in brief as follows:

These unions maintained a headquarters in the balcony of a saloon, where they had desks and telephone booths. Whenever an employer of labor in the city violated some rule or requirement of the unions he was notified to pay a certain sum of money to said unions. If he refused, the plate glass in his store was broken, and when he went to a glass dealer to have it replaced they refused to replace it and directed said employer to the saloon where the unions maintained their headquarters. When the employer went to said headquarters he was informed that he must pay a certain sum of money, usually larger than the first demand. The violation by the employer of the union rules or requirements in many cases was unintentional, or a very minor offense, or really no offense at all, but merely fancied on the part of the members of the unions. Some of the rules were unreasonable. Isadore Hoffman employed an electrician who showed

a card of Union Local 376, which had seceded from one union and had formed another, which was unknown to Hoffman. The union which took its place, Local 134, claimed that Local 376 was irregular. For this act Hoffman was required to pay \$300, and when he refused his glass windows were broken. Before he could get new windows he was compelled to pay \$400. A charge of conspiracy was brought against 25 of the members of these unions in an indictment containing 16 counts charging conspiracy at common law. Fourteen were convicted, 2 paid their fines, and the remaining 12 appealed. In affirming the convictions the court said, in part:

The principal objection is that, as the counts contain the essentials of an offense under the Criminal Code (Hurd's Rev. St. 1917, ch. 33, secs. 1-594), they should have concluded against the form of the statute. If an act is an offense both against the common law and the statute, the prosecutor may proceed under either the statute or the common law, or both. It was not necessary, to constitute the offense of conspiracy at common law, that the object of the conspiracy should constitute a criminal act, but it was sufficient that the object was unlawful though not indictable. The court did not err in denying a motion to quash the indictment or any count thereof.

It is argued that the court erred in ruling on the admission of evidence. There was evidence, already stated, of more than 50 cases, all substantially alike, and the objection is that there was no evidence connecting any of the defendants with the breaking of glass and smashing the windows. Some of the counts charged a conspiracy against persons to the grand jurors unknown, and it was proper to prove all the instances if they implicated the plaintiff in error. Where certain events having a natural connection follow each other frequently with uniformity, the necessary inference is that they are referable to the same cause. The evidence was that the black list was made, the windows broken, the dealers in glass refused to furnish glass and directed the owner to the saloon where the plaintiffs in error, who made the blacklist, made their headquarters, and extorted money from him as a condition of removing his property from the list and having his glass reset. These facts lead to the irresistible conclusion that they were all parts of one systematic scheme and that the breaking of the glass was caused by the plaintiff in error.

It is claimed that the court erred in not requiring the people to elect upon which count or counts they would proceed. The conspiracies charged in the various counts were different parts of one conspiracy, and the right to demand an election does not exist in such a case. (*Andrews v. People*, 117 Ill. 195, 7 N. E. 265.)

LABOR ORGANIZATIONS—CONSPIRACY—LIABILITY FOR DAMAGES—TORTS OF MEMBERS—*United Mine Workers of America et al. v. Colorado Coal Co. et al.*, *United States Circuit Court of Appeals, Eighth Circuit* (Apr. 28, 1919), 258 *Federal Reporter*, page 829.—This case first came up for hearing before the circuit court on a demurrer in 1916, when the action was instituted by Dowd as receiver for certain

coal mines against the United Mine Workers of America. The demurrer was dismissed and a trial ordered. The present case was an action for damages for the destruction of property by the United Mine Workers. Dowd, who had represented nine coal-mining corporations whose stock was all controlled by one company, was succeeded by the Coronado Coal Co. et al. The nine coal-mining companies operated mines owned or leased by them in Arkansas and maintained what is called an "open shop." The companies refused to sign agreements with the labor unions to unionize their mines.

The United Mine Workers of America, the defendant, is an international association of coal mine workers, the national headquarters of which is in Indianapolis, Ind. This association is composed of a national or controlling union, under which there are district unions, and under the latter, local unions. It was and is the policy of the united mine workers eventually to bring about the operation of all mines by union labor, and it devoted its energies to this end.

After repeated but unsuccessful attempts by the United Mine Workers to get the plaintiff mining companies to agree to operate their mines with only union labor, the mine workers proceeded to do what they could to coerce the companies to accede to their wishes. Incidents of violence occurred against the property and employees of the plaintiff mines, and an injunction was sought and secured. The injunction, however, seems to have had little effect upon the mine workers' activities. The unions held several conventions at which they declared it to be their purpose either to make the mines using nonunion labor to unionize their mines or to put them out of business.

The union later purchased arms and ammunition in considerable quantities and distributed them among the union miners of the district where plaintiffs' mines were located. An attack was made by the union miners upon the property and employees of the plaintiffs' mines. The mine property was dynamited and burned and many employees were injured, some being killed, and the action for damages followed.

The case was submitted to a jury which rendered a verdict for the plaintiffs in the sum of \$200,000, which was trebled under the provisions of the Sherman Antitrust Act. Interest was also awarded from the date of the destruction of the property to the date of the judgment. The United Mine Workers appealed, urging 184 assignments of error. The judgment was affirmed in every particular except the interest, which was ordered to be remitted. The opinion is in part as follows:

The defendants insist that it was error to hold the unions which were made defendants as entities, against which an action could be

instituted, process had, and judgment recovered; they being unincorporated labor unions.

This question was determined by this court on the former hearing, *sub nomine Dowd v. United Mine Workers of America*, 235 Fed. 1, 148 C. C. A. 495 [Bul. 224, p. 168], and it was there held that under the Sherman Antitrust Act these unincorporated unions may be sued by one injured in his business or property by reason of anything done which is forbidden by the Sherman Act. That decision is the law of the case, and cannot now be again reviewed.

Other contentions were then considered and rejected, after which the court said:

The objection to the introduction of the *United Mine Workers' Journal* is equally untenable. The secretary of the organization testified that—

"It is the official publication of the organization, published by authority and under the supervision of the International Executive Board of the United Mine Workers of America; that its editor is appointed by the president of the International Union."

Therefore the editorials, which were published in almost every issue of the *Journal*, must be deemed the acts of the organization. They were clearly admissible. As the action is one for conspiracy, the law permits great latitude in the introduction of evidence tending to establish the conspiracy and connecting those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy.

The main issue in this cause, so far as the national organization and its officers were concerned, was whether the torts committed by some of the defendants were in pursuance of an unlawful conspiracy to compel the plaintiffs and other coal mine operators to unionize their mines, and were authorized, encouraged, advised, and, if not authorized, ratified by the national organization and its officers, after they had been committed. The court did not err in admitting these journals in evidence. (*Clune v. United States*, 159 U. S. 590, 593, 16 Sup. Ct. 125 [Bul. No. 2, p. 213]; *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, 249, 38 Sup. Ct. 65 [Bul. No. 246, p. 145]; *Louie v. United States*, 218 Fed. 36, 41, 134 C. C. A. 58.)

That corporations, and this association must be treated as such in this action, are liable for the torts of their members or employees, when encouraged in the commission of them, or if ratified thereafter, is well settled. (*Philadelphia etc. R. R. v. Quigley*, 62 U. S. (21 How.) 202; *Denver etc. Ry. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286; *Stewart v. Wright*, 147 Fed. 321, 327, 77 C. C. A. 499.)

The admission in evidence of the indictment and pleas of guilty of some of the defendants, members of the local unions, for the destruction of this property, was clearly proper against those defendants, as admissions made by them, and if their unlawful acts were applauded and approved by their codefendants, after having encouraged them in their unlawful acts, such approval is a ratification of these unlawful acts, and makes them liable. (*Loewe v. Lawler*, 208 U. S. 274, 28 Sup. Ct. 301 [Bul. No. 75, p. 622].)

Whether the acts of those defendants amounted to a ratification was a question to be determined by the jury from the evidence under

proper instructions. If the unlawful acts were in pursuance of a conspiracy, and were committed before the unlawful conspiracy had been abandoned, or the object of the conspiracy completed, all persons who were members of the conspiracy or made themselves parties thereto at any time before the conspiracy had been abandoned, or its object completed, are responsible.

The correspondence between the officials of the Remington Arms Co., showing the purchase of arms and ammunition and payment therefor, by the officers of the United Mine Workers of America, their shipment to Hartford, Ark., to the officers of the district and local unions, their distribution by them to the striking members, shortly before the battle which resulted finally in the destruction of plaintiff's mines, and their use by them, was admissible as tending to show that the organization aided and encouraged the commission of the torts. But in no event could the admission be prejudicial to the defendants, for there was ample testimony showing that those who committed these wrongs were members of the union, armed with guns and ammunition, which were freely used on the occasion alleged in the complaint.

It is contended that the evidence fails to establish a conspiracy in violation of the Sherman Act, which is the gist of the action, and therefore it is claimed there can be no recovery in this action. A great deal of the testimony relating to the organization of the mine workers, their acts to accomplish the object of absolute control of all coal mines, is almost identical with that set out in the opinion of the district judge in *Hitchman Coal & Coke Co. v. Mitchell*, 202 Fed. 512 [Bul. 152, p. 137], to which reference is made, in order to shorten this opinion.

The evidence, to our minds, as it was in the opinion of the learned trial judge and the jury, established the conspiracy practically beyond question. It is much stronger than that in the *Hitchman Coal & Coke Co.* case. To review it fully, covering as it does over 3,000 pages of the printed record, would only tend to prolong this opinion and serve no useful purpose. The law requires that, in order to entitle defendants to such a direction, the court must give the evidence the strongest probative effect, and view it in the light most favorable to the plaintiffs, and, if there is any substantial evidence to sustain the allegations in the complaint, a peremptory instruction must be refused. This is too well settled to require the citation of authorities. A careful reading of the evidence satisfies that it fully sustains the conclusions of the learned trial judge on these motions.

The judgment of the court below was therefore affirmed, subject to an agreement to remit the interest allowed; otherwise a new trial would be granted.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—MEMBERSHIP AS GROUND FOR DEPORTATION—UNDESIRABLE ALIENS—SABOTAGE—*Ex parte Bernat* and *Ex parte Dixon*, *United States District Court, Western District of Washington, N. D.* (Dec. 17, 1918), 255 *Federal Reporter*, page 429.—Bernat and Dixon were both members of

the Industrial Workers of the World and both were aliens. The Commissioner General of Immigration of the Department of Labor ordered that both of them be deported as undesirable aliens and on the ground that each of them "has been found advocating and teaching the unlawful destruction of property." Dixon is a subject of England and Bernat a subject of Russia, and each of them brings petition on the ground that they were denied a fair hearing. Because the facts are similar and the issue identical, both cases were decided together. After stating the facts, the court said:

If the alien has been accorded a fair, though summary hearing, and the finding is supported by competent testimony, however slight, the court may not interfere.

The court thereupon examined the testimony and found that both aliens were active members of the Industrial Workers of the World; that both were in good standing; that they knew and understood the purposes and doctrines of that order, and that they both adhered to and practiced them; that they had read the literature and propaganda of the order, and that they advocated its teachings. The court then reviewed some of the literature of the I. W. W. and quoted at length from some of the publications. As illustrative of the methods of the I. W. W. the following was quoted from "The I. W. W., Its History, Structure, and Methods," by Vincent St. John and others:

"Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede to the demands of the workers."

The court quoted several definitions of sabotage by I. W. W. writers, one of them being by Andre Tridon in the *New Unionism* and is as follows:

"We may distinguish three forms of sabotage.

"(1) Active sabotage, which consists in damaging of goods or machinery. * * *

"(3) Obstructionism, or passive sabotage, which consists in carrying out orders, literally, regardless of consequences."

Excerpts were also quoted from the *Industrial Workers of the World*, and one of the I. W. W. songs was also quoted. In conclusion the court upheld the ruling of the commissioner general, saying:

From the activity, as disclosed in the record, the court can not say that there is no evidence upon which to predicate the finding of the commissioner general in each case; and it would appear that the conclusion of the commissioner general, based upon the facts as stated, is within the purpose and intent of the Congress in enacting section 19 of the act of June 5, 1917, ch. 29, 39 Stat. 889 (U. S. Comp. St. sec. 42894jj), and this is emphasized by the passage of the act of October 16, 1918, entitled: "An act to exclude and expel from the

United States aliens who are members of anarchistic or similar classes."

The application for writ will be denied in each case.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—MEMBERSHIP AS PROOF OF POLITICAL PRINCIPLES—POLICIES—RIGHT OF MEMBERS TO CITIZENSHIP—*United States v. Swelgin, United States District Court, District of Oregon (May 22, 1918), 254 Federal Reporter, page 884.*—Carl Swelgin, a native of Germany, had, on his application in due form, been admitted to citizenship in the United States in May, 1913. Suit was subsequently brought to vacate and annul the certificate of naturalization on the ground that neither at the present time nor at the time he was naturalized and during the preceding five-year period was Swelgin "attached to the principles of the Constitution of the United States," nor is he "well disposed to the good order and happiness of the same."

It was therefore claimed that his certificate of naturalization was procured by deception and fraud practiced on the court, warranting its cancellation. This contention prevailed, Judge Wolverton saying in part:

The proofs show, and the defendant admits, that he became a member of the organization known as the "Industrial Workers of the World" in December, 1911, and was such member at the time he was admitted as a citizen of the United States, and ever since has been a member thereof. I should qualify that, because the witness said that there was a time following August, 1913, for a period of two or three years, that he was not a member; but he thereafter did become a member, and has continued such ever since. Not only this, but he has been active in the order, in promoting its propaganda, and furthering the cause that the order espouses. He asserts his firm belief in the principles enunciated in the preamble and constitution of the order, and admits that he is in full sympathy with the propaganda and practices thereof. Among other things, he indorses the sabotage recently practiced upon the timber and lumber industries in the Northwest, and when asked if he was willing to join the forces of his country against Germany, he answered, in effect, that he entertained conscientious scruples against entering the Army. He further states that the views he entertained respecting these subjects at the time and previous to his naturalization were the same as he now holds and adheres to. So that his attitude of mind then respecting the principles and practices of the order of the Industrial Workers of the World was the same as his attitude now, to which he firmly adheres.

No further evidence is necessary for establishing his purposes and designs as it relates to organized government and the peace and tranquillity of society, and we have only to inquire, touching the doctrine and principles of the organization, whether they are promotive of or inimical to the maintenance and stability of organized

government, and whether they are calculated to promote peace and good order in society, or whether they are adapted by design to the demoralization and degradation thereof.

Quotations were then made from the preamble of the constitution of the I. W. W., and from its documents and publications of various kinds, among them being an expression from a pamphlet:

With a free society, without class rule and exploitation, a society of free cooperation, we have that which corresponds with the absence of government, "anarchism."

And from one of its newspapers, *The Industrial Worker*, published at Spokane, Wash., issue of May 8, 1912:

The I. W. W. opposes the institution of the State. It holds that State or governmental control of industry would merely introduce a different form of slavery. Government implies governors and governed, a ruling and a subject class. No man is great enough or good enough to rule another.

The I. W. W. is creating its own ideas of morality and ethical conduct, as opposed to the current conceptions of what constitutes "right" and "wrong."

Other expressions quoted were:

Toward the existence of government the I. W. W. is openly hostile.

It is antipatriotic.

The kernel of evil lies in the very existence of the State, and violence is an economic factor.

Judge Wolverton then said:

No one can read these pamphlets and pronouncements of the order without concluding, by fair and impartial deduction, that it is not only ultrasocialistic but anarchistic. It is really opposed to all forms of government. It advocates lawlessness, and constructs its own morals, which are not in accord with well ordered society. Its adherents are antipatriotic. They own no allegiance to any organized government. And I am unable to understand by what right such of them as come from another country can claim that they are entitled to be admitted to citizenship under the Stars and Stripes.

When, therefore, the defendant declared that he was attached to the principles of the Constitution of the United States, and was well disposed to the good order and happiness of the same, he made avowal of that which was not in his heart, and thereby deceived the court. And, further, he was a disbeliever in and opposed to organized government, and he fraudulently misled the court as to that.

The annulment of the defendant's certificate of naturalization was therefore directed.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—PURPOSES OF ORGANIZATION—CONSPIRACY—ANARCHY—*State v. Lowery*, Supreme Court of Washington, 177 Pacific Reporter, page 355.—

Fred Lowery was convicted of the crime of criminal anarchy, denounced by Rem. & Bal. Code, section 2563, and he appeals. The complaint charged him in the language of the statute with membership in the Industrial Workers of the World and that such organization had for its aims, objects, and purposes the violent, felonious, and anarchistic overthrowing of the Government of the United States, and with having committed acts of an anarchical nature. To this complaint Lowery demurred and his demurrer was overruled. The court in affirming the overruling of the demurrer said in part:

It (the complaint) charges in plain, clear, and concise language the violation of subdivisions (1) and (4) of section 2563, Rem. & Bal. Code, by alleging that the defendant advocated the overthrow of organized government by unlawful means, to wit, by an organization known as the Industrial Workers of the World, which organization has for its purpose the anarchistic overthrow of government, and that the defendant was also guilty, in that he was a member of, or had voluntarily assembled with, this organization formed to propagate anarchical doctrine. The information is surely sufficient to notify the defendant of the charge which he is called upon to defend against; it specifies the time, the place, and the means by which the crime is alleged to have been committed, and it so charges it that a person of common understanding can not mistake its meaning.

The defendant had in his possession when apprehended various written propaganda most of which was of an inflammatory character issued by the Industrial Workers of the World. These documents were admitted in evidence against the defendant as showing the aims, objects, and methods of the Industrial Workers of the World by whose authority they were published. Defendant protested against the admission of this evidence. On this point the court said in part:

This was all admissible against the defendant, there having been introduced evidence, sufficient to go to the jury, establishing that the defendant himself was not only associated with, but was a member of, such organization. The defendant claims that he is not responsible for the recitals contained in the exhibits. That is beside the question, because the defendant made these doctrines his own by accepting membership in the organization by which they were promulgated, and an exposition of whose principles they represent. They were also admissible on the theory that they were declarations of coconspirators engaged with the defendant in the furtherance of an unlawful purpose.

The defendant next claimed error on the part of the trial court in excluding testimony which he offered through certain witnesses as to what the members of a mediation commission, an unofficial organization appointed by the President of the United States to investigate the causes of labor unrest, had reported. The purpose here

was to establish by this testimony that the Industrial Workers of the World were not in fact an anarchical organization. In dismissing this assignment of error that court said in part:

The persons making the report were not the Industrial Workers of the World, nor, so far as disclosed, were in any way associated or affiliated with that organization. The statements contained in the report, therefore, could not have come from that organization nor can they be considered as the authorized statement of the principles of the organization. There is nothing in the report to indicate that the ones making it were specially delegated to investigate the organization, nor is there any suggestion that the persons making the report could not have been secured as witnesses, and, if they were qualified, to have testified to the reputation of the Industrial Workers of the World, as did other witnesses put on the stand by the defendant for that purpose. It is certainly not permissible for a witness on the stand to testify as to what some one else, even though cloaked with the title of a mediation commissioner, may have thought from his investigation of the Industrial Workers of the World as to their doctrines. This violates all the rules of hearsay testimony.

The judgment of conviction was affirmed.

LABOR ORGANIZATIONS—INSURANCE BENEFITS—COLOR BLINDNESS AS LOSS OF SIGHT—*Fallin v. Locomotive Engineers' Mut. Life & Accident Ins. Assn., Court of Appeals of Georgia, Division No. 2 (Feb. 10, 1920), 102 Southeastern Reporter, page 177.*—Fallin was insured by the defendant association against death and accident. He became color blind, and because he was thereby incapacitated from following his vocation the same as if he had become totally blind, he demanded his insurance for total and permanent blindness. The association refused to give him any benefits and he sued. The lower court sustained a demurrer to his complaint and he appealed. In affirming the decision the court said:

Where a certificate or policy of insurance issued by the Locomotive Engineers' Mutual Life & Accident Insurance Association contains the following: "Any member of this association * * * sustaining the total or permanent loss of sight in one or both eyes shall receive the full amount of his insurance. * * * This association will not recognize a claim for the insurance of any certificate holder for impaired eyesight, but for total and permanent blindness only, in one or both eyes"—and a suit is brought against such association seeking to recover for total and permanent blindness the petition alleging that the plaintiff had become color blind in both eyes, under the terms of the policy or certificate the company is not liable, as color blindness does not amount to total and permanent blindness within the meaning of the policy. The court did not err in sustaining the general demurrer and dismissing the case.

This case is directly contrary to an earlier decision handed down by the Supreme Court of Nebraska in *Routt v. Brotherhood of Railway Trainmen*, 165 N. W. p. 141, noted in *Bulletin No. 246*, p. 68.

LABOR ORGANIZATIONS—INSURANCE BENEFITS—EFFECT OF AMENDMENT TO CONSTITUTION—*Tierney v. Perkins, City of Albany Court, New York (Dec. 23, 1919), 179 New York Supplement, page 297.*—Mrs. Tierney, the deceased wife of the plaintiff, had once been a cigar packer and in 1894 joined the Cigarmakers International Union of America, of which Perkins is the president. She regularly paid her dues up to the time of her death and was according to the constitution of the union entitled to indicate to whom the insurance benefit was to be paid. The constitution of the union when Mrs. Tierney joined it provided that upon her death a death benefit would be paid to her dependent relatives or to a beneficiary indicated by her in writing, or in the absence of the former or the failure to do the latter to her "heirs at law." Mrs. Tierney had never, prior to her death in 1914, designated in writing any beneficiary, nor did she leave surviving her any dependent relatives. The constitution of the union was amended in 1912 so that death benefits would be payable as before, except that undesignated "heirs at law" could not take, but that in the event of failure to name a beneficiary or in the absence of surviving dependent relatives the benefits would be forfeited. The defendants claim that according to the constitution of the union at the death of Mrs. Tierney the plaintiff was not entitled to the death benefits and therefore he ought not be permitted to recover. Tierney claims, however, that the constitution as it was when his wife joined the union should govern his claim to the benefits. The court held that the amendment to the constitution was not unreasonable and that the benefits had been forfeited. The following is the opinion in part:

When Mrs. Tierney became a member of the defendant organization, she entered into a contract with them, and the terms of that contract are those specified in the constitution as it then existed, and her rights must be determined under that constitution and such amendments thereto as were reasonable in their nature and operation.

Mrs. Tierney, up to the moment of her demise, could have prevented a forfeiture to the defendant by simply filing a written designation, and so long as this privilege was reserved to her, it can not be said that the defendant association exceeded its authority in adopting this amendment.

I have given very careful and thorough consideration to this case, realizing that the plaintiff's wife for 20 years had contributed her dues to the defendant union and undoubtedly expected that the benefit would be paid upon her death; but I am unable to find any recognized authority which proves the invalidity of this amended constitution, and consequently I am bound to declare that she forfeited the benefit by failure to take advantage of the privileges which the new constitution extended. In view of the conclusion reached aforesaid, it will be unnecessary for the court to discuss the other questions raised in this case.

LABOR ORGANIZATIONS—INSURANCE BENEFITS—FORFEITURE OF MEMBERSHIP—WAIVER—*Staffan v. Cigarmakers' International Union of America, Supreme Court of Michigan (Dec. 27, 1918), 169 Northwestern Reporter, page 876.*—The plaintiff, Mrs. Staffan, is the widow of Chauncey L. Staffan, who had been a member of the defendant union since 1894. He died October 11, 1917. The defendant has headquarters in the city of Chicago and is made up of local unions maintained all over the United States, Canada, and Porto Rico, whose members are engaged in cigar making. The parent body and the local unions of which it is made up operate under a constitution which the members take an obligation to support. The constitution provided that a member would be suspended if he failed to pay his dues for more than eight weeks, whereupon if he wished to be reinstated he must pay \$5. It also provided that if a member had been such continuously for 15 years his widow would be entitled to \$500 benefit and \$50 funeral expenses. Staffan had during his membership fallen in arrears in his dues in excess of the eight weeks period a number of times, but he had never been suspended by the local union nor by the headquarters officers, and he was always allowed to pay the back dues, so that on the day he was dropped from the rolls as insane he was less than eight weeks in arrears. The union refused to pay the widow the \$550 benefits due on the ground that under the constitutional provision Staffan had automatically been suspended. The court, in affirming the judgment of the lower court allowing recovery of the benefit, rendered a decision from which the following is quoted:

It is elementary that the law abhors forfeitures and will avoid them whenever reasonable ground can be found for so doing. We are of the opinion that the facts in this case bring it clearly within the rule laid down in *Wallace v. Mystic Circle*, 121 Mich. 263, 80 N. W. 6, wherein we quoted with approval the following:

"If the company has, by its course of conduct, acts, or declarations or by any language in the policy, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to the payment of the premium on the day stipulated would not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement and will be estopped from setting up the condition as cause for forfeiture. In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the nonpayment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the insured, or by the acts and declarations of his authorized agents, has induced in the mind of the insured an honest belief that the terms and conditions of the policy declaring a forfeiture in event of nonpayment on the day and in the manner prescribed will not be enforced, but that payment will be accepted on a subsequent day and

in a different manner, and when such belief has been induced and the insured has acted on it the insurer will be estopped from insisting on the forfeiture."

The judgment is affirmed.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—INJUNCTION—*Callan et al. v. Exposition Cotton Mills, Supreme Court of Georgia (May 14, 1919), 99 Southeastern Reporter, page 300.*—The Exposition Cotton Mills required in its business a large number of laborers skilled in the particular trade, which it employed under contracts terminable at will. The mills determined to operate the business on a nonunion basis and to that end made a rule that no person who belonged to a labor union should be employed in the business, and that if any employee should at any time join a labor union his employment would immediately cease. This rule was promulgated among all of the employees and assented to by them impliedly by continuing to work under the rule after its promulgation or expressly. It was declared by the court that the employer had a contractual relation with the employees so assenting, and that where strangers who, knowing of the status, conspire to coerce the employer to abandon this policy of employing nonunion labor and to cause a breach of the contractual relation between the employer and employees, and who in pursuance of such conspiracy make inflammatory speeches to the employees at and near the business place of the employer and denunciatory of the business and its owners, endeavoring thereby to induce the employees to break their contracts of employment by joining a labor union in such large numbers as would force the employer to assent to the unionizing of the laborers or would render it impossible to carry on the business, equity will protect the employer by injunction against such strangers. (*Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145].)

It was also decided that the lower court did not err under the pleadings and evidence in granting to the Exposition Cotton Mills an interlocutory injunction against Callan and others, who had attempted to induce its employees to join a union.

LABOR ORGANIZATIONS—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—INJUNCTION—*Patterson Glass Co. v. Thomas et al., District Court of Appeals, Third District, California (June 12, 1919), 183 Pacific Reporter, page 190.*—The Patterson Glass Co. was about to open and operate an establishment for the manufacturing and selling of window glass in Stockton, Calif. The company required for this

work a large number of skilled artisans. It had 75 artisans with whom it had made contracts for the season of 1917-18 under the terms of which the employer was required to give seven days' notice before dismissing any employee and each employee was to give like notice before quitting the company's employment. Thirty more artisans were required for the company's work. It therefore engaged this number of workers in various eastern cities, with whom were made contracts of employment containing the above provisions. In Cleveland, Ohio, there existed an unincorporated association of persons who were engaged as workmen in the manufacture of glass. The purpose of this labor union was to establish and fix the wages, hours, etc., of its members. The wages were fixed according to the value of the product produced by their labor, and in order to limit the output of the product and thus increase its price the union forbade its members from working at their calling during certain periods of the year. In this case the Patterson Glass Co. opened its factory on September 15, 1917, and its employees were at the time working under wages and conditions which were satisfactory to them. The union had issued an order to its members forbidding them to engage in work before December 1, 1917. The union proceeded to urge the company's employees to abandon their contracts and return to the eastern cities from which they had come, promising if they did so to pay their living expenses and transportation costs. The company was not able to secure other skilled workers in California. It therefore sued for an injunction against the members of the union to prevent and enjoin them from "knowingly and intentionally causing and attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by any like inducement or persuasion, any employee of the plaintiff under contract of hire to break such contract to render service" to it. A demurrer to the petition was sustained, thus denying the relief sought. In reversing the decision of the trial court the appeal court used in part the following language:

The men who were there at work had voluntarily entered into these contracts, and were engaged in the performance of their duties when defendants appeared upon the scene and commenced their propaganda and persuasions, as alleged in the complaint, to induce these men to quit work, the result of which, if successful, would necessarily cause plaintiff to shut down its establishment and cease its productive activities. That such an injury may not be adequately compensated in damages, but may only be thwarted by injunctive relief, is manifest.

We think that by fair implication it sufficiently appears that defendants knew that the employees of plaintiff were working under a contract with plaintiff. An inference that they were ignorant of the fact that a contract existed is inconsistent with the averments of the complaint.

The right to injunctive relief is no longer questioned, and it is no justification that defendants acted without ill will but in good faith, in pursuance of the provisions of the constitution of the union prohibiting its members from working with nonunion men, the employer not being aware of or a party to such provisions.

LABOR ORGANIZATIONS—INTERFERENCE WITH EMPLOYMENT—RIGHT OF WORKMEN TO ORGANIZE—*Sheehan v. Levy et al.*, *Court of Civil Appeals of Texas* (June 28, 1919), *215 Southwestern Reporter*, page 229.—Sheehan was a master plumber engaged in the contracting plumbing business in Dallas, Tex. He had a number of contracts on hand to install plumbing in various buildings which required the employment of journeymen plumbers. Other master plumbers of the city had formed an association and had demanded that Sheehan also become a member. They declared that if he refused they would compel the plumbers' union to order its members not to work for him. The journeymen plumbers had a trade-union called Local No. 100. Sheehan employed only such journeymen as belonged to this union. The plumbers' union, Local No. 100, issued an order prohibiting its members from working for Sheehan, with the result that he was not able to fulfill his contracts. He thereupon sued the Master Plumbers' Association and the Local No. 100 of the United Association of Journeymen Plumbers for damages and for an injunction, but he was unsuccessful and judgment was rendered in favor of the defendants.

The court of appeals sustained this judgment, saying that as the trial court had found as a matter of fact, which the present court could not disturb, that the evidence offered by the Master Plumbers' Association completely exonerated its members from the charge of complicity in the action of the local union in withdrawing its members from the plaintiff's service, there was no ground for an injunction against the association.

As to the action of the journeymen plumbers in withdrawing their members, the court said:

It is declared by statute in this State to be lawful for any and all persons engaged in any kind of work or labor, manual or mental, to associate themselves together and form trades-unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal services in their respective pursuits and employments; and that it shall not be held unlawful for any member or members of such trades-union or other organization or association, or any other person, to induce, by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit, in which

such person may then be engaged. (Vernon's Sayles' Civil Statute, art. 5245.) Aside from this statute, it is well settled, eliminating the earlier decisions, that a person has the right to work for and with whom he pleases, and that laboring people may "organize for the purposes of promoting their common welfare, elevating their standard of skill, advancing and maintaining their wages, fixing the hours of labor and the rate of wages paid, obtaining employment for their members." The case at bar is one in the nature of a strike, and we see no good reason for saying that article 5245 is not applicable. But aside from this statute, and for reasons indicated, we think appellant was not entitled to the injunctive relief sought.

The judgment is affirmed.

LABOR ORGANIZATIONS—MEMBERSHIP AS GROUND FOR DEPORTATION—GENERAL STRIKE—"FORCE"—COMMUNIST LABOR PARTY—*Cohyer et al. v. Skeffington et al.*, *United States District Court, District of Massachusetts (June 23, 1920)*, 265 *Federal Reporter*, pages 17, 58, 59, 61, 63, 79.—On October 16, 1918, Congress enacted a law providing in part (sec. 1) as follows:

That * * * aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States * * * shall be excluded from admission into the United States.

Under this law wholesale arrests were made of all persons who could be found who belonged to the Communist Party or the Communist Labor Party. The Department of Justice operatives made the arrests and the Bureau of Immigration officials conducted the hearings of those arrested. Many of the persons arrested were citizens of the United States. After holding the arrested persons for varying lengths of time most of them were discharged. Those who were not discharged were held for deportation, and brought this action for writs of habeas corpus for their release. It appears that the sole charge against these aliens is membership in the Communist Party or Communist Labor Party, these parties being held by the commissioner of immigration at Boston to be organizations that advocate and teach the overthrow of the Government by force or violence. Many irregularities in the arrests and the proceedings before the commissioner of immigration were discussed by the court. The petitioners contend among other things that the Communist Labor Party or Communist Party does not advocate violence of any sort and that it is not an illegal organization under the act of Congress.

On this point Circuit Judge George W. Anderson said in part:

The immigration authorities have no legal right to deport these aliens unless there was some evidence tending to show that the

Communist Party "believes in, advocates, or teaches the overthrow of the United States by force or violence" within the fair meaning of the words "overthrow," "force," and "violence" as used in this statute.

This problem may be most conveniently approached by considering first what the evidence shows that the Communist Party is not, and also what it is. It is not a militaristic organization. It is anti-militaristic—pacifist. There is therefore not a scintilla of evidence warranting a finding that the Communists are committed to the "overthrow of the Government of the United States" by violence or military force or by the use of weapons or bombs or of any other devices for destroying or injuring life or property. "Violence" is no part of their program.

But their nonreliance upon parliamentarism is not enough to ground an inference that they adopt violence as an alternative. In this regard the Secretary of Labor seems to me to have fallen into error. No organized set of human beings can be found to be committed to the proposition of overturning a great Government by violence unless their plan of organization admits at least the possibility of the existence of violence. The organization and the avowed purposes of the Communists exclude such possibility.

On what, then, does the Communist Party rely for effecting the radical change in the scope and functions of the Government which it urges; changes which its own manifesto describes as "revolutionary"? Upon creating "mass consciousness," "mass action," the concrete and effective expression of which is the general strike.

Stated as a generalization, their proposition is that under capitalistic society the mass of the workers, who are alleged to do the really productive work, are exploited and robbed by the minority; that, as a resultant of "mass consciousness" and "mass solidarity," the real workers may say to society: "We will hereafter work on our own terms or not at all." This theory is easy of statement and superficially pleasing and plausible. But, translated into practical, political action, it means nothing but advocacy of the general strike as a political weapon; otherwise, it is nothing but idle words: "Vox, et præterea nihil."

It is no proper part of the present function of this court to analyze and comment upon the gross errors, historic, economic, and logical, into which the Communists fall in their differentiation of workers from nonworkers, or to depreciate their unconstructive, impractical notions of a political and economic society managed only by those whom they now erroneously classify as "workers." The present task is merely to determine what "force" they really seek to use in order to effect the changes they urge, and thus to reach a conclusion as to whether that force is the sort of force condemned by the statute of October 16, 1918.

The conclusion is irresistible that the only force worth discussion, believed in or advocated by this party, is the general strike; otherwise, its methods are those of ordinary political and social propaganda.

Analysis, then, brings me to this crucial question: Did Congress intend by the use of the word "force" in this statute to condemn the general strike when advocated as a political weapon by aliens?

There is clearly no evidence that the Communist Party advocated the use of any other kind of force in their attempts to change our political institutions.

The present problem is purely one of statutory construction: Did Congress, by the act of October 16, 1918, providing for the expulsion of aliens seeking to overthrow our Government by force or violence, intend thereby to outlaw the general strike, at any rate when advocated by aliens?

I am unable to believe that such was the purpose of Congress. It is not the natural interpretation of the words. It does not accord with the historic genesis of the statute. Moreover, this statute should be interpreted in the light of legislative precedents and of analogous legislation. It is familiar history that for about a century the tendency of lawmaking bodies has been to legalize and to facilitate, not to outlaw, strikes as forces in the industrial conflict. The trend of American legislation has been to limit the power of the courts to interfere with strikes by injunction.

Coming now to the second question in the problem above stated. Was there evidence before the Secretary upon which he might have found the Communist Party committed to the "overthrow" of our Government "by force or violence"? The necessary result of the foregoing analysis of the evidence, in the light of the interpretation of the statute adopted, is to require an answer in the negative.

This conclusion that the statute does not outlaw the general strike as a political weapon, and that there is no evidence of the advocacy of any other kind of force, makes it unnecessary to determine whether there was any evidence before the Secretary of Labor that the Communists believed in, advocated, or sought the "overthrow" of our Government.

LABOR ORGANIZATIONS—MEMBERSHIP AS GROUND FOR DISCHARGE—CITY FIREMEN—*McVatt et al. v. Lawther, Mayor, et al., Court of Civil Appeals of Texas (June 9, 1920), 223 Southwestern Reporter, page 503.*—McNatt and the other plaintiffs were firemen in the employ of the fire department of the city of Dallas. Prior to January, 1918, they, together with other firemen in the city, organized themselves and became members of a local union affiliated with the American Federation of Labor. The mayor and commissioners of the city demanded that they withdraw from the union upon penalty of being discharged from the city's employ. The plaintiffs refused to comply with this demand and were suspended. Later, in accordance with the provisions of the city charter, they were given a hearing and discharged. This provision of the charter is as follows:

All policemen and firemen of the city of Dallas shall hold their position during good behavior and shall not be removed from same except for such cause as in the opinion of the board of commissioners renders them unfit to remain in the service of the city and after written notice, giving the grounds for such discharge or removal, and an opportunity to be heard on such charges or reasons.

This action is for a writ of mandamus to compel the mayor and commissioners to reinstate the plaintiffs in the city's employ on the grounds that section 5244 of the Revised Statutes, which made membership in unions lawful, controlled in this case and could not be made a reason for discharge; and on the ground that the rule of the fire department prohibiting membership in the union was purely arbitrary and capricious. The lower court sustained a general demurrer to the petition and the plaintiffs appealed. The decision was affirmed, however, and judgment rendered for the city officials. The reasons for the decision are set forth in the following extracts from the opinion:

The petition in the case before us shows that a hearing was had on the charges made against the plaintiffs. It does not disclose what evidence was offered on the hearing, and it will, of course, be presumed that the evidence supported the charge. So that the only question for us to determine is whether the charge itself, if sustained, was sufficient to authorize the removal.

It is appellants' contention that their action in becoming members of the union was lawful, under the express provisions of article 5244 of the Revised Statutes, and could not form the basis of any charge for removal from their positions. This article reads as follows:

"It shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades-unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments."

The act merely announced that there was no prohibition of law against such unions. But, on the other hand, it did not seek to regulate the attitude of the employer toward the organization of unions among his employees, and we take it that, if the employer should see fit to prohibit his employees from becoming members of such "trades unions" on pain of discharge in case of violation of such prohibition, such act would not be in violation of this law. (Martin's Modern Law of Labor Unions, sec. 258.) This would have been plain, we think, without any statement to such effect in the law, but the act itself declares that—

"Nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employees." (R. S. art. 5246.)

If the act had sought to impose any restrictions upon the freedom of the employer in such matter, it would probably be held unconstitutional. (*Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 [Bul. No. 169, p. 147].)

The court then quoted an ordinance of the city of Dallas which forbids members of the fire and police departments of the city to organize any association without first securing the approval of the

proper officials, such organization being subject to dissolution if determined to be detrimental.

The opinion continued:

We refer to this ordinance as merely explaining the reference in the charge to the rule and regulations of the fire department, which it was charged the plaintiffs had violated, and while the petition itself did not refer to such ordinance, it can be fairly inferred from the allegations of the petition, which set out the charge preferred against the firemen, that such charge was made in view of such or similar rules, duly promulgated for the regulation of the fire department.

The board of commissioners of the city of Dallas had the interest of the public, as well as the employees of the city, to consider. In addition to the consideration stated in the quotations above referred to, the commissioners may have taken into consideration the effect of the increased probability of strikes by the policemen or firemen of the city, as a body, if such employees were permitted to become members of an organization which might bind them to act as a body in such matters. The dire consequences of such a strike has been exemplified in the comparatively recent strike of the policemen of the city of Boston. The adoption of the ordinance referred to or similar rules and regulations may have been the result of a purpose to minimize, as far as possible, the probability of some such calamity in the city of Dallas. We are not called upon to express an opinion as to whether such rules were wise or not. We do conclude, however, that we can not say that the adoption and enforcement thereof by the constituted authorities of the city was arbitrary or capricious.

We think the court correctly sustained the demurrer to the petition, and its judgment will be affirmed.

LABOR ORGANIZATIONS—MEMBERSHIP AS GROUND FOR DISCHARGE—INJUNCTION TO PREVENT DISCHARGE OF UNION MEMBERS—*San Antonio Fire Fighters' Local Union No. 84 v. Bell et al.*, *Court of Civil Appeals of Texas, San Antonio (June 19, 1920)*, 223 *Southwestern Reporter*, page 506.—The members of the city of San Antonio's fire department organized themselves into a union and became affiliated with the American Federation of Labor. The mayor and commissioners issued an order forbidding the members of the fire department to become members or to remain in the union. The San Antonio Fire Fighters' Local Union No. 84, which is the union the members of the fire department had joined, brought this action against the mayor and commissioners of the city of San Antonio to restrain them from discharging from the city's employ any members of the fire department because of their membership in the union. The court sustained a general demurrer to the petition and the plaintiff appealed. In sustaining the decision in favor of the defendant the court said in part:

The general rule is that in the absence of a contract the employer has the authority to discharge an employee, with or without reason, and the only change made in that rule so far as the city of San Antonio is concerned is that charges must be preferred in writing and the trial must be public on those charges. It must be inferred that the legislature intended that the charges must not be frivolous or trivial, for such charges would be fraudulent. It must be presumed that before any of the appellant's members are removed or discharged proper charges in writing will be filed and a just trial had thereunder. (*City of San Antonio v. Tobin*, 101 S. W., 269; *White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1161; *City of San Antonio v. Newnan*, 218 S. W. 128.)

It can not be said as a matter of law that a municipal corporation has no right or authority, as must be the claim of appellant if there is any basis for its suit, to determine that membership in a certain organization renders its appointees inefficient or untrustworthy, and even without admission on the part of one of the affiants that he owed a higher duty to his union than his city in case of orders for a strike upon the part of the firemen it can not be assumed that a fair trial will not be given the members of the union.

It is not alleged in the petition that membership in the union would not affect the loyalty of the members of the city nor make them subject to orders that would interfere with the public service and the discharge at all times of their duties. It is not alleged that they would not obey a strike order coming from the proper union authorities nor that there would be no interference with the service if a member should at any time be removed or discharged from the service of the city; but the original petition merely states that firemen are about to be discharged because they are members of a union which subscribes "to principles, rules, and regulations promulgated or prescribed by the American Federation of Labor for the benefit and protection of its members," without indicating what the "principles, rules, and regulations" may be. Such rules and regulations may be deemed by the commissioners inimical to the interests of the city, and this court has no authority to anticipate that they will abuse their discretion should they entertain such an opinion and act upon it.

Judgment affirmed.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—ATTEMPT TO UNIONIZE RESTAURANT—*Stuyvesant L. & B. Corporation v. Reiner*, Supreme Court of New York, Special term (February, 1920), 181 New York Supplement, page 212.—The Stuyvesant L. & B. Corporation was a restaurant company employing from 20 to 30 waiters and kitchen help. The principal officers of the restaurant had previously been members of Waiters' Union Local No. 1, of which the defendant, Reiner, is the treasurer. The restaurant had no dispute with its employees, who were satisfied with the wages, conditions, and hours of labor. Some of the employees were members of the union. Reiner wanted to unionize the plaintiff's business. When plaintiff refused

to agree to employ union labor exclusively, Reiner threatened to call a strike. When Reiner came to plaintiff's place and blew a whistle the employees refused to strike, but on the contrary made an affidavit in which they declared they did not desire to strike, whereupon Reiner caused plaintiff's restaurant to be picketed. The usual threats to and intimidation of plaintiff's employees and annoyance to its customers were indulged in. This action was brought to secure an injunction to prevent further picketing of plaintiff's restaurant. In granting the injunction the court said in part:

We have thus a case in which all of the employees of plaintiff refuse to join the union, and where the employer refuses to submit to a compulsory acquiescence in the defendant's demands to engage only employees who belong to a union. It is a commonplace that labor organizations are lawful bodies, which may seek by lawful means to secure adequate compensation for their services, fair hours of labor, proper conditions under which to work, or to accomplish any other legitimate objects. The conduct of the defendants, however, is not only coercive upon the plaintiff, but also upon their employees. It is tantamount to saying to these employees: Unless you join the union you will be deprived of your positions and prevented from securing work elsewhere. It is a direct interference with the exercise of their right of freedom of action in a matter in which they alone should decide.

The right to join a union implies the right not to join one.

The facts established in this action come peculiarly within the condemnation of law. The defendants had no grievance against plaintiff, other than that it and its employees were not in accord with their views about unionizing the plaintiff's business. It is no answer to say that picketing has been held to be lawful if peacefully conducted. But picketing, even though ostensibly peaceable, may not be employed when its purpose is in effect a malicious and wanton interference with another's business or vocation. As a matter of fact, there is no strike here at all. The picketing is therefore a malicious act and unlawful. Since no overt act of interference with the plaintiff's business is shown, other than that of picketing, the motion will be granted to the extent of forbidding any picketing in front of plaintiff's premises.

Ordered accordingly.

LABOR ORGANIZATIONS — PICKETING — INJUNCTION — EFFECT OF CLAYTON ACT—*Kinlock Telephone Co. et al. v. Local Union No. 2 et al.*, *United States District Court, Eastern District of Missouri* (May 6, 1920), *265 Federal Reporter*, page 312.—The Kinlock Telephone Co. and others brought an action in equity against Local Union No. 2 of the International Brotherhood of Electrical Workers, its members, and officials to obtain an injunction to restrain an unlawful strike and to prevent picketing. The telephone company had made a contract with its employees, some of whom belonged to the union and some of

whom did not, whereby the company was to be permitted to maintain an "open shop." The union voted to call a strike of the company's employees for the purpose of compelling the company to maintain a "closed shop" and to make it see that union members in its employ regularly paid their dues. The strike was called, and many of the company's employees were induced to quit their employment in violation of their contracts. The usual picketing and persuasion was indulged in by the union, with the result that irreparable damage was inflicted upon the company's business. A temporary restraining order was allowed. The company's business is interstate in character, and upon the hearing of the motion for injunction the union set up as a bar the Clayton Act (38 Stat. 738, see Bul. No. 166, p. 235), which restricts the courts of equity from issuing injunctions in certain cases. District Judge Faris held that the facts of the case brought it within the provisions of the Clayton Act and refused to grant the injunction prayed for. The decision is in part as follows:

I am of opinion that the most that the proof may be said to show is that the defendants, as members, officers, and agents of the International Brotherhood of Electrical Workers and as individuals, are causing, maintaining, and supporting the strike in question upon wholly feigned and insufficient grievances, with the aim and intent as already stated, to compel plaintiffs to unionize their business; that the result of such action upon the part of the defendants has been to cause the contract existing between plaintiffs and its employees to be breached by such employees without sufficient reason or excuse, in law or in fact, and, further, that defendants threaten to cause other of plaintiffs' employees to breach their contract with the plaintiffs, and that defendants are seeking to attain the results above stated by advice, persuasion, and inducements bottomed upon labor unionization and union obligations.

Construing the contract offered in evidence, I am of opinion that this contract requires arbitration as therein provided for, even though one party to the same may contend that there is no grievance in fact upon which to bottom the complaints made. Neither upon a construction of this contract, nor in common fairness or reason, is there any obligation on the part of plaintiffs to pay the union dues of plaintiffs' employees, or to see that such dues are paid, or to discharge men who do not pay such dues, although it is clear from the evidence that this is one of the chief ostensible reasons for calling the strike now existing.

In the light of the provisions of the Clayton Act, have the defendants, by the several acts found, become in equity liable to be enjoined? I am constrained, by the view I am compelled to take of the fairly plain provisions of the act, to hold that they have not. The Clayton Act was passed on the 15th day of October, 1914, and provides generally in substance, that no injunction shall be granted in any case between employers and employees, unless such injunction is necessary to prevent irreparable injury to property or property rights, for which injury the law furnishes no adequate remedy.

The court then quoted that portion of the act which forbids injunctions against picketing, peaceable persuasion, the payment of strike benefits, etc., and continued:

Upon the record there is no manner of doubt that irreparable injury has been done to the property of the plaintiffs, and that further irreparable injury is threatened, and that the law applicable to the facts in this case provides no adequate remedy. But the definite particularization set out in that part of the Clayton Act which I have quoted specifically defines what acts shall nevertheless be deemed lawful (of course, so far only as concerns the power to enjoin such acts), even though the doing of such acts shall result in irreparable injury, without an adequate remedy at law for the redress of such injury.

Being constrained to follow the fairly plain provisions of the Clayton Act, I am of opinion that this case is ruled by it, and, however strongly I have heretofore entertained the view that, when there is committed an irreparable injury to property and when similar injury is clearly threatened and no adequate remedy at law exists, equity may grant relief by injunction, even as against employment, I am yet bound by this statute, which I deem it my plain duty to follow, even to the exclusion of these views.

It follows that the motion of plaintiffs for a temporary injunction should be denied, and the temporary restraining order heretofore issued dissolved. Let an order be entered accordingly.

LABOR ORGANIZATIONS—PICKETING—INJUNCTION—RIGHT OF MOVING-PICTURE PROPRIETOR TO RUN HIS OWN MACHINE—*Hughes et al. v. Kansas City Motion-Picture Machine Operators, Local No. 170, et al., Supreme Court of Missouri (Apr. 30, 1920), 221 Southwestern Reporter, page 95.*—J. E. Hughes had been a motion-picture machine operator and was a member of the defendant union. It was alleged by the union but denied by Hughes that he had revealed certain secrets of the union. In accordance with the rules of the union he was fined \$100, or in event of failure to pay to suspension for one year. Hughes refused to pay and he was both fined and suspended. He thereupon purchased an interest in a moving-picture theater and operated the projecting machine. It being contrary to the rules of the union for a person having an interest in a show to conduct it himself, Hughes was again fined \$100. Later Hughes became a partner with one Briner, the other plaintiff in this case, in the Eastern Theater. At that time Briner had in his employ a union machine operator, but as Hughes was capable of operating the machine the union operator was dismissed. The executive board of the union, together with a machine operator and two pickets, called on Hughes on April 16, 1916, and told him he must choose either the

operator or the pickets. Hughes asked time to consider, but this was refused and the place was picketed that night and every night thereafter at 7.45 p. m., which was the busiest hour of the day. The picketing continued regularly and occasioned some friction and involved some intimidation of passers-by. It also caused a falling off of \$15 in the show's weekly earnings. Hughes and his partner sued for an injunction and a temporary injunction was allowed but later dissolved, and they appealed. In reversing the decision of the lower court and issuing a permanent injunction, the court rendered a decision in part as follows:

The court below in its judgment found that each and all of the defendants had been engaged in picketing plaintiff's place of business and persistently requested the public not to patronize it, on the theory plaintiffs did not employ a union operator and therefore was unfair to union labor; that the picketing resulted in substantial damage to the business of plaintiffs, but was conducted in a peaceable manner and therefore was not unlawful; that if the defendants were enjoined from continuing their conduct they would be deprived of the rights of free speech and personal liberty guaranteed by sections 4 and 30, article 2, of the State constitution, and amendments 1 and 14 to the National Constitution.

Beyond question the demand of the union that plaintiffs should desist from conducting business in that way, and should employ an outside operator, was arbitrary and unlawful. The right asserted by plaintiffs to keep down the expense of their business by having Hughes manipulate the projector is the simple and primitive right of a man to earn a livelihood with his own hands, as much so as that of a blacksmith to blow his forge. (*Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7 [Bul. No. 189, p. 53].) This right the rule of the union denied to Hughes, even if he became a member.

Defendants contend the picketing was peaceable and therefore lawful, and to prevent it by the writ of injunction will deprive them of their privilege of free speech and the use of the public streets. Without denying that there can be peaceable picketing, as some courts have held, we dissent from the proposition that picketing is lawful, as a matter of course, simply because it is not accompanied by assaults, threats, or other methods of intimidation. In some instances we consider peaceable picketing is lawful. For example, where in the prosecution of a strike pickets are posted to observe and report what takes place on the employer's premises, and in the course of their task use neither violence nor threats toward other employees. (*W. & A. Fletcher Co. v. Assn. of Machinists* (N. J. Ch.), 55 Atl. 1077; *Karges Furniture Co. v. Woodworkers' Union*, 165 Ind. 421, 75 N. E. 877.) It has been held, but not by all courts, to be lawful in such instances, when nothing more is done by the pickets than to endeavor by argument and persuasion to prevent other workmen from taking service under the employer against whom the strike is directed. (*St. Louis v. Gloner*, 210 Mo. 502, 109 S. W. 30; *Standard Tube etc. Co. v. International Union*, 9 Ohio Dec. 692; *Ricard etc. Co. v. Benner*, 14 Ohio Dec. (N. P.) 357; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45.) It is unlawful, according to the

authorities, when a strike is in progress for members of a labor union to endeavor to persuade employees to break their contracts, and doubtless picketing for that purpose is unlawful.

The point of difficulty is not whether the picketing as prosecuted was wrong, but whether the writ of injunction can be used to prevent it. Decisions of this and other courts are cited as holding it may not. The courts of review of this State have declared peaceable picketing is lawful and can not be enjoined; but the instances were where the legality of the act was determined with reference to the effect of the absence of intimidation by violence and threats, and not with reference to the harassment of the complainants and the damage to their business by the manner in which the picketing was done. Intimidation happened in the present case, as we have stated, and in consequence of it and of the propaganda conducted by the pickets in defaming the behavior of plaintiffs to organized labor, much damage was inflicted on them, considering the small scale of their business. They and their employees were compelled for months, during the busiest hours of the evening, to do their work under the constant annoyance of the picketing a few feet from the entrance of the theater. To break the effect of the misrepresentations of the pickets, Mrs. Hughes walked the sidewalk informing passers-by that plaintiffs were not unfair to organized labor; and it may be fairly concluded that plaintiffs were forced into this unpleasant activity to preserve in some measure their patronage. To our minds such a condition of affairs constituted a private nuisance and an intolerable one. No organization should be permitted to thus vex and harass men; at any rate, when the act objected to by the organization affects so remotely the welfare of the members, as in the present instance.

We hold that the picketing by defendants of the premises of these plaintiffs was, as carried on, a nuisance that worked irreparable injury and is subject to be enjoined. Authority for this view is not wanting.

Referring to the constitutional guaranties invoked by defendants, we remark that the first amendment to the National Constitution is a restraint on congressional action only, and has no bearing on the rights of defendants in this case.

The clause of the fourteenth amendment providing against a State's depriving a person of liberty without due process of law, the kindred provisions in sections 4 and 30 of article 2 of the constitution of the State, and the guaranty of freedom of speech in section 14 of said article 2, are not, it is hardly necessary to say, absolute rights to be exercised by a person without limit or reference to the correlative rights of others. To follow a lawful business or vocation is part of the liberty protected by the constitutional limitations; but when the business is carried on at a place or in a manner to make it a nuisance and injurious to others it is no longer within that protection, but is an illegal act.

The judgment is reversed and the cause remanded, with directions to the court to set aside the judgment dissolving the temporary injunction heretofore granted, and to issue a permanent injunction against defendants, restraining them from picketing in front of plaintiffs' theater.

LABOR ORGANIZATION — PICKETING — INJUNCTION — VIOLATION — VALIDITY—CONTEMPT OF COURT.—*Lyon & Healy v. Piano, Organ & Musical Instrument Workers' International Union et al.*, *Supreme Court of Illinois* (June 18, 1919), *124 Northeastern Reporter*, page 443.—The plaintiff, Lyon & Healy, is a corporation engaged in manufacturing and dealing in musical instruments. On October 4, 1917, some of its employees, who it seems were members of the defendant union, went on a strike. The strikers picketed plaintiff's establishment and resorted to violence and intimidation in an effort to induce plaintiff's remaining employees to quit their employment. The employer procured on November 5, 1917, a temporary injunction against the union, its president, and its members, restraining them from engaging in picketing. In spite of the injunction the picketing and other unlawful acts were continued. Various employees of plaintiff were assaulted and injured and some of their homes were bombed. Plaintiff's store and garage were also bombed. Thereupon plaintiff filed a petition against six individual defendants, including Charles Dold, president of the defendant union, asking for a rule to show cause why they should not be punished for contempt for the violation of the injunction. They answered the petition and denied that they violated the injunction and further declared that the court had no jurisdiction to issue the injunction. The court found them all guilty and fined them and they appealed. In affirming the decision the court said in part:

The only question to be considered is whether the circuit court had jurisdiction to grant the injunction. Counsel for appellants do not contend that they did not picket the appellee's plant, or did not violate the injunction, but only that there is no evidence that they were guilty of any threats, intimidations, or acts of violence, or have attempted to create or enforce a boycott, and therefore it is argued that they have not violated any prohibition of the injunction which the court had power to grant.

The injunction prohibited the picketing or the maintaining of any picket or pickets at or near the appellee's premises, and the appellants' contention is that picketing is the exercise of a legal right, which can only be enjoined when something else besides the act of picketing itself is done.

No one denies that the courts have the power to interfere by injunction in controversies between employer and employee in proper cases, at the suit of either party. So the appellants' counsel state that the court had the undoubted right to prohibit violence, assault, and breach of the peace upon the workmen employed in complainant's shop during the strike, but did not have the right to prohibit the peaceful assembly of workmen who are on a strike; that this part of the injunction, therefore, was illegal, and should not have been included in the writ. Granting this to be true, it does not follow that the court had no jurisdiction to grant the injunction. Jurisdiction is the power to hear and determine the matter in controversy

between parties, and if the law gives the court power to render a judgment or decree, then the court has jurisdiction. Jurisdiction does not depend upon the correctness of the decision, and is not lost by an erroneous decision. Where a court has before it a party complainant asking that an injunction issue on a bill stating a case belonging to a class within the general equity jurisdiction of the court, and also the party against whom the injunction is asked, the court has jurisdiction to decide whether an injunction ought to issue, and the character of the injunction, and, should the court err in ordering an injunction to issue when one ought not to issue or in ordering an injunction broader in its terms than is justified by the bill, its decree will be reversed, but the error will be no defense to an attachment for contempt for violating the injunction. The error does not deprive the court of its jurisdiction, and the decree is binding upon the defendant until vacated or set aside. (*Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176.)

A party may refuse to obey an order where the court had no jurisdiction to make it, but not on the ground that it was erroneously made. An order made in the exercise of jurisdiction, though erroneous, must be obeyed until modified or set aside by the court making it, or reversed by an appellate court. (*Court Rose Foresters of America v. Corna*, 279 Ill. 605, 117 N. E. 144; *Christian Hospital v. People*, 223 Ill. 244, 79 N. E. 72.) There can be no doubt that the circuit court of Cook County had jurisdiction of the subject-matter and the parties. It had jurisdiction to determine whether the bill was sufficient to justify the issue of an injunction and the character of the injunction which should issue. Whether the bill stated a cause of action for which an injunction should be granted, or whether the affidavits sufficiently establish the facts upon which an injunction should be granted, are questions of no importance upon the hearing of a charge of contempt for violating the injunction which the court ordered. If the bill was insufficient, it should have been tested by a demurrer, and not by disobedience of the writ. (*Court Rose Foresters of America v. Corna*, supra.) If its averments were not true, a motion should have been made to dissolve the injunction, but until it was dissolved the appellants were bound to obey it. The sufficiency of the bill is not before us for determination. Neither is the question whether the scope of the injunction is broader than the allegations of the bill. Those questions can arise only on a direct proceeding for the review of the order granting the injunction.

The appellants having violated the injunction were properly adjudged guilty of contempt of court, and the judgment against them is affirmed.

Judgment affirmed.

LABOR ORGANIZATIONS—PICKETING—INTERFERENCE WITH CONTRACT—INJUNCTION—*Dail-Overland Co. v. Willys-Overland (Inc.) et al.*, United States District Court, Northern District of Ohio (Dec. 27, 1919, and January, 1920), 263 Federal Reporter, page 171.—The Willys-Overland Co. manufactured automobiles in Ohio and sold them through the Willys-Overland (Inc.). The court called the former the "Overland" and the latter the "Willys-Overland." The plaintiff is a

North Carolina corporation to whom was given a certain territory in which it might sell the Willys-Overland automobiles. By contract the Dail Co. was to get a certain number of cars for sale each year. The required deliveries were made for the first four months in 1919, but in May, by reason of a labor dispute at the plant of the Overland at Toledo, Ohio, the deliveries stopped. This action was brought by the Dail Co. against the Willys-Overland, the Overland, and the labor organizations causing the dispute which stopped work for conspiracy in restraining interstate commerce. An injunction was also prayed for to restrain any interference with the contract to deliver the automobiles and to restrain the strike, picketing, and an alleged lockout, which was in reality a closing of the plant at the request of the city authorities to avoid violence and bloodshed on the part of the strikers and their supporters. In granting the injunction, Judge Killits, speaking for the court, referred to *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301 (Bul. No. 75, p. 622), and *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492 (Bul. No. 95, p. 323), and continued:

The acts charged against the alleged coconspirators in this case to have been in contemplation as agencies to effect the conspiracy, and also committed to further that conspiracy, were morally much more responsible than those charged against the alleged conspirators in the cases cited; also in the present case the labor defendants are charged with conspiring to induce the employees of the Overland to break their contracts with the latter. Consequently the case is within the scope of *Hitchman Coal Co. v. Mitchell*, and *Eagle Glass & Mfg. Co. v. Rowe*, reported in 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145], and 245 U. S. 273, 38 Sup. Ct. 80 [Bul. No. 246, p. 152], respectively.

Does the Clayton Act change the law in any way so as to affect the application here of the cases above cited? We are unable to see that it does, for we see nothing in this case that brings into pertinency the statement with which section 6 of that act (Comp. St. 8835f) begins, "that the labor of a human being is not a commodity or article of commerce;" nor are the other provisions of section 6 applicable here. We are not asked here "to restrain individual members of such organization [labor organizations and others named] from lawfully carrying out the legitimate objects thereof," nor are we asked to declare the labor organizations named as defendants in this case "to be illegal combinations or conspiracies in restraint of trade." The things which the labor defendants are alleged to have in mind to accomplish the purposes of their alleged conspiracy, and the things which are alleged to have been done in furtherance of that conspiracy by way of overt acts, can not, by the wildest stretch of imagination, be considered to be "lawfully carrying out the legitimate objects" of such organizations. Intimidation, violence, bloodshed, can not be said to be lawful means to the effecting of legitimate objects of a labor organization, nor can it be said that the acts alleged to have been in contemplation and to have been

put in practice as agencies of the alleged conspiracy were remotely within the privileges of peacefully persuading and lawfully assembling accorded to persons engaged in a labor controversy by section 20 of the Clayton Act (Comp. St. 1243d).

Our order made part of its conditions the terms of the Clayton Act, and we allowed picketing at the plant under such sanctions, respecting both parties, as would tend to identify authors of disorder if any occurred.

This court has repeatedly in this case disclaimed a judgment that picketing per se was lawful. It was ordered and allowed in this case as a convenient means of stabilizing a very uncertain situation, providing a concrete expression, at the Overland factory, of rights declared by section 20 of the Clayton Act, and to fix responsibility, if those rights were exceeded or infringed. The immediate reason for fixing the terms of picketing, and thus apparently approving of it, having disappeared, there is no reason in allowing it to continue as a court provision.

There was a motion before the court to dismiss the case for want of jurisdiction. but this was overruled and a permanent injunction allowed, with a warning that if picketing continued in the present form the final order, at the time of its issue, "will definitely abrogate the apparent privilege of picketing."

A supplemental opinion was afterwards filed, in which it was stated that the foregoing "intimation that organized picketing at the Overland plant should cease" had been ignored, and the practice continued "with a rather flamboyant air, as if enjoying an unrestrainable right to do, in that behalf, just as they please." Some account of the methods prescribed, and of their consequences, was then given, after which the opinion continued:

We have recently discussed the fact that the defendant, the Willys-Overland Co., has made steady and rapid headway against the opposition of the labor defendants, until more than a month ago both its working force and its daily production exceeded the maximums when the dispute arose. This increase of both force and production has been maintained since our last memorandum. The blunt truth is that the revolt against their employer of certain Overland employees, which arose seven months ago, has failed of its purpose to influence the company's policy respecting terms and conditions of employment. It is the plainest fact—appreciated everywhere, whether acknowledged or not—whether the truth is unpalatable to anyone or not—that the "strike" or "lockout" has long since ceased to be anything else than an ineffective protest against the Willys-Overland Co. by persons which that company may or may not heed, as it pleases.

It follows that it can not be fairly said that there is now existing a real controversy, or one which any court is bound to honor, over questions which caused the trouble early in May of 1919. As we have suggested in an earlier opinion, it can not be tolerated that a few men, either from pride of office in their respective organization or otherwise, or from sheer willfulness, may indefinitely parade the ghost of a dead contest and claim the special consideration which might pos-

sibly have been given them and those they claimed to represent when the dispute had vitality. Our notion is that the court is called upon to—in fact, common sense dictates that it should—treat the situation much more stringently and differently under circumstances which now attend this cause, than it should do under those which confronted the court when the temporary injunction was issued. If, last June, there were to be equitably granted the labor defendants a privilege of picketing, it was allowable because of conditions which existed then but which, since, have wholly vanished. The foundation for the privilege of picketing of the character the court has permitted having collapsed, no matter what a few men who assume to be leaders of the labor defendants think about it, there is nothing to support it.

We are therefore enjoining the continuance of picketing at the Overland plant.

LABOR ORGANIZATIONS—PICKETING—NUISANCE—CONSPIRACY—ATTEMPT TO UNIONIZE RESTAURANT—*Moore v. Cooks', Waiters' & Waitresses' Union No. 402 et al., District Court of Appeals, California (Jan. 30, 1919), 179 Pacific Reporter, page 417.*—The defendants wished to unionize the restaurant of the plaintiffs and for that purpose placed pickets before it, each wearing a band or sash of white bearing the word "picket." These pickets regularly walked up and down in front of plaintiffs' restaurant during the busy hours of the day. Plaintiffs secured in the superior court an injunction against the defendant union restraining them from picketing his place and the defendants appealed. In affirming the judgment of the superior court, the court spoke in part as follows:

The fact that the purpose for which the defendants maintained pickets, as was done here, viz, to induce plaintiffs to unionize said restaurant by compelling the women employees to pay their dues to said union, and to discharge the nonunion cook and employ a union cook in his place, does not justify maintaining a patrol in front of plaintiffs' premises as a means of carrying out their scheme, which is nothing short of a conspiracy—as the court found the fact in the case at bar to be. The admitted facts in the case, we think, disclose "a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him," and "is outside of allowable competition, and is unlawful" (*Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077), and against such "the law will protect the victim and punish the movers of any such combination." (*Crumph v. Commonwealth*, 84 Va. 927, 6 S. E. 620.)

Peaceful picketing! There is no such thing, if the term is intended to apply to the facts as they are shown to be by the record in the case at bar. We are in full accord with the doctrine enunciated in the case of *Atchison v. McGee* (C. C.), 139 Fed. 582, where it was held that "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."

From what has been said here, it follows that, as appellants contend, "the only question involved in the present appeal is the right of organized labor to maintain a 'peaceful picketing' in front of plaintiffs' place of business, so that all members and friends of labor unions may know that plaintiffs are operating their business in a manner that organized labor believe to be 'unfair.'" The entire contention of the defendants here is that they have a right so to do. We are convinced, from an examination of the record presented to us, that under the law they have no such right, and that the court acted within its jurisdiction in granting the injunction herein.

LABOR ORGANIZATIONS — PICKETING — PURPOSES — CONSTITUTIONALITY OF STATUTE PERMITTING PEACEFUL PICKETING—*Truax v. Corrigan*, Supreme Court of Arizona (Dec. 14, 1918), 176 Pacific Reporter, page 570.—William Truax and his partner owned and conducted a restaurant. A dispute arose between them and their employees over wages and hours of employment, and the parties could not come to an agreement. The employees proceeded to strike and picket the restaurant of the petitioner, Truax. This they did by carrying banners back and forth in front of the restaurant and passing out handbills and by loud talking advertising the strike and the reasons therefor. All the acts alleged to have been done by the strikers were peaceful and lawful. The employer seeks an injunction against this peaceful picketing, declaring that the statute, paragraph 1464, Civil Code 1913, which permits injunctions against picketing only when necessary to prevent injury to property rights and to prevent unlawful acts, is unconstitutional by reason of the fact that it violates the fourteenth amendment to the United States Constitution, in that it deprived the employer of his property without due process of law and denied to him the equal protection of the law. Chief Justice Cunningham, in upholding the constitutionality of the statute and refusing the injunction, rendered a decision, which is in part as follows:

The good will of the public toward the plaintiffs was successfully attacked by the defendants and temporarily limited to those of the public who were not persuaded by the recommendations, advice, and appeals made by the defendants. Without any doubt, good will in any business is a valuable factor to business success, but no man carrying on any business has a vested property right in the esteem of the public.

The plaintiffs had the unquestioned right to adopt any terms and conditions of employment of servants in their business as they may choose. No one has a right to interfere with the private management of a man's business. If he refuses to employ union members, or refuses to pay union wages, and refuses to recognize union conditions of employment, that is his affair altogether, and his rights can not be interfered with. If any person conducting a business elects to disregard the demands of his employees, and such employees strike for that reason, no right of the employer is violated if the striking

employees advertise the cause of the strike. If the publicity given the facts cause a loss, such loss is attributable to the employer and his business methods as the proximate cause of the loss to him.

The purpose of the statute in question is to recognize the right of workmen on strike to use peaceable means to accomplish the lawful ends for which the strike is called. The statute adopts the view of a number of courts which have held "picketing," if peaceably carried on for a lawful purpose, to be no violation of any legal right of the party whose place of business is "picketed," and whether as a fact the picketing is carried on by peaceful means, as against the other view, taken by the Federal courts and many of the State courts, that picketing is per se unlawful. The last view is that contended for by the appellant. The contention is that the statute, having attempted to legalize picketing when peaceably carried on for any purpose, deprives plaintiffs of their property without due process of law, and denies to plaintiffs the equal protection of the law. Conceding that prior to the enactment of paragraph 1464, supra, the state of the law in this jurisdiction was as contended—that is, that picketing carried on in any manner, in a concededly peaceable manner, was an unlawful act, as held by a great number of courts; in other words, that picketing naturally induces breaches of the peace, and is therefore unlawful—yet plaintiffs have no vested right to have the law continue in that state. A change in the law, so that when it is made to appear that peaceable picketing is in fact carried on, and all picketing is no longer conclusively presumed to be unlawful, as recognized by said statute, that change in the law places the burden upon the plaintiff to show as a fact that the defendant violates the law, while the other view presumed that the law was violated, if any manner of picketing was carried on. The statute simply deals with a rule of evidence requiring the courts to substitute evidence of the nature of the act for a presumption of the nature of the act, based upon an inference from the bare act. Hence it is quite clear that the statute recognizes the right of the striking employees to carry on a campaign of picketing in furtherance of a strike for a lawful purpose, provided the means used and the manner in which such means are used are peaceable and otherwise violate no legal rights of the party whose premises are subjected to the picketing, and are not in violation of any duty owing by the striking employees to such party or to the public. In no sense can the statute be considered as one either depriving the plaintiffs of property without due process of law, or denying plaintiffs the equal protection of the law.

The plaintiff's property rights are not invaded by the picketing, unless the picketing interferes with the free conduct of the business by the plaintiffs; and the plaintiffs do not claim that the defendants have, by using violent means with picketing, invaded their rights in this respect by causing a loss in business.

LABOR ORGANIZATIONS—PICKETING—STRIKES—BOYCOTTS—INJUNCTION—*Rosenberg v. Retail Clerks' Assn., Local 428, District Court of Appeals, First District, California (Dec. 4, 1918), 177 Pacific Reporter, page 864.*—The defendant union called a strike of Rosenberg's

employees and proceeded to picket his store. The pickets wore badges and walked in front of plaintiff's store, accosting and calling out to possible patrons passing by: "This is an unfair house; it is unfair to organized labor. Don't patronize it." Plaintiff sued for an injunction on the ground that these actions of the pickets intimidated his patrons. An injunction was granted, but not to the extent desired by the plaintiff, and he brings this appeal for the purpose of securing an injunction against the acts above set out and complained of. In granting his plea the court said, in part:

The question presented involves the subject of peaceful picketing. The right of united labor to enforce a boycott by means of peaceable, oral persuasion, and to induce those sympathetic with such a cause to refrain or withhold their patronage from an employer is one that has received extended consideration from the courts, and the decisions on the subject are widely divergent. This principle, however, is not one of first impression in this State. The manner and extent to which organized labor may strike, the means that may be employed in furtherance thereof, and the respective rights of the employer and employee are subjects which have received elaborate consideration by our supreme court. [Cases cited.]

It is unnecessary to discuss the principles reviewed and established in these [cited] cases, it being sufficient for the purposes of this case to say that while coercion, intimidation, or menace can not be resorted to for the purpose of enforcing a boycott, strikers have an unquestionable right, where no contractual obligation interferes, to present their cause by peaceful persuasion and argument. The question whether picketing is a peaceful and lawful means is one that has also received frequent judicial consideration. The cases in different jurisdictions are not harmonious on the question. Some of the courts have recognized, or at least do not deny, that picketing may not be unlawful. The weight of authority, however, and the growing tendency is to accept the contrary view, and to regard picketing as inherently illegal, for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly, it has been held that there is no such thing as peaceful picketing any more than there can be peaceful mobbing.

This being so, it follows that as the trial court found that the defendants committed the acts complained of, judgment should have been rendered in accordance with the prayer of the complaint, declaring that such acts constituted a threat or menace against plaintiff's customers, and defendants should have been enjoined from a continuance thereof. This was the issue raised by the pleadings, and, the finding having been in the plaintiff's favor, he was entitled to a judgment declaring that his patrons were intimidated by the admitted acts, and on account of such intimidation were restrained from patronizing him. Under the judgment as rendered, defendants being merely prohibited from interfering with or obstructing plaintiff in the conduct of his business by means of threats, menace, or intimidation, plaintiff would be compelled, in order to enforce his judgment, to institute proceedings upon a charge of violating the injunction on the assumption that the acts complained of came within its terms.

This was the only issue in the present case, and it should have been finally disposed of by the judgment.

LABOR ORGANIZATIONS—RESTRAINT OF TRADE—BOYCOTT—SYMPATHETIC STRIKES—INJUNCTION—REFUSAL TO HANDLE GOODS HANDLED BY NONUNION MEN—*P. Reardon (Inc.) v. Caton et al. and Reardon v. International Mercantile Marine Co. et al., Supreme Court, Special Term, Kings County (June, 1919), 177 New York Supplement, page 803.*—This was an action for an injunction by the plaintiff, a trucking company, against Caton as president of the Steamship Clerks' Union, Brooklyn and Staten Island, Local 975. The plaintiff conducts a large trucking business devoted principally to hauling freight, under contracts, between railroad terminals and steamship terminals and employs a large number of teamsters. The employees of plaintiff are composed of both union and nonunion labor. About 85 per cent are nonunion men who have no desire to become union members. Plaintiff's employees are working for the same wages as are earned by union teamsters wherever employed. The union employees of plaintiff and the teamsters union have not struck, nor have they made any demands or manifested any discontent. The checkers, weighers, and clerks employed on the docks and by the steamship companies are well organized. For the purpose of forcing plaintiff to unionize his business these checkers, weighers; and clerks refused to handle in any way, freight that had been hauled by plaintiff's nonunion employees. Injunctions pendente lite were granted and defendants appealed. The court continued the temporary injunctions until the case could come to trial. The opinion is in part as follows:

The defendants say that their members are merely refusing to work with nonunion men, i. e., plaintiff's drivers, but it is plain that they are not employed and do not work with plaintiff's men. They are employees of the various steamship companies, who admit that they would accept all of the freight brought by plaintiff's trucks, if the checkers, weighers, etc., would perform their work upon it, but that, if they ordered them to do so, they would all quit, and, as all of such dock workers appear to be organized into some union or other, the companies say they would be worse off than the plaintiff.

The defendants admit that 15 per cent of plaintiff's present force are now members of the defendant Teamsters' Union. They strenuously contend that their acts, of which plaintiff complains, are merely directed to prevent union men (checkers, weighers, scalesmen, etc.) from working with plaintiff's nonunion men; yet it is a most remarkable circumstance that these union truckmen (comprising 15 per cent of plaintiff's force) have not left plaintiff's employ or in any way attempted to refrain from working with plaintiff's other or nonunion men. Thus it appears that the only union work-

men who are actually working with nonunion men voluntarily consent to continue to so work, and with defendants' consent.

In the last analysis, therefore, the defendants' acts have but one purpose; that is, the unionization of plaintiff's workmen against their will under penalty of discharge, and instead of persuading the individuals concerned, or a substantial majority of them, by showing the various alleged benefits to be derived from joining this union they command the plaintiff to boycott its own workmen, at the peril of disorganizing its entire force, by voluntary withdrawals upon their refusal to join the organization.

It is stated repeatedly that the defendants' members shall handle "plaintiff's goods" if it is trucked by union drivers. The merchandise in question is not plaintiff's; it never was, and never will be. It belongs to persons against whom defendants have no grievance and who, in turn, have no control over the situation. It is contended that the defendants are merely exercising their right to refuse to handle material upon which nonunion labor has been employed. The labor of one of plaintiff's nonunion drivers is not employed upon this freight any more than the labor employed in making the cars, say, of the Union Pacific Railroad in which these goods were carried before arriving at the terminal in New York was so employed, and yet the defendants do not contend that they are enforcing the same right against such workmen, or the truck drivers who transferred this freight at Buffalo, Chicago, or San Francisco. The plaintiff is the only one of all the carriers involved in each shipment who is singled out for discipline.

"The right of one man to refuse to work for another on any ground that he may regard as sufficient" is a frequent quotation, and yet the refusal of any one of plaintiff's employees, union or nonunion, to work for plaintiff is not in any way involved. The only union men who can rightfully be said to be working with nonunion men do not seem to desire to exercise that right.

It is claimed that the acts of defendants, if successful, will broaden the field of employment for union teamsters. Plaintiff, however, is not charged with refusing to employ union teamsters. In fact, the defendants admit that 15 per cent of plaintiff's workmen are members of other teamsters' unions. Plaintiff does not discriminate in any way between a union or nonunion man. If any individual is competent and capable, and the plaintiff desires his labor, it employs him, irrespective of whether he belongs to the defendants' union or any other labor organization. The plaintiff's field of employment, therefore, is as open to union drivers as it possibly can be.

It is charged that the court's preliminary order is unlawful because it compels the defendants' members to work with nonunion men. It does nothing of the kind. Its members, one or all, can refuse to work at any time they see fit, without in any way coming within the purview of this order. The order merely restrains the defendants' members from singling some distant shipper's merchandise out of the mass presented and refusing to check or weigh it simply because it or part of it happened to be brought from the freight station to the dock in one of plaintiff's trucks. The fact is that defendants seek to get this court to rubber stamp their demand

that nonunion men be ordered to work with union men, although it is just as much a nonunion man's right to refuse to work with a union man as vice versa.

This court is satisfied that the facts as thus far outlined by the papers submitted show sufficient facts to warrant the continuance of the injunction until a trial of the merits has been had. In the meantime no harm can come to the defendants unless, of course, they violate the order; whereas the plaintiff will be protected to a certain extent, as it has a right to be.

Motion granted.

Two separate appeals were taken from this decision; the defendant unions and members appealed and the International Mercantile Marine Co. appealed. These appeals were decided on November 21, 1919, and are reported in 178 New York Supplement, pages 713 and 722. The appellate division of the supreme court, second department, reversed the above decision and in each case denied the motion for preliminary injunction before trial. Judge Kelly, expressing the majority opinion of a divided court, said in part concerning the case in the appeal of the unions:

We are concerned on this appeal solely with the question of the legality and propriety of the preliminary injunction issued in this action, originally without notice and continued after argument.

If disputes of this kind are to be reviewed in courts of equity, the plaintiff must present a case in conformity with equitable principles, and upon the papers before the court on this appeal I think it fails to present such a case. The plaintiff does not make the employers, or common carriers, or shippers of freight, parties to this action. We are dealing here with the facts presented by the record, and with conditions prevailing in the months of January, February, and March, 1919. We have here no dispute between employer and employee. No common carrier or employer, or shipper or receiver of freight is before the court complaining of the defendants. On the proof here one trucking concern, the plaintiff, is before the court, complaining that it can not transact its business, although 75 per cent of the truck owners in the port of New York have no difficulty with the defendants. There is but one other trucking concern mentioned in the affidavits as involved in the same controversy, and that concern is not before the court as a plaintiff. Despite the agreement of its fellow truck owners, the plaintiff will not agree with the defendants; and, so far as the record discloses, the immediate cause of the break between plaintiff's concern and the defendants is its refusal to accede to the demand for an 8-hour day and \$1 an hour for overtime for its drivers. These are the so-called "union rates." They are the rates paid by 75 per cent of the truck owners. The plaintiff pays its men the same regular wages as other truck owners, but it insists upon a 10-hour day and pays but 50 cents an hour for overtime. Of course, this gives plaintiff a great advantage over its competitors; its profits are greater; but is the assertion of such a right sufficient to justify a court of equity in issuing a mandatory injunction without notice, since continued after argument, compelling

the defendants, comprising the entire body of dock laborers in the port of New York, to work with the plaintiff's nonunion employees? Because this is the effect of the injunction.

There is no proof of any violence or intimidation in this record. The plaintiff's affidavits will be searched in vain for any evidence of unlawful overt acts by the defendants. There is no evidence of any appeal to the shippers or receivers of freight to refuse employment to plaintiff. There is no evidence of malice or animosity toward the plaintiff in particular, because the defendants have never refused to handle the merchandise brought to and from the docks by its union drivers. The sole object of the refusal to deal with plaintiff's nonunion employees is to bring about the same hours and the same pay for its drivers as prevail in 75 per cent of the trucking concerns in New York. This does not appear to be unlawful or unreasonable.

But it is said that this injunction, granted originally without notice, directed to this army of more than 100,000 laboring men, is not mandatory; that there is no obligation on the men to continue working if they do not wish to work with plaintiff's nonunion drivers. This argument, it seems to me, is no answer in a court of equity. We know that longshoremen and dock laborers who are not regularly employed, and who are paid by the hour, can not quit their work because of their necessities. A so-called "strike," even if it be lawful, is a serious matter, entailing loss and hardship on employer and employee; a last resort, to be avoided if it be possible by united effort. It appears that in this case the defendants have continued to work because of these considerations and in obedience to the preliminary injunction of the court, which gives to the plaintiff the full relief to which it might be entitled after trial.

There are diverse contentions concerning strikes and boycotts which affect public service, but I think these are for the legislative branch of government, and no legislature, State or National, has so far enacted that they are illegal.

I therefore vote to reverse the order and to deny the motion for preliminary injunction before trial.

The second appeal, by the International Mercantile Marine Co. is from a temporary injunction restraining it from refusing to accept for shipment freight hauled by the plaintiff companies. Judge Kelly, in giving the opinion of the court on this appeal, said in part:

It seems to me that the preliminary injunction, granted in this case originally without notice, and continued after argument, is contrary to law for several reasons:

The action is based entirely upon the allegation that the defendant common carriers knowingly and wrongfully permit the workmen to refuse dealing with the nonunion drivers of the league members. But each of the common carriers makes positive affidavit that the action of the dock laborers is without their assent and without their approval. No conspiracy between the common carriers and the dock laborers is pleaded or suggested. The affidavits for the carriers state that they are powerless in the matter, because, if they discharge their men, they can procure no one else to do the work, which is of so great importance to the entire community.

As already suggested, the plaintiff has not joined the labor organizations as parties defendant in the action. The preliminary injunction is unnecessary and uncalled for. If the injunction in the action against the labor unions is sustained, there is no reason or necessity for enjoining the steamship companies. If, on the other hand, it is dissolved, in my opinion it would be the height of folly to issue a mandatory injunction such as this against the defendants; because it appears that practically the entire force of dock laborers, checkers, weighers, etc., to the number of some 125,000 men, is unionized, and if they are left free to pursue their work and better their condition by lawful methods, any attempt by the steamship companies to force them to work with nonunion drivers would only result in a general strike and tie-up of the freight of the port. Upon the papers it is uncontradicted that it is impossible from a practical standpoint to obtain nonunion labor to perform the work.

Under elementary principles I think the injunction should have been denied. The dispute must be settled in the other case. From every point of view I think it was an abuse of discretion to issue such a mandatory injunction in advance of trial. Taking the case by itself, as the plaintiff sees fit to present it to the court, a preliminary injunction may benefit the two trucking concerns mentioned, enabling them to continue their exaction of the 10-hour day and payment of 50 cents for overtime; but it might ruin the 75 per cent of the truck owners in the port who are in accord with the labor organizations, and result in an embargo on the shipping in and out of New York, and would be unenforceable because it would bring about the very results which it purports to prevent. I think the order should be reversed and the motion denied.

LABOR ORGANIZATIONS—RESTRAINT OF TRADE—INTERFERENCE WITH INTERSTATE COMMERCE—CONSPIRACY—INJUNCTION—*Burgess Bros. Co. (Inc.) v. Stewart et al.*, *Supreme Court of New York, Special Term, Kings County (June, 1920)*, 184 *New York Supplement*, page 199.—The plaintiff is a foreign corporation, engaged in business as a dealer in lumber. Its principal business is in the exportation of lumber to foreign markets and for this reason is required to use extensively the various steamship lines docking in New York. The defendants are steamship lines and common carriers. Other defendants are the Truck Drivers and Chauffeurs' Local Union No. 807, Greater New York Lumber Handlers' Union Local No. 17122, Steamship Clerks' Union of Brooklyn and Staten Island, Local No. 975, I. L. A., and the Transportation Trade Council of the Port of New York and Vicinity. The teamsters, chauffeurs, and lumber handlers of the Burgess company went on a strike in January, 1920, to compel the company to maintain a closed shop. This the company refused to do, reorganized its business, and continued to transact its business on the open-shop plan. Thereupon the defendant unions in order to coerce the Burgess company and other companies to maintain a closed shop served notice upon the steamship companies that if they

received or accepted for transportation any of the Burgess company's or other blacklisted companys' goods said unions would call a strike of the employees of said steamship companies. The steamship companies in the face of this threat refused to accept the plaintiff's goods for shipment, and the plaintiff brought this action for injunction to prevent the defendants from conspiring together to prevent it from engaging in interstate and foreign commerce and to prevent the unions from calling, participating in, or threatening to call strikes with the purpose in view of preventing plaintiff's goods being handled in such commerce. In granting the injunction the court rendered a decision from which the following is quoted:

The moving papers herein show that all of the parties are engaged in a combination having for its object the exclusion of plaintiff's merchandise from transportation by defendant carriers, both where plaintiff is the shipper and where its customers are the shippers. The continuance of this condition makes it impossible for plaintiff to carry on export trade in any form. If combinations of this character are lawful, then it is impossible for any trucking to be done in New York City and vicinity except on terms that the Truckmen's Union permits, and it becomes entirely practicable for the Truckmen's Union to decide what merchandise it will haul and what merchandise it will not haul.

The affidavits of the union defendants generally admit the specific acts charged, and assert their legality.

This seems to me to be a combination to gain control over transportation, and to blockade the channels of trade against all but union merchandise, and against all concerns who do not make union contracts. Such a combination to exclude open-shop merchandise from the channels of trade and commerce and from the markets of the Nation is a conspiracy against public welfare, and deprives the public of their sovereign right of choice to purchase such goods as they want, because by artificial methods it keeps such goods out of the market. They will not permit anyone but themselves to handle shipments.

It appears the carriers knew of the rule laid down by the employees, and, so far as the papers go, have acquiesced in them without any protest. Common carriers owe an affirmative duty to perform impartial service, and it is unlawful to subject plaintiff to undue prejudice. Their duties call upon them as common carriers to serve the plaintiff and not discriminate against it. If the carriers and their terminal agencies, instead of joining with the unions in this combination, by submitting to this discrimination for fear of a strike, had stood squarely for the performance of their public duties it is doubtful if the plaintiff would now be in court. The carriers appeared to have aided, abetted, and encouraged the unions by seeking to evade their duties to handle the plaintiff's goods without discrimination.

The facts herein seem to present a conspiracy within this definition:

"A conspiracy is sufficiently described as a combination of two or more persons by concerted action to accomplish a criminal or

unlawful purpose or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

They show a combination to violate the positive provisions of the shipping act and the provisions of section 5440 of the Revised Statutes (U. S. Comp. St. 10201).

Under the provisions of these statutes it seems clear that a refusal on the part of the carriers to transport the plaintiff's merchandise constitutes a violation of law and a crime, and that the defendant unions and officers are engaged in an unlawful conspiracy when they induce, aid, and abet the carriers in committing this misdemeanor, and threaten them with a strike unless they commit the misdemeanor.

The combination presented in this case is in violation of both the shipping act and Revised Statutes, and the plaintiff, being irreparably injured in its property rights by acts done in furtherance of such conspiracy, is entitled to an injunction.

While it is indisputable that a man may enter any vocation that he chooses, yet if he sees fit to select a field indissolubly linked with the rights of the public, such as that of a common carrier, he must subserve his own rights to that of the public welfare, and must at all times stand ready and willing to assume all of the exacting duties which he knows are owed the public. When he enters the public service he impliedly acquiesces in assuming all of these obligations. He must either get out of the transportation business or serve all persons alike.

Employees of steamships and those employed in and about the docks and all others associated in or connected with and necessary to the conduct of business of common carriers should perform their usual services regardless of whether the merchandise is worked upon, or handled, received or delivered by union or nonunion men, and such service should be impartial and uninterrupted. The plaintiff is not asking anything unjust or unfair in insisting upon the free use of the transportation lines. It does not lie with union leaders to lay down the proposition that the last word in deciding what merchandise shall or shall not be transported should vest exclusively in them.

The court distinguished this case from the Reardon cases above, decided by the appellate division, in that the common carriers and shippers were not made party to the action therein, while here their complicity, or at least assent to the conditions complained of was an essential factor in the proceedings.

The opinion concluded:

The papers sufficiently establish, for the purpose of the present application, and until the rights of the parties and the issues herein can be determined on a trial, the existence of an unlawful conspiracy on the part of the defendants, and therefore the preliminary injunction as prayed for herein is granted.

LABOR ORGANIZATIONS—RESTRAINT OF TRADE—INTERFERENCE WITH INTERSTATE COMMERCE—SECONDARY BOYCOTTS—INJUNCTION—*Buyer v. Guilan*, United States Circuit Court of Appeals (Feb. 2, 1921),

271 *Federal Reporter*, page 65.—Samuel Buyer & Co. were “engaged in the business of manufacturing and selling elastic garters and notion specialties.” The principal office and salesrooms were in New York City and the factories were in Norwich, Conn., and Norfolk, Va. The defendants are the Old Dominion Transportation Co., its general agent Guilan, and a large number of labor unions connected with the shipping of goods by water, the most important of which are the District Council, No. 16, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers, and the International Longshoremen’s Association. The Citizens’ Trucking Co. (Inc.) employed both union and nonunion men. Buyer delivered a shipment of raw materials for his Norfolk factory to this trucking company for transportation to the docks of the Old Dominion Transportation Co., the only steamship line plying between New York and Norfolk. When the goods arrived at the dock, the Old Dominion Co.’s employees, who were highly organized, refused to unload, check, or weigh the shipment because the trucking company refused to maintain a closed shop and employ none but union labor. The Old Dominion Co. thereupon refused to accept the shipment. This incident occurred on July 8, 1920, and was repeated on July 12. The same thing took place in connection with a shipment by the International Cork Co. of Brooklyn.

Buyer thereupon brought this action for an injunction against the defendants, alleging that the Old Dominion Co. had violated its duty as a common carrier and that it had entered into a combination with the labor unions in violation of acts of Congress, among others the Sherman law, to prevent the handling or transportation of the plaintiff’s merchandise or of any merchandise handled or operated on by nonunion men or which is offered for transportation by any transfer company or individual teamster not employing union men exclusively. The court sustained the plea for a preliminary injunction on the ground that the agreement of the unions not to handle goods which have been handled by nonunion labor was in restraint of interstate commerce and a violation of Federal laws. The opinion in part is as follows:

While it is true that the injunction asked for is of a mandatory nature, rarely granted on affidavits, the question is really one of law and we believe that it will be to the interest of the public and with the approval of the parties with the exception of the Old Dominion Transportation Co. to dispose of the question now.

It will be seen that the representatives of the unions admit the existence of an agreement that their members will not handle the plaintiff’s interstate shipment unless he sends them to the Old Dominion Transportation Co. by some transfer agency operated entirely by union men and the Old Dominion Transportation Co. admits that it will not transport his shipments until its employees consent to

handle them. For this reason it may be regarded as a party to the combination. It is also plain that the plaintiff has sustained and is sustaining and will sustain in the future special and irreparable damage as the result of this combination for which he has no adequate remedy at law because of the difficulty of ascertaining the damage in case of each shipment refused and of the necessity of bringing a multiplicity of suits.

The whole case of the defendants and the conclusions of the learned judge of the court below are based upon the law of the State of New York as laid down in *Bossert v. Dhuy*, 225 N. Y. 342, 117 N. E. 582 [Bul. No. 246, p. 129], to the effect that a combination of individuals whose primary intent is the protection of their own interests, as, for instance, to establish complete unionization of the longshore work of the water front of the port of New York, not accompanied by violence or intimidation and not to gratify malice, is lawful, even if it does injure others.

In *Duplex Printing Press Co. v. Deering*, 252 Fed. Rep. 722 [Bul. No. 258, p. 109], we followed this view and also held that such combinations did not violate the Sherman law. We construed section 20 of the Clayton Act as legalizing a secondary boycott so far as it consists in refusing to deal with anyone who deals with an employer whose employees are on strike. But this decision has lately been reversed by the Supreme Court holding that if the combination was in violation of an act of Congress it is of minor consequence whether either kind of boycott (primary or secondary) is lawful or unlawful at common law or under the statutes of particular States; that section 6 of the Clayton Act providing that labor organizations shall not be held illegal combinations in restraint of trade under the antitrust laws contemplates only such organizations as lawfully carry out their legitimate objects; that section 20 prohibiting United States courts and judges from issuing injunctions applies only to disputes between employers and employees. [41 Sup. Ct. 172.]

The combination in this case being in restraint of interstate commerce and no controversy between employer and employees being involved the order is reversed and the court below directed to issue a preliminary injunction in accordance with the opinion.

LABOR ORGANIZATIONS—RULES—EXPULSION OF MEMBER—LOSS OF INSURANCE—JURISDICTION OF COURTS—*Simpson v. Grand International Brotherhood of Locomotive Engineers et al.* (two cases) and *Smith v. Same* (two cases), *Supreme Court of Appeals of West Virginia* (Feb. 11, 1919), 98 *Southeastern Reporter*, page 580.—The brotherhood named had had much trouble in regard to certain matters connected with the disposal of work by the Norfolk & Western Railway, which had finally been settled by an agreement known as the Elk Horn pool. This pool permitted steam engineers and electric engineers and firemen who worked in the capacity of engineers to work interchangeably with either steam or electric locomotives. The pool was broken up and certain engineers were permanently assigned to electric engines. Smith and Simpson each were thus

assigned. They were both then accused and tried by the brotherhood to which they belonged of having violated a rule of that organization which prohibited any member from interfering with or causing the breaking or changing of any agreement of the brotherhood with any employer. The divisions to which they belonged twice acquitted them of any wrong doing, whereupon one Stone, the grand chief engineer of the organization, in the exercise of his appellate jurisdiction and power of suspension, caused another trial to be had, and Smith and Simpson were declared guilty. Stone then suspended Smith and Simpson and permitted them to appeal to the convention or Grand International Division, which met triennially. This they refused to do. The effect of their expulsion resulted in the loss of insurance in the Locomotive Engineers' Mutual Life & Accident Association, as a condition both precedent and subsequent to retaining insurance therein was membership in the union or brotherhood. Suit was brought by each of the expelled members for the loss of their insurance and for wrongful expulsion. Both the brotherhood and the accident association were sued as corporations, and the members of the organizations were also sued as individuals. In affirming the judgment of the lower court in favor of the individual defendants and in reversing, for want of jurisdiction, the judgment against the brotherhood the court said in part:

A preliminary of vital importance in some aspects of the case is whether the Grand International Brotherhood of Locomotive Engineers has been brought within the jurisdiction of the court by sufficient process and pleadings. Upon the assumption that it was a corporation qualified under the laws of the State to do business here, the summons in each case as to it was served upon the auditor of the State, and it was impleaded as a corporation. It filed special pleas at rules denying that it was a corporation, to which plaintiffs replied generally, and the issues thus raised were determined in favor of the defendant, and the actions accordingly dismissed as to it. But in the same order in which the dismissal was formally adjudged the plaintiffs were permitted to amend both the summons and the declaration in each case by striking out the words "a corporation" and inserting in lieu thereof the words "a fraternal beneficiary association." The course pursued by the plaintiffs was adopted upon two theories: (1) Identity of the Grand International Brotherhood of Locomotive Engineers with the Locomotive Engineers' Mutual Life & Accident Association and the Locomotive Engineers' Building Association; and (2) liability of the association to be sued by its associate name under the provisions of chapter 55A of Barnes's Code, 1918.

There is no proof that the contracts of membership made between the plaintiffs and the association were understood or deemed by them to have been made in a corporate name. On the contrary, both admit in their testimony that the association is not incorporated. Not having been misled nor deceived as to the capacity in which

the association made its contracts with them, they are not in any position to invoke the doctrine of estoppel.

The Grand International Brotherhood of Locomotive Engineers and Locomotive Engineers' Mutual Life & Accident Association, the two corporations to which reference has been made, are not identical. The Grand International Brotherhood covers vastly more ground than the insurance association. Its purpose is the promotion of the general interests of railway locomotive engineers. The insurance merely provides life and accident indemnities for such members of the brotherhood as become certificate or policy holders therein, and the building association is a corporation owning and managing a brotherhood building in the city of Cleveland, Ohio. Relationship of the institutions is not determinative of the question of identity. Almost anything conceivable bears some sort of relation to everything else.

Lack of jurisdiction of the Grand International Brotherhood of Locomotive Engineers makes reversal of the judgment against it inevitable, and also renders it unnecessary as well as improper to pass upon any of the numerous rulings made in the course of the trials, in so far as they might, if it were a party to the cases, affect its interests. Without having brought the association within its jurisdiction, the trial court could not properly decide anything against it nor can this court do so. But since the court acquired jurisdiction of the individual defendants, it is necessary to determine whether it properly directed verdicts in their favor.

Although the plaintiffs claim to have been injured by wrongful and illegal acts of the defendants, the injuries of which they complain were deprivation of contractual rights. Both their right of membership in the division and in the brotherhood and the powers, privileges, and rights of the defendants within the same organizations are measured and defined by the organic or fundamental laws thereof, called the constitution and statutes and its rules and regulations. This contract governs not only the rights of individual members and local divisions but the higher tribunals and their officers as well.

But the construction of the organic agreement, by-laws, rules, and regulations of a benefit society or other unincorporated voluntary association belongs not to the court but to the board, council, or other tribunal provided for the purpose in the organization, if any. So long as the body upon which this power of interpretation has been conferred does not substitute legislation for interpretation, nor transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land in their conclusions and decisions, the courts can not interfere with them.

Stone's exercise of his power of suspension and appellate jurisdiction conjointly and simultaneously, so as to compel the expulsion of the accused members or loss of the charter and thus restrain the liberty of members in respect of their action in the trials, is harsh and drastic on its face and decidedly variant from the course of ordinary judicial procedure. But it must be remembered that the association was not formed in absolute accord with the scheme or plan of the State government. The mere reversal of a finding of

not guilty by a division would not affect an expulsion of a guilty member.

The propositions on which these observations stand are obvious corollaries of others to which the courts have yielded practically unanimous assent. The expulsion of a member of a voluntary association, whether incorporated or not, after notice, an opportunity to be heard, and a trial fairly conducted agreeably to the laws of the association, is conclusive upon the civil courts.

As nothing can be decided against the association without jurisdiction, and the judgment in favor of the other defendants is free from error and completely discharges them, there is no occasion to deal with the numerous assignments of error, based upon the other rulings of the court during the course of the trial. As to the Grand International Brotherhood, the cases will be remanded, with leave to the plaintiffs to acquire jurisdiction of its members by proper process and proceed with a new trial, if they shall see fit so to do.

LABOR ORGANIZATIONS—RULES—EXPULSION OF MEMBER—POWERS OF CENTRAL ORGANIZATION—*Love v. Grand International Division of the Brotherhood of Locomotive Engineers, Supreme Court of Arkansas (July 7, 1919), 215 Southwestern Reporter, page 602.*—J. C. Love and F. C. Stelter were members of the Brotherhood of Locomotive Engineers, their membership being in Local Division 554. The Grand International Division, commonly known as the G. I. D., was an incorporated organization, located at Cleveland, Ohio, with power to do business in Arkansas. Stelter had received an injury while operating an engine on the Rock Island Railroad and had sued the company for damages. The suit was settled by compromise, but the company refused to reemploy him, contrary, as he claims, to his contract with the brotherhood. However, the organization refused to secure redress in spite of the presentation of his claims to the various authorities of the order, in presenting which he was assisted by the appellant Love. While attending the convention of the G. I. D. for the purpose of securing a consideration of these claims, it was charged that the appellants, Love and Stelter, had violated an obligation of the order by publishing an attacking pamphlet which contained a complete statement of Stelter's case and his fruitless attempts to obtain redress from the local division, the brotherhood officials, and a prior convention of the G. I. D. Deceit, falsehood, and tyrannical influence were said to have been used to prevent a proper redress of grievances.

A committee was appointed to consider the charge of insubordination, and after hearing this committee recommended expulsion. This recommendation was acted upon by the G. I. D. after refusing to allow the appellants to appear before the board. A motion was then adopted giving to the grand chief engineer and the advisory board

power to hear and reinstate the suspended members on a proper showing. The nature of the committee's hearing was vigorously disputed, the appellants claiming that they did not know that it was anything more than an informal discussion of the situation and had no idea that they were being tried on the charges preferred against them. The committee, on the other hand, asserted that the appellants understood the procedure and that they admitted the authorship and responsibility for the circulation of the pamphlet.

The vote of expulsion was followed by a petition to the chancery court of Pulaski County seeking legal action to protect the interests of Love and Stelter, claimed to have been illegally violated by the order. This petition was ordered dismissed, whereupon the petitioners appealed.

The first insistence was to the effect that the G. I. D. had only appellate and not original jurisdiction to expel members of the subordinate divisions. The court cited apt provisions of the constitution of the organization, which were construed to confer original authority on the G. I. D. On this point Judge Humphreys, who delivered the opinion of the court, said in part:

It is hard to conceive what broader or more specific language could be invoked in an attempt to confer all power upon a body than was utilized in this section. The first clause confers jurisdiction on the G. I. D. over all subjects pertaining to the brotherhood, the next makes the enactments and decisions the supreme law of the brotherhood, and the next exacts complete obedience of every member of the order to the laws enacted, or decisions made by the G. I. D., touching any subject concerning the brotherhood. If this is not an investment of all power in a body by plain, unambiguous language, we are unable to detect the restriction or limitation. Touching upon the unlimited power vested in the G. I. D. by the first paragraph of this section of the constitution of the order, it was said by the court in the case of *Simpson and Smith v. Grand International Brotherhood of Locomotive Engineers* (W. Va.), 98 S. E. 580 [above], that:

"The powers thus vested in it expressly exclude any presumption of intent to adopt the limitations and rules of the civil laws, respecting either procedure or substantive rights in the order."

As to the nature of the offense committed, Judge Humphreys said:

Again, it is insisted by appellants that there was no by-law establishing the offense charged and fixing expulsion as the penalty. Section 92 of the constitution of the order provides that:

"All divisions, or members of divisions, are prohibited from issuing circulars or signing any form of petition relative to brotherhood business among members of the brotherhood or others. If issued by a division its charter shall be suspended, and the length of such suspension shall be at the discretion of the grand chief engineer. If issued or signed by a member, he shall be suspended or expelled: *Provided*, That the foregoing shall not prevent or hinder in any manner any official or division of the brotherhood in properly conducting

the business of the organization as to sending out notices, reports, etc., for the purpose of securing or giving information."

The third claim was that the procedure was contrary to the by-laws of the order. It appeared that there were detailed regulations for procedure in case of trial of members by subordinate subdivisions, but no regulations were prescribed covering the G. I. D.

Under these circumstances it was within the power of the G. I. D. to adopt a fair method of procedure, even though it did not conform to the method governing trials of the members before subordinate divisions.

The delegation of authority to the committee was also attacked, but the court held that this was the only practicable method and that it had been approved in other cases; while as to the conflict of evidence regarding the fairness of the trial, it was said that the chancellor's finding was in favor of the brotherhood, "which finding seems to be supported by the evidence."

The decree appealed from was therefore affirmed.

LABOR ORGANIZATIONS—RULES—POWER OF UNION TO MODIFY—*Burger et al. v. McCarthy et al., Supreme Court of Appeals of West Virginia (Oct. 7, 1919), 100 Southeastern Reporter, page 492.*—This was an action by three railway conductors, members of the Brotherhood of Railway Trainmen, against the 14 members of the grievance committee of said brotherhood for an injunction to prevent them from entering into a certain agreement with their employer, the Chesapeake & Ohio Railway Co. The grievance committee was the legislative body of the brotherhood and was intrusted with the promulgation of rules for the government of the members and with the drawing up of working agreements with the railway. The particular brotherhood here involved is composed only of employees of the Chesapeake & Ohio Railway.

Many years previous to this action the grievance committee of the brotherhood made a rule and entered into an agreement with the railway establishing this rule as a regulation of the employees. This rule provided that the runs on the railroad be apportioned among the employees of the railroad according to seniority of service. In 1918 the grievance committee made another rule changing the previous rule with regard to the apportionment of runs, and were about to enter into an agreement with the railway to establish this rule when the present action was brought. A temporary injunction was granted against the grievance committee, but on final hearing it was dissolved and plaintiffs' bill was dismissed. Plaintiffs appealed, but the judgment was affirmed. The opinion was in part as follows:

The bill avers that plaintiffs have been in the railroad service from 15 to 18 years, having commenced as brakemen and worked up to the position of conductors, and have been members of the Brotherhood of Railroad Trainmen for 13 years or more, and have thereby acquired property rights under the old rule or regulation, a right growing out of contract between themselves and their employer, and therefore a sacred property right, which the new rule, if put into operation, would destroy. It is seriously contended in brief of counsel that this right of seniority is a thing of value; that it is one of the cherished rights of railroad men, gained only by long and arduous years of service.

It is established by the evidence that the new regulation was adopted in the manner and by the body of representatives provided for by the constitution and by-laws of the Brotherhood of Railroad Trainmen.

Presumably the action of the general grievance committee was for the general good of the brotherhood; nothing appears to the contrary. We are furthermore of the opinion that the old rule, giving preference in making runs of trains according to seniority, did not create a property right in plaintiffs such as to justify the interference by a court of equity to prevent the operation of the rule.

We affirm the decree of the circuit court.

LABOR ORGANIZATIONS—SOLICITING MEMBERS FOR UNION—RIGHT TO ERECT HOUSES FOR DISCHARGED UNION MEN—*Diamond Block Coal Co. v. United Mine Workers of America et al.*, Court of Appeals of Kentucky (June 18, 1920), 222 Southwestern Reporter, page 1079.—The defendant labor union, its officials, and its members were engaged in a campaign to organize the coal miners of the Hazard field and vicinity and make them members of their union. The plaintiff and other operators of mines in the vicinity refused to recognize or employ union labor and opposed the movement to organize the laborers. The Diamond Block Coal Co.'s mine was some 3 miles from the town of Hazard. The company maintained 78 houses for its employees. When the movement was started to organize the miners of Hazard field a few of plaintiff's employees joined the union and were for this reason discharged by plaintiff and ejected from the company's dwelling houses. The ejected miners and their families had no other employment in the vicinity nor had they any place to go to secure shelter. To meet this condition the union, after much difficulty, found a number of small available parcels of land which it leased and upon which it proceeded to erect shanties or shacks for the purpose of affording shelter to ejected miners and their families. The officials and members of the union also made some efforts peaceably to persuade other employees of the plaintiff to join the union. No violence was indulged in and none was threatened by the union or any of the other defendants, although

some threats were made by some persons supposed to be members of the union.

The company sued for an injunction against the union and certain other persons to restrain them from constructing the shacks or shanties for the housing of discharged miners near its property and further to restrain them from soliciting members for the union from among its employees. A temporary restraining order against the union was issued by the circuit court. On motion made by the union and other defendants to the court of appeals the order was dissolved. The decision of the court is in part as follows:

As there is no evidence to support the allegations of the petition that defendants have used threats, intimidation, coercion, and fraud to accomplish their purposes, and as these allegations are specifically denied by defendants, thus putting the burden of proof upon the plaintiff, and as it is admitted by plaintiff and its officers that its mines continue uninterruptedly to run, and no employee has been induced by defendants, or either of them, to leave its employment, and that its employees have the right to quit its employment at any time, it follows that the plaintiff has wholly failed to make out its case, unless it be that the peaceable solicitation of miners to become members of the organization in that district was a violation of the rights of the plaintiff, or that the leasing of the ground by defendants from Davis and others and the erection or attempted erection of the shacks or tenant houses was an invasion of the rights of plaintiff. In its last analysis, plaintiff's only complaint supported by evidence is that defendants have leased the ground and are proposing to erect shacks thereon, and are soliciting other employees to become members of the union.

While the United Mine Workers of America is a voluntary association, and not a corporation, it is recognized both by Federal statutes and the statutes of Kentucky. The association, through its officers, had a right to enter into a lease contract with Davis and to erect the houses for the shelter of their membership. Of this there can be no doubt. That it was going to house and care for laboring men who had been discharged and evicted by employers in that vicinity because the men joined the unions does not militate against the manifest right of the association to otherwise make a lease and erect houses. So long as the union keeps within its legal rights it may lease as much ground and erect as many houses as may satisfy its purpose, and it violates no right of the plaintiff, because the rights of two persons never conflict.

It may be urged that there is evidence in this record sufficient to warrant the conclusion that certain of the persons named in the affidavits as making threats or proposing injury to the plaintiff's employees or plant were at the time members of the United Mine Workers of America, and therefore acting for and on behalf of the union. Even if it be granted that these men or any one or more of them were members of the union, and that they made the statements with which they are charged, no injunction would lie against the organization on account of such threats.

In this jurisdiction the rule is thoroughly established that a labor organization, through its officers and agents, may organize new branches and solicit membership among employees of concerns that are opposed to union labor so long as they use only peaceable means, such as persuasion and argument, and are not guilty of threats against the person or property, intimidation, coercion, or fraud. No sufficient facts were shown on which the extraordinary remedy of injunction should have been granted to complainant in this case, as injunctive relief can be had in no case except where it is made to appear that complainant has no adequate remedy at law and that great and irreparable injury will result.

LABOR ORGANIZATIONS—STRIKE FOR RECOGNITION OF UNION—PICKETING—CONSPIRACY—INJUNCTION—ACTION FOR DAMAGES—*Heitkemper et al. v. Central Labor Council of Portland and vicinity et al.*, Supreme Court of Oregon (Oct. 11, 1920), 192 Pacific Reporter, page 765.—The manufacturing and merchant jewelers of Portland, Oreg., are the plaintiffs. They employed a number of engravers, watchmakers and repairers, stonecutters and stone setters, members of the defendant union. The employees were being employed on an eight-hour basis and their wages ran as high as \$45 per week. According to their own statements they were satisfied both with the hours of labor and the wages paid; they also openly admitted that they were satisfied with the conditions of labor and were pleased with their employers. The Central Labor Union, backing up Local Union No. 41 of the International Jewelry Workers, to which the employees belonged, called a strike of all the plaintiffs' employees for the purpose of making the employers recognize the union, deal with it in collective bargaining, and sign an agreement promising to maintain a closed shop. The employers had each individually refused to sign the agreement presented by the union. The strikers picketed the employing jewelers' shops and indulged in the usual tactics in such cases, such as carrying banners and wearing sashes inscribed with "Unfair to organized labor" and similar statements, parading back and forth before the employers' shops, speaking to and exhorting prospective customers not to deal with the plaintiffs, and similar acts. The picketing was intended to injure the plaintiff's business and it was successful. The plaintiffs were damaged, and because the defendants were insolvent and therefore no adequate relief could be had by suing them for damages the plaintiffs brought this action for an injunction to enjoin the picketing which was conceded to be peaceful. The strike commenced in July, 1919. The State legislature had that year passed a law (ch. 346) in which labor organizations were declared to be lawful organizations, and restricted the

power of courts to issue injunctions against them or to prevent them from engaging in peaceful picketing. The circuit court awarded judgment in favor of the plaintiffs and the defendants appealed. In affirming this decision the court held that as there was no dispute in this case as to hours, wages, or conditions of labor the above mentioned law did not apply and could not be regarded as permitting picketing for the purpose of forcing recognition of the union. The opinion in part is as follows:

There is no real dispute between the plaintiffs and the defendants as to wages, hours of labor, treatment, or conditions of employment.

We hold that under the facts in this case, chapter 346, Laws 1919, does not embrace or legalize picketing a man's place of business and destroying his patronage where the only question involved is the recognition of the union.

The complaint is founded upon conspiracy, and on that point the alleged and admitted facts bring the case within the purview of *Alaska S. S. Co. v. International Longshoremen's Assn. of Puget Sound et al.* (D. C., 236 Fed. 964 [Bul. No. 246, p. 160].

Regardless of any statute bearing on the subject, every fair-minded man must concede that labor has a right to organize and to use any and all lawful means to further and protect its own interests, and that in the absence of contract any individual, with or without cause, has a right to terminate his employment at any time and without notice. Organized labor is organized brain and muscle. It has all the legal rights of any other association and in this State they are specifically recognized by section 1 of chapter 346, Laws 1919. But under the existing facts the question is squarely presented whether or not, in the absence of a statute conferring such power, any organization has the right, even peacefully, to picket a man's store, drive away his patrons, materially injure his business, and continue to do so, for the sole purpose of compelling him to recognize the union.

When the evidence is analyzed, it clearly appears that the primary purpose of the picketing was to compel recognition of the union, and that it was the defendants' intent to make it continuous.

Even where the relation of employer and employee is shown to exist, and there is a dispute as to wages or hours of labor, there is a sharp conflict in the authorities as to whether there is such a thing as peaceful picketing.

But distinguished counsel have not cited, and after diligent search we have not found any authority which would justify or sustain picketing, even though it be peaceable, where the controversy is not between employer and employee, and there is no dispute growing out of employment but the purpose of the picketing is to induce the employer to recognize the union. As we analyze the authorities, the legal right peacefully to picket is largely dependent upon the purpose and intent, and the method and manner in which the picketing is done.

Assuming that the plaintiffs sustained material injury, the defendants vigorously contend that it was the result of picketing which was both peaceful and lawful, and that the damages were only incidental, for which the plaintiffs would not have any right of action; in other words, that it would be *damnum absque injuria*. Under

another state of facts that legal principle would be sound and sustained by the authorities; but in applying the rule both the facts and the motive are important.

Under the facts shown to exist in the instant case, we hold that chapter 346, Laws 1919, does not apply; that the relation of employer and employee did not exist; that there was no real or vital dispute about the scale of wages, hours of labor, or pay for overtime; and that the primary purpose of calling the strike, placing the plaintiffs on the unfair list, and picketing their places of business was to obtain the recognition of the defendant local union No. 41. Under such a state of facts, the damages are not incidental to the legal right of the defendants. It appears from the record that the defendants are insolvent, and that the plaintiffs have sustained material injury to their business, which will be continuous if the defendants are permitted to picket, and for which the plaintiffs would not have a complete and adequate remedy at law even in a multiplicity of actions. The decree of the circuit court is affirmed on the merits, but, for the reason that this is in the nature of a test case, it is modified as to costs, which neither party shall recover in either court.

Two judges out of seven sitting on this case dissented, and each rendered dissenting opinions in which they attacked the majority's interpretation of the proper application of the law and declared that the anti-injunction statute should be enforced in any and all cases, and that the picketing if peaceful should not be enjoined.

LABOR ORGANIZATIONS—STRIKE TO COMPEL CONTRACT—PICKETING—EFFECT OF STATUTE—BOYCOTT—RIGHT TO LABOR MARKET—*Folsom Engraving Co. v. McNeil et al. and Wright Company v. McNeil et al.*, Supreme Judicial Court of Massachusetts, Suffolk (March 20, 1920), 126 *Northeastern Reporter*, page 479.—This was an action for tort by two photo-engraving companies against the members of a local union of workmen who were employees of companies doing such work as that engaged in by plaintiffs. The members of the employees' union drew up a contract by which the absolute right of "collective bargaining" was conferred upon the union. It also provided for preferential employment of union men at a minimum wage and forbade the "laying off" of permanent employees even if there was not sufficient work on hand to keep them employed. Various other provisions were contained in the contract, among which was one providing that no contracts, individual or otherwise, would be entered into conflicting with this contract. The union then presented the contract to the employers, many of whom had individual contracts with their employees, with the demand that it be unconditionally accepted as an entirety. This demand was refused, and the union declared a strike. In furtherance of their efforts to bring the employers to terms, the union resorted to picketing and intimidation

of faithful employees, who continued to work, by the use of scurrilous language and abusive epithets. Individual boycotting was resorted to and strenuous attempts were made to compel nonstriking employees working under contracts to breach their contracts and leave the city. Printed and written communications were published branding the employers as unfair to and prejudiced against union labor, and calling on others to refrain from dealing with the companies. The court granted an injunction against the defendants, saying in part:

The question for decision is not whether an individual employee who has contracted to perform labor can abandon his contract, leaving his employer to whatever remedy in damages he may have. It is whether by concerted action using the strike as a mass weapon the defendants could lawfully compel the plaintiffs to yield to their demands. The proposed agreement was presented as an entire contract to be unconditionally accepted.

If the plaintiffs declined to enter into the agreement the underlying purpose manifestly was to enforce acquiescence through the coercive power of a strike, which even where there is both a legal and illegal purpose is of itself illegal. (*Bausch Machine Tool Co. v. Hill*, 231 Mass. 30, 36, 120 N. E. 188 [Bul. No. 258, p. 127].)

The provision that the employer must retain and pay more employees than were actually or reasonably required for carrying on his business, and that disputes not covered by the agreement must be submitted to arbitration even if proper subjects for negotiation where the parties are willing to negotiate, were, until accepted, mere proposals, the refusal of which was wholly insufficient to justify the measures adopted by the defendants. The plaintiffs could not be compelled to make an involuntary contract, or to substitute compulsory arbitration for due process of law. (*Haverhill Strand Theater v. Gillen*, 229 Mass. 443, 118 N. E. 671 [Bul. No. 258, p. 108]; *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457 [Bul. No. 77, p. 393].) But these provisions, while material and important, comprise a part only of the general plan to compel the plaintiffs, who were employing nonunion as well as union labor, "to unionize" their shops. The record states that prior to the vote to strike which followed the declination of the agreement no disagreement or controversy had arisen between the plaintiffs and their workmen. It is true, the agreement reads, that the plaintiffs in the employment of journeymen and apprentices will give preference to union men by notifying the union officials when additional journeymen and apprentices are needed, and if the union can not furnish and supply competent help, the employer may secure such help from other sources, and no express requirement is found for the discharge of nonunion men already under employment. No prolonged discussion, however, is needed to make plain that this was merely an indirect method which must culminate in a closed shop. The position of nonunion employees under the practical working of the agreement would gradually become so unbearable and intolerable that as they retired and were gradually eliminated by the process of selection the plaintiffs necessarily must resort solely to union workmen to recruit their in-

dustrial force. It is unnecessary to consider what the status of the parties would have been if the agreement had been mutually accepted and executed. (See *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036 [Bul. No. 99, p. 727].)

The right of the plaintiffs at all times to hire in the labor market, and to retain in their employment, such workmen as they might choose unhampered by the interference of the union acting as a body through the instrumentality of a strike, or of a boycott, or of a black list, is a primary right which has never been abrogated but remains unimpaired by our decisions. (*W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 389, 116 N. E. 801 [Bul. No. 246, p. 171]; *Folsom v. Lewis*, 208 Mass. 336, 94 N. E. 316, 787 [Bul. No. 95, p. 341].)

Statutes 1913, chapter 690, an act to define the extent to which peaceful persuasion is permitted, is invoked as a shield for what has been done. But the statute is applicable only to a lawful strike lawfully conducted. It is unavailing as a defense on the present record. The prayer for the assessment of damages has been waived, and the defendants having deliberately, intentionally, and unlawfully entered upon a course of procedure materially interfering with the right of the plaintiffs unmolested to carry on business in their own way, they are respectively entitled to a decree with costs awarding injunctive relief, the terms to be settled by a single justice. (*Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603 [Bul. No. 60, p. 702]; *Cornellier v. Haverhill Mfg. Assn.*, 212 Mass. 554, 109 N. E. 643 [Bul. No. 189, p. 318]; *Shinsky v. Tracey*, 226 Mass. 121, 114 N. E. 957 [Bul. No. 246, p. 142].)

LABOR ORGANIZATIONS—STRIKE TO UNIONIZE ELECTRIC RAILWAY—INJUNCTION—INTERFERENCE WITH WAR WORK AND MAIL—*Montgomery et al. v. Pacific Electric Ry. Co., United States Circuit Court of Appeals, Ninth Circuit (May 26, 1919), 258 Federal Reporter, page 382.*—The Pacific Electric Railway operated a line in Southern California which accommodated various military and naval posts or bases and also supplied various shipbuilding corporations and an oil refinery which was engaged in supplying the federally controlled railroads with oil. The company made it a condition precedent to procuring employment that each employee refrain from becoming a member of any labor organization. The railway was not under Federal control and therefore in no way obligated to grant its employees the increases in wages which were ordered by the Director General of Railroads; however, it voluntarily granted its employees the same increases in wages as called for in these orders, and they were satisfied as to their wages, hours of labor, and conditions of employment. The defendants, the Brotherhood of Railway Trainmen and the Brotherhood of Locomotive Engineers, unincorporated associations of Cleveland, Ohio, represented by Montgomery and Forquharson, attempted to unionize the railway company's employees, inducing them to violate their contracts of employment and

associate themselves with the defendants. They succeeded by various methods in inducing about 1,200 of the railway's employees to join their unions and thereupon issued an ultimatum to the railway company stating that unless it would recognize the union by July 2, 1918, at 7 o'clock they would call a strike of its employees and tie up the company's lines. The company secured a temporary restraining order against the brotherhoods to prevent them from interfering with its employees, and later it secured a temporary injunction, from which the defendants appealed. Circuit Judge Ross, expressing the opinion of the court which affirmed the order issuing the injunction, said in part:

The contention of the appellants' counsel that because the act of Congress of October 15, 1914 (38 Stat. 730, ch. 323), commonly called the Clayton Act, was not expressly mentioned in either the majority or dissenting opinions of the Supreme Court in the case of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, we should hold that the court decided that case "upon the condition existing at the time of its commencement, and not upon the condition existing at the time of the decision," is wholly unsound. The exact reverse is manifestly true. That the order here appealed from accords with the decision in the case cited is expressly conceded in the brief for the appellants, where it is declared that—
"the injunction approved by the Supreme Court in the *Hitchman* case does the same violence to the provisions of the Clayton Act as does the order at bar."

And again:

"Certain it is that the provisions of the Clayton Act and the decision in the *Hitchman* case can not be reconciled."

Nor is it true that the Supreme Court made in the case cited no reference to the Clayton Act; for, notwithstanding the fact that that act was pressed upon its consideration, the court, in the course of its elaborate opinion, expressly declared it "needless to say there is no act of legislation to which defendants may resort for justification."

While it is perfectly true, as is expressly declared in section 6 of that act (Comp. St. p. 8835f), "that the labor of a human being is not a commodity or article of commerce," it is equally true that laborers in this country, in whatever field of operation, and whether of head or hand, are governed and protected by the same Constitution and laws that govern and protect the owners of property here. One of the things thus permitted and secured is the right of contract. The latter, freely and fairly made upon sufficient consideration, is inviolable. In the present case the complainant company made nonmembership in a union a condition of employment, and to that condition the employees in question agreed. Such was the contract of the parties.

With the contract between the complainant company and its employees the appellants, Montgomery and Farquharson, in their respective capacity, and others acting with them, undertook to interfere, not by "recommending, or advising, or persuading" such employees to break their contract and stop the work in which they were

engaged by any peaceful or lawful means, but by threats, opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States submarine base at San Pedro to give public warning to all persons concerned against any interference, or attempt to interfere, or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the outer harbor there, and to actually put naval guards on each car to enforce his command. Surely nothing more need be said to show the absurdity of the pretension that the appellants' interference with the existing contract between the complainant company and its employees was not that peaceful, lawful recommending, advising, or persuading the latter to cease work and terminate their employment, permitted by the provisions of the * * * [Clayton Act].

The order appealed from is affirmed.

LABOR ORGANIZATIONS—STRIKES—BOYCOTT—PICKETING—INJUNCTION—*Thomson Mach. Co. v. Brown et al.*, *Court of Chancery of New Jersey* (Aug. 14, 1918), 108 *Atlantic Reporter*, page 116.—A number of the employees of the plaintiff company who are members of the Grand Lodge, International Association of Machinists, went on a strike. They posted pickets, attempted a boycott, and did other things which were calculated to aid the cause of the strike. They also maintained a building in close proximity to the plaintiff's factory, on which were posted many placards bearing statements of an unpleasant nature. This case was heard on a petition for a preliminary injunction in 1918 (104 Atl. 129, Bul. 258, p. 115) in which the injunction was granted. The present case is a supplemental opinion confirming the opinion in the previous case and is in part as follows:

I am still of the opinion that the act of the respondents maintaining in close proximity to the plant of the complainant a building upon which they maintained placards, upon which were printed statements of the following nature: "Don't scab. Honest jobs are plenty. Strike at Thomson Mch. Co.," etc.—distributing generally and handing employees and prospective employees of complainant cards drawing attention to the fact that there was a strike on, and that those who labored for complainant were scabs, and that complainant was unfair, communicating with users of machinery manufactured by complainant and with labor employed on such machines in the use or repair thereof with the purpose of establishing a boycott, were illegal and should be enjoined. (*Jonas Glass Co. v. Glass Bottle Blowers' Association*, 77 N. J. Eq. 219, 79 Atl. 262.)

The strike was unaccompanied by violence. The only illegal acts of which there was any evidence was the posting of placards, the maintenance of a black list, the distribution of the cards, and the attempted boycott. How far the court will go, where a strike has been accompanied by so many illegal acts as that it is apparent that the strikers have no intention of complying with the law, in enjoining the performance of illegal acts not proven to have been per-

formed, but so closely related with those already performed as to make it apparent that there is danger that they will be indulged in, I do not find it necessary to determine on this preliminary application. The complainant can be protected by enjoining the continuance of the illegal acts which have been proven to have been performed, with leave to at any time apply if any further illegal acts occur.

The injunction will restrain defendants:

First. From knowingly and intentionally causing or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by inducement or persuasion any employee of the complainant under contract to render service to it to break such contract by quitting such service.

Second. From attempting to cause any person employed by complainant to leave such employment by intimidating or annoying such employees by annoying language, acts, or conduct.

Third. From causing persons willing to be employed by complainant to refrain from so doing by annoying language, acts or conduct.

Fourth. From inducing, persuading or causing to attempt to induce, persuade, or cause the employees of complainant to break their contracts of service with complainant or quit their employment.

Fifth. From threatening to injure the business of complainant or of any corporation, customer, or person dealing or transacting business or willing to deal and transact business with complainant, by making threats in writing or by words for the purpose of coercing such corporation, customer or person, against his or its will so as not to deal with or transact business with the complainant.

Sixth. From displaying or circulating cards, placards, pictures, or other devices, either printed, painted, or written, in any place, reflecting upon the ability of the Thomson Machine Co. to make and fulfill contracts, or in any way casting reflection upon the reputation, ability, or conduct of the present employees of the Thomson Machine Co., or any of them, or any persons willing to become such employees.

Seventh. From communicating with the users of the machinery manufactured by complainant or with labor unions whose members work with said machines or on the repair thereof in such manner as to induce or persuade such users to discontinue the use of such machinery and prospective customers to refrain from purchasing such machinery and labor to refuse to work with such machines or on the repair thereof.

LABOR ORGANIZATIONS—STRIKES—COMBINATIONS OF EMPLOYERS AND EMPLOYEES—"OPEN SHOP"—RIGHT TO INJUNCTION—*State v. Employers of Labor et al., Supreme Court of Nebraska (Nov. 30, 1918), 169 Northwestern Reporter, page 717.*—In May, 1917, certain industrial disturbances took place in Omaha, finally culminating in interference with the comfort and welfare of large classes of the community, and in lockouts, strikes, disorderly assemblages, assaults, and damage to property. Prior to that year it had been the custom in that city for certain trades to make collective agreements through labor unions with associations of employers in such trades, but the

practice was stopped by the employers and it was sought by some of them to have their workers sign an agreement recognizing the "open shop" principle. A business men's association was formed which was influential in preventing agreements being made with the unions which did not recognize the "open-shop" principle. The unions attempted to establish a "closed shop." A strike of the teamsters in one of the building material and coal yards led to a general teamsters' strike where nonunion men were employed. Violence resulted and the employers established a lockout and refused to sell fuel and building material to the public generally, and, this preventing building construction, many building craftsmen were rendered idle. Conditions were becoming chaotic when this action was brought by the attorney general of the State against all employers of labor, both those belonging to associations and those who did not, and against a large number of labor unions and their officers in the city to secure an injunction. Injunction was allowed against the owners of the coal yards enjoining them from closing the yards and against the teamsters enjoining them from attacking nonunion teamsters. The attorney general appeals from that part of the judgment refusing an injunction against the other employers and unions and the Teamsters' Union appeals from the injunction against it. In the language of the court, as expressed by Judge Letton, the prayer for injunction by the attorney general was in substance as follows: "That the Omaha Business Men's Association, and all employers of labor in the city, be enjoined from committing any acts in restraint of trade, transportation, or commerce or conspiring so to do, and from punishing any of its members for failure to continue to cooperate with it; that the owners of coal and building material yards in the city be enjoined from refusing to sell their goods to anyone who is willing to pay the price for the same; that the labor unions and their officers be enjoined from agreeing to refuse to transport any commodity in the usual course of trade, from carrying on any unlawful business, from picketing, from threatening, intimidating, or interfering with any individual in performing lawful work, or from seeking to require any individual to join a union, and—that the question of union or nonunion shops, whether advocated or contended for or against, by any of the defendants herein, be held in abeyance until the close of the present war." The opinion of the court is, in part, as follows:

Both employers of labor and workingmen may form organizations for their own personal benefit. Their right to form and organize associations is the same. That which is lawful for the employers is lawful for the employees. If there is no contract for any fixed term of employment, the employer may discharge, or the employee may stop work, at his own pleasure.

In such a case there is no law which prevents workingmen from combining for the purpose of improving working conditions, raising their general standard of living, procuring shorter hours of labor and higher wages, or for any other lawful and useful purpose. They have a right to refuse to work, if they believe this will aid them in accomplishing their object. They have a right, also, for that purpose to persuade other workmen to cease work, in a legal and proper manner, and to employ any other lawful means which will aid them in attaining their end.

On the other hand, employers may legally agree with each other that they will not adopt the "closed-shop" principle, but will require any man employed to work upon the "open-shop" principle, or may counsel and advise with each other for that purpose. They have as much legal right to refuse to employ members of labor unions as such members have to refuse to work in an "open shop," and the same legal right to adopt a course of conduct in concert.

Of the moral aspect of the respective legal right to combine, we can not take note in such a proceeding.

It may be that, in the great mass of testimony, some instance has escaped us where a contract relation existed, or malice was shown: but, if so, that fact, while perhaps affording an action for damages to the person whose rights were affected, would not warrant granting such an injunction as is asked for in this suit. While relief by injunction will be granted in proper cases by the courts, it is not their function to attempt to regulate by such process the relations between capital and labor. It is only when property or personal rights are assailed that the courts interfere. Viewed in the light of these legal principles, we conclude that evidence as to the Omaha Business Men's Association, and as to employers of labor generally, does not warrant the granting of an injunction against them.

The same considerations apply with respect to the injunction sought against the labor unions and their respective officers, with the exception of the Teamsters' Union. In the main, the acts in evidence with respect to the action of these defendants show simply a refusal by members of these unions to work upon the same job with non-union men, and peaceable efforts by union members to induce other workers to join the union in their respective crafts. Taken as a whole, there is not sufficient evidence to sustain the sweeping and blanket injunctions sought by the attorney general in behalf of the State. These considerations dispose of the appeal of the State.

We are convinced that the evidence sustains the finding that the Teamsters' Union and its members conspired together to prevent the transportation of goods and merchandise within the city by assaults, threats, and other disorderly conduct. The evidence as to this is in sharp conflict, but the circumstantial evidence and the general situation which the record discloses with respect to the obstruction of commerce and interference with the attempted delivery of goods by nonunion teamsters is such as to convince an unprejudiced mind that the illegal acts occurred by reason of a concert of action instigated by the men directly connected with and in control of the organization.

On the whole case, we find no reason for interfering with the judgment of the district court; and it is therefore affirmed.

LABOR ORGANIZATIONS—STRIKES—EFFECT ON EMPLOYERS' CONTRACTUAL OBLIGATIONS—*The Richland Queen, United States Circuit Court of Appeals, Second Circuit (November 13, 1918), 254 Federal Reporter, page 668.*—*The Richland Queen*, a steamship belonging to the Richland Steamship Co., was in need of repairs and was sent to the Buffalo Dry Dock Co. on September 5, 1916. In October a dispute arose between the workmen and the dry dock company, the workmen demanding an eight-hour day, which the company refused to grant. A strike was declared and it was impossible to do very much work so that *The Richland Queen* was not repaired until December 2. Since no time had been fixed for the completion of the repairs it was understood that they should be completed within a reasonable time, and, taking this stand, the Richland Steamship Co. has sued the dry dock company for the loss of the use of its vessel. Decisions were rendered in favor of the dry dock company by Judge Hazel on the ground that the work was done within a reasonable time in view of the circumstances obtaining during the course of the repair work. The plaintiff points out the fact that the strike was a peaceful strike and thereupon cites a number of New York decisions where it was held that a peaceable strike is no defense to a claim for delay. In affirming the lower court's decision, Circuit Judge Ward said in part:

We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable strike and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike. The question, however, in each case is the same, whether the conduct of the employer was reasonable. A peaceable strike on frivolous grounds, which the employer did all he could to prevent, should be a defense against a claim for delay. On the other hand, a violent strike on justifiable grounds, which the employer either fomented or unreasonably resisted, ought to be no defense. Of course the employer in either case could end the strike by surrendering. We are not disposed to differ with Judge Hazel's finding that the dry dock company's performance was reasonable in view of the strike.

Circuit Judge Manton rendered a rather lengthy dissenting opinion in which he declared that the dry dock company should have averted the strike until the work in hand had been completed.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—UNLAWFUL ARRESTS OF STRIKE BREAKERS—*American Steel & Wire Company v. Davis, Mayor, et al., United States District Court, Northern District of Ohio (Dec. 17, 1919), 261 Federal Reporter, page 800.*—Certain organizations of workers in the steel industry

throughout the United States went on a strike. The plaintiff company operated one plant in Cleveland, Ohio, and seven plants in Cuyahoga County for the manufacture of steel and steel products, in which over 11,000 men were employed. A considerable number of the company's employees joined in the strike, and in order to continue operations the company employed other persons in other cities and States. These other employees were engaged under contracts which provided that transportation to Cleveland would be paid by the company, and in event the new employees were dissatisfied with conditions the company would provide them with transportation back to their homes. All these new employees of the company were proved by the company's affidavits to be American citizens of good character and habits. With reference to these affidavits the court said:

In my opinion, however, the citizenship of the persons thus engaged is not a material circumstance. The law would be the same if they were any persons entitled to the privileges and immunities accorded to citizens of the United States, including aliens lawfully admitted, pursuant to treaty and the immigration laws.

Shortly after the strike was declared the mayor of Cleveland, Davis, publicly announced that the police of the city would arrest all persons brought into the city for the purpose of becoming employed in the company's plants. In pursuance of this policy uniformed policemen boarded trains entering the city and arrested all persons who were on their way to plaintiff's plants and took them to police stations, where they were locked up. This was all done without warrants of arrest, without information or suspicion of the commission of a felony, and without the persons arrested having committed misdemeanors in the presence of the policemen. The sole reason for the arrests was that the persons arrested were "suspicious persons." In this manner the police arrested over 100 prospective workmen of the plaintiff's and caused at least 4 of them to return to their homes.

The plaintiff company sued for an injunction to restrain the mayor and police of the city of Cleveland from illegally and unlawfully arresting its employees. Judge Westenhaver in granting the injunction said in part:

It was not seriously contended before me that this procedure is legal. The law to the contrary is well settled.

In cases of felony arrest may be made without a warrant only when the arresting officer has information or knowledge of facts reasonably calculated to induce a belief that a felony has been committed and that the person thus arrested without warrant is guilty of having committed it. In cases of misdemeanors a warrant is always required, except when committed in view of the peace officer making the arrest.

The so-called "suspicious person" ordinance of the city of Cleveland confers no authority in conflict with those settled rules of law.

It follows then that the procedure pursued by defendant is illegal and that if a violation of plaintiff's rights results therefrom then an injunction should issue.

The history of defendants' interference with persons employed by plaintiff, or seeking to enter of their own initiative plaintiff's employment, is not fully covered by the affidavits on file; but, as already stated, this procedure has been pursued since a few days after the declaration of the strike. On one day, October 16, 1919, some 200 persons came to Cleveland for the purpose of entering the employ, either of the plaintiff or of some other manufacturer of steel and iron products. All of these were arrested, detained, investigated, and escorted by the police out of the city.

Peaceful, law-abiding citizens stand in awe of being arrested, and have a proper respect for public authority. The mere proclamation by the mayor and chief of police of a city that all persons seeking to enter the employment of the plaintiff, to take the place of other persons who have left that employment, will be arrested, detained, and investigated, would inevitably tend to prevent the plaintiff from obtaining employees and other persons to enter into its employment. The prejudicial effects to the plaintiff are sufficiently proved.

That plaintiff is entitled to relief by injunction in this situation is obvious from a consideration of well-settled legal principles. It is engaged in a lawful business and has a right to conduct that business without unlawful interference, either by its striking employees or by any other persons. It may solicit and procure persons to work in its plant, no matter where they reside, or whether citizens of the United States or not. No one may lawfully interfere with this right of plaintiff, and if deprived thereof its property is destroyed.

This is also equally true of all persons desiring to enter into the employment of plaintiff. To deny any such person that right because he does not live in Cleveland would be to abridge or deny to such person privileges and immunities belonging to every citizen of the United States and protected by its Constitution from a denial or abridgement by any State. The protection accorded by the constitution of Ohio is equally sweeping. The power to preserve the public peace and to arrest and prosecute persons for crime can not be made to support action depriving persons of these constitutional rights and privileges.

The courts have uniformly protected and enforced these rights by injunction. The legal principles which support equitable jurisdiction are too well known to require the citation of authority. The question has often arisen in suits to enjoin unlawful interference by striking employees and their pickets. Employees have ordinarily the right to leave an employment at will unless restrained by contract or law, either singly or in combination.

They have a right peaceably to persuade others to do likewise and to refrain from taking the places thus vacated. They have no right, however, by violence, intimidation, coercion, or threats to prevent the former employer from conducting his business at will, or from obtaining other persons to take their places or to prevent such persons from seeking and entering the places thus vacated. The rights are at least equal. In all cases in which picketing has been allowed, the courts have not hesitated to restrain or regulate picketing in such a way as is necessary to prevent violence, coercion, or intimidation

being used against the persons employed or seeking to be employed to take the vacant places.

What striking employees may not themselves do to prevent an employer from conducting his business may not be done by police officers under the guise of preserving the peace or preventing crime. Such conduct is outside any power or authority conferred by the law on police officers. Injunction will lie against police and other officers when thus acting beyond lawful power.

LABOR ORGANIZATIONS—STRIKES—INTERFERENCE WITH EMPLOYMENT—INJUNCTION—*Smith v. Bowen et al. Supreme Judicial Court of Massachusetts (Feb. 4, 1919), 121 Northeastern Reporter, page 814.*—Rice & Hutchins, employers, had a price-list agreement with the members of the Shoe Workers' Protective Union, who are the defendants in this action. This agreement made no provision that the employer was to employ only union men in his shop. However, the superintendent had been in the habit of employing only union men because he preferred them. In January, 1918, one Stafford, a member of the union, "voluntarily gave up his job" as a channeler, whereupon Smith was brought from Lynn to fill the vacant job. Smith was a nonunion man, and the superintendent told him to join the union before he was employed, which Smith accordingly attempted to do by putting in his application. The application was refused, but Smith was employed notwithstanding his not belonging to the union. Later the members of the union went on a strike to have Smith removed. At the employer's request Smith left their employ. He now brings an action for a permanent injunction to prevent the union from combining to prevent him from being employed by Rice & Hutchins. In granting the motion for a permanent injunction and thereby reversing the decision of the lower court, the court said, in part:

An agreement by an employer with a union to give all his work to members of the union is legal and a valid agreement. A strike by members of the union to enforce their rights under such an agreement is a legal strike. But the peculiarity of this case is that there was no stipulation to that effect in the price-list agreement between Rice & Hutchins and the defendant union. The price-list agreement here in question fixed the prices to be paid and the conditions (or some of them) under which the work should be done; in addition it gave to the union a right to have an agent "visit the factory during working hours," and "to have a shop committee." But this price-list agreement went no further. It did not stipulate that Rice & Hutchins should give all their work to members of the union. It is found, indeed, by the judge that the purpose of "the superintendent of the factory" of Rice & Hutchins was "to secure" union men and their shop "was to run as a union ship" in all departments with which the defendant union had to do. But a price-list agreement with a

union in which it is agreed that the union shall have a shop committee and an agent who shall be allowed to visit the factory during working hours is not in and of itself an agreement on the part of the employer to give all its work to members of the union. In case of such a price-list agreement the employer has a right to change his mind and decide not to employ union men because he has not made an agreement that he will give all his work to the members of the union in question. Inasmuch as the union before the strike here in question had not secured from Rice & Hutchins an agreement to give all their work to members of the union, a strike to compel Rice & Hutchins to employ none but union men was an illegal strike. (*W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801 [Bul. No. 246, p. 171].)

It follows that the plaintiff is entitled to an injunction permanently enjoining the members of the defendant union from interfering and from combining, conspiring, or attempting to interfere directly or indirectly by striking or otherwise with the employment of the plaintiff by Rice & Hutchins.

LABOR ORGANIZATIONS—STRIKES—JUSTIFIABLE CAUSE—VIOLATION OF INJUNCTION—CONSTITUTIONALITY OF STATUTE REGULATING PUNISHMENT—*Walton Lunch Co. v. Kearney et al.*, *Supreme Judicial Court of Massachusetts* (Oct. 18, 1920). 128 *Northeastern Reporter*, page 429.—The employees of the Walton Lunch Co. belonged to a union known as the Hotel & Restaurant Employees' International Alliance, Local No. 34. They desired a contract with the lunch company, which, among other things, called for a closed shop. The defendants, who are officers and members of the union, met the representative of the lunch company in his office and discussed the contract for two hours. No decision was arrived at, and it was agreed at the request of the company's representative to meet again the following day at the same place. On the following day, when the union representatives put in appearance, the company's representative could not be found. It was later learned that, although he was in his office at the time, he had concealed that fact from those in charge of the office and from the union men. The union used this as a cause for striking and proceeded to patrol or picket the company's lunch rooms. The manner of this picketing led to an injunction prohibiting it, but it was nevertheless persisted in. This action was brought to punish for contempt those who had violated the injunction. Two questions are involved. "Was the cause for the strike justifiable, and could punishment be meted out for contempt in a case like this without a jury trial, contrary to chapter 339, Statutes 1911?" In answering these questions the court handed down the following opinion:

The ruling that a strike for this cause was justifiable was right. This is not a case of a mere refusal to meet employees for discussion

of demands for change of wages or working conditions. It is not a declination to confer with strangers about the subject. It is a plain case of breach of good faith and of square dealing between man and man by intentionally failing without apparent excuse and without notice to keep an engagement deliberately made for further consultation touching their contractual relations with each other. It does not appear that the strike was in violation of the terms of any contract between the plaintiff and its employees.

The essential words of the final decree are that the defendants "are perpetually enjoined and restrained from interfering with the plaintiff's business by picketing in such a manner as to annoy, harass, and intimidate the plaintiff's customers or intending customers, or his (its) present employees or those desirous of entering his (its) employment, or by inducing by any means whatever any employee now or hereafter under written contract of employment to violate said contract."

There is no error of law in this decree. Although not minute as to details, it unmistakably enjoins in every particular all the acts and conduct of the defendants set forth in the findings of fact as means by which the strike was carried on. The scope of the decree is co-extensive with findings as to methods used to enforce the strike. Forms of interference with the plaintiff's rights which are not found to have been practiced or threatened are not rightly included within the terms of an injunction.

The matter came on to be heard before another justice, who has reserved for our consideration in that connection the question whether Statutes 1911, chapter 339, is constitutional. The pertinent part of the statute is in section 1, which is in these words:

"The defendant in proceedings for violation of an injunction, where it appears from the petition filed in court alleging the violation that the violation is an act which also would be a crime, shall have the right to trial by jury on the issue of fact only as to whether he committed the acts alleged to constitute the said violation, and the said trial by jury shall take place forthwith, and if there is no sitting of a jury in the county where the contempt proceedings are to be heard, a venire shall issue to impanel a jury forthwith."

It is provided by section 2 that the act shall not apply to the proceedings in the probate court.

It is an essential element of a court that it possesses power to enforce its orders and to protect itself from having its authority flouted. It was said by Chief Justice Gray in Cartwright's case (114 Mass. 230, 238):

"The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery or other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of the Magna Charta and of the twelfth article of our Declaration of Rights."

This statement is complete, unequivocal, and binding upon us. To undertake to amplify or make it more clear by further discussion would be vain. Similar statements are to be found in the decisions of numerous other courts where the question has arisen.

Trial by jury of the question whether a contempt of court had been committed would be a serious limitation of the power of courts. It has been so held whenever the point has arisen. (*Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450, 31 Sup. Ct. 492 [Bul. No. 95, p. 323].)

A number of other cases were cited, the court finding therefrom that "the conclusion is inevitable that this statute is unconstitutional as applied to the case at bar."

LABOR ORGANIZATIONS—STRIKES—PICKETING—CLOSED SHOP—DAMAGES—*Michaels et al. v. Hillman et al.*, *Supreme Court of New York, Trial Term, Monroe County (June 25, 1920)*, 183 *New York Supplement*, page 195.—This was an action for an injunction and damages by Michaels and others against the Amalgamated Clothing Workers of America, certain of its members, and Hillman, its president. The plaintiffs are engaged in the clothing business and employ a large number of workers. Previous to 1915 the plaintiffs had had a contract arrangement with the United Garment Workers, an organization affiliated with the American Federation of Labor. Upon the breaking down of this union in 1915 the plaintiffs refused to have any more dealings with any unions whatever, but set up and maintained an inside shop organization of its workers and declared it to be their policy not to have in their employ any employees who were members of an outside organization or union. The Amalgamated Clothing Workers of America had organized most of the city of Rochester, where plaintiffs are located, and in 1919 entered into a contract with all the clothing manufacturers of that city except the plaintiffs. The aloofness of the plaintiffs aroused the hostility of the union, and it set about unionizing their plant. The plaintiffs always immediately discharged any of their employees who joined a union. The union knowing this, secretly induced about 200 of plaintiffs' employees to join the union, and then when plaintiffs still adhered to their policy of refusing to recognize it, it declared a strike and proceeded to picket the plant. Later, the greater part of plaintiffs' employees joined the United Garment Workers' Union with the sanction of plaintiffs, but this did not satisfy the officials and members of the Amalgamated Clothing Workers' Union, and the strike and picketing were continued. Violence and intimidation were resorted to by the strikers, which brought them a certain measure of success, causing plaintiffs damage. The court in granting plaintiffs' plea and awarding a permanent injunction against the unlawful acts of the union and its members said in part:

The case turns upon the question as to whether or not force, or what is equivalent to force, was employed by the defendants to secure

this recognition. If no threats, intimidation, force, violence, or other coercive measures were employed, the defendants are not liable, for they were within their rights in seeking to compel recognition by calling a strike. Whatever number of pickets was necessary to secure the reasonable and lawful purpose of the union is sanctioned by law, but where the number is swelled to 500 or 600, and at times to 1,000, made up in part of workers from other factories, the unnecessary and unlawful purpose to awe and intimidate by numbers is apparent. Intimidation may consist in numbers alone without any actual notice. Many of the workers in plaintiffs' factories were girls, and in such a case a large crowd of pickets, composed in part of women of foreign birth, with the calling of opprobrious names, and expressions and gesticulations of violence, would be sufficient alone to intimidate, without a single blow being struck.

Actual violence supplemented opprobrious epithets. There was no physical violence every day, but that was hardly necessary. An overt act of this kind now and then would be a sufficient warning, and a blow or disturbance now and then would be rumored about, and be quite adequate as an object lesson. It is enough if violence was employed with sufficient frequency to warrant the conclusion that it was a part of the program for conducting the strike. There were actual assaults upon employees, and interferences with and even attacks on the police. Twenty-nine arrests were made, which represent, however, only a small fraction of the number of misdemeanors actually committed. The number of police deemed necessary on the ground, and the necessity for reserves at the police station for emergencies, indicate the temper of the so-called picketers and the condition that existed. If the leaders admonished the strikers not to indulge in violence, there is no evidence that they followed the advice, or that anything was done by the union to punish the offenders. They created a situation from which violence might be expected, by congregating unnecessary crowds at the factories, and must take the full responsibility for the results, and can not be heard to exculpate themselves by the claim of advice given that was not heeded. The speeches made at the general meeting at Convention Hall show that the temper of the leaders was no more moderate than that of the rank and file of the workers, and these speeches were well calculated to lead them to believe that their conduct was not disapproved.

The defendants sought to interfere, also, with the contract of the United Garment Workers. While the strike was in progress, the plaintiffs' employees in large numbers joined the United Garment Workers affiliated with the American Federation of Labor, but the strike and its methods continued just the same. Salvation, it seems, could be secured only through the upbuilding of an organization represented by the defendants. The United Garment Workers had as much right on the ground as did the Amalgamated Clothing Workers. The latter has no patent right on unionism.

This intolerant attitude of the Amalgamated Clothing Workers toward the United Garment Workers savors of a species of domination which does not inspire confidence in their ultimate purposes.

But not only were the Amalgamated Clothing Workers opposed to the unionization of the plaintiffs' factories by the United Garment

Workers, but they were unwilling that independent contractors and home workers who were making garments for the plaintiffs should have the privilege of working for the plaintiffs. House workers were persuaded by promises of strike benefits, or by still more effective measures, to quit working for the plaintiffs.

Thus by means that were in part lawful, but in most part illegal, the defendants have sought economically to strangle the plaintiffs' business, in order to compel them to recognize an organization against their wishes. "Employees, having struck, will not be permitted, though it might subdue their late employer, to coerce dealers and users into starving his business." (*Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 51.) The law should favor the lawful purposes of unionization, but "rights that are lawful, and purposes that are useful and just, can not, however, be effectuated and accomplished by unlawful means." (*Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97 [see p. 172].)

All the defendants who acted in concert with respect to the illegal means conceived and employed are liable for the damages occasioned thereby. The national organization must bear its share of the responsibility. It had two national organizers on the ground before the strike was called, and it is a fair conclusion that they were directing the action of the joint board and the conduct of the strike in the interest of the national body.

A concert of action by a labor organization and its members to compel recognition of a union, or to redress grievances, by means of threats, intimidations, force, violence, or similar coercive measures constitutes a conspiracy, whether such intention was present at the inception of the strike or afterward, and a national unincorporated labor union is liable for damages, if its officers and agents, acting within the scope of their authority as such, called and carried on the strike, with the intention of using such unlawful means, and used such means; but the liability does not extend to the individual members who are not specially connected with such acts.

The plaintiffs are entitled to a permanent injunction, restraining the defendants substantially in the terms of the temporary injunction heretofore granted (181 N. Y. Supp. 165), and to damages to be hereafter determined.

LABOR ORGANIZATIONS—STRIKES—PICKETING—CLOSED SHOP—MONOPOLIES—JOINDER OF PLAINTIFFS—*Baldwin Lumber Co. et al. v. Local 560, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, et al.*, Court of Chancery of New Jersey (Feb. 25, 1920), 109 Atlantic Reporter, page 147.—The complainants are 15 in number, and are operators of lumber yards and dealers in building and masons' materials who have associated themselves solely for the purpose of prosecuting this action for an injunction to restrain the defendant unions from engaging in picketing their yards. The defendants are three local unions, the International Brotherhood of Teamsters, etc., the Hudson County Building Trades Council, the Coal Drivers' Union, and various individuals said to represent other unions. These unions had each year

made agreements with the various complainants fixing wages, hours of labor, establishing closed shops, etc., and as January 1, 1920, approached the unions prepared new demands which they desired incorporated in the agreement for 1920. These demands called for a weekly wage increase of \$10 and the reduction of the working hours per day from 10 to 9. The complainants would not agree to any larger increase in wages than \$3, whereupon the unions declared a strike. In furtherance of the strike various members engaged in "peaceful picketing" of the complainants' yards. Strangers were also hired to engage in picketing the yards. The tactics of the latter although persuasive were not in all cases exactly peaceful. The complainants by reason of these activities were compelled to shut down their respective businesses. They then associated themselves together and brought this action for an injunction to restrain the picketing. In rendering the decision granting the injunction the court first disposed of questions of jurisdiction, dismissing the bill as to the Coal Drivers' Union, which did not appear to be properly before the court, but retaining jurisdiction as to the teamsters, who were shown to have been active, and properly represented at the proceedings. Continuing, the court said:

The next objection denies the right of complainants to unite in the prosecution of this action, and the facts pertinent to its consideration are: That the former contracts between the employers and their employees were joint contracts executed by complainants and the defendant organizations; that the contract in question is of the same joint character; that the vote to order the strike was taken at a joint meeting of the unions; that the strike against all the complainants was called and went into effect at the same time, and has been directed and managed in the same way and by the same parties, and the result has been common to all the yards—a complete cessation of business. The rules of the court are to be liberally construed, and rules Nos. 5, 23, and 24 (100 Atl. vii, viii) seem clearly to sanction the joinder of complainants in prosecuting this action, in which there is a common question of law and facts arising out of the same transactions with the defendants, and in which they seek to prevent defendants by their joint conduct doing them severally an injury for their joint refusal to comply with defendants' demand for the execution by them of this joint contract. Their grievances and injuries arise out of the same joint transactions, and are the results of the same joint action and conduct of defendants; and no satisfactory reason has been shown why they should not be permitted to jointly ask for relief.

Objection is particularly urged against the injunctive relief sought on that branch of the case relating to the execution of the contract containing the provisions for making the yards of complainants closed shops to all nonunion men, the insistment being that, if such contracts are illegal, complainants need not perform them; and, further, because complainants during the past four years have executed, without objection, contracts containing similar provisions.

Contracts of this character, containing provisions designed to unionize an entire industry in a territory as large as Hudson County, do not appear to have come directly before our courts for consideration, except as hereinafter mentioned. In other jurisdictions where they have been involved they have uniformly been held to be illegal as against public policy. (*Connors v. Connolly* (Connecticut Court of Appeals), 86 Conn. 641, 86 Atl. 604.)

The illegality of such contracts is pronounced upon the fundamental principles of our theory of government, to which monopolies of any kind affecting in any way the utmost freedom of the individual to pursue his lawful trade or business are abhorrent.

The remaining question to be considered relates to the restraint on peaceable picketing. It is insisted that the restraint imposed under the rule, and which is asked to be continued by preliminary injunction, enjoins peaceful picketing and persuasion, and that in this respect it is beyond the scope of the restraint imposed by Vice Chancellor Bergen in *Jonas v. Glass Assn.*, 72 N. J. Eq. 653, 66 Atl. 953, and approved by the Court of Errors and Appeals in 77 N. J. Eq. 219, 79 Atl. 262, in affirming the decree in the case.

A careful consideration of the vice chancellor's opinion, and of the opinion of Chancellor Pitney in the court above, and the dissenting opinions therein, do not support this insistent. Vice Chancellor Bergen quoted with approval from the opinion of Judge McPherson in *A. T. & S. F. Ry. Co. v. Gee* (C. C.), 139 Fed. 582, that, "There is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching," and later in his opinion the vice chancellor held that such picketing "in its mildest form is a nuisance, and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted * * * committee, whose very presence upon the highway for such purpose is deterrent, is just as destructive of his property, and is a boycott which prevents the sale of his product." This language was neither criticized nor modified in any of the opinions in the court above. Chancellor Pitney in delivering the prevailing opinion summarized the 10 features of the strike to which the restraint advised by Vice Chancellor Bergen applied, and his comment on No. 3 was:

"With respect to other persons not as yet employed, but willing to take employment under the complainant, the defendants are restrained from interfering to prevent this by coercion or personal molestation and annoyance, but are not restrained from using mere persuasion in such a case."

The present hearing was on a return to a rule to show cause why the injunction should not issue, the rule having laid down certain restraints in the meantime. These restraints were embodied in a temporary injunction not affecting certain of the plaintiffs whose plants were not shown to have been affected, other restraints also being added, binding upon the unions and "their representatives and those associated with them in the promotion and management of the strike."

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—CONSTITUTIONALITY OF ANTI-INJUNCTION LAW OF OREGON—*Greenfield v. Central Labor Council of Portland and vicinity et al., Supreme Court of Oregon (Oct. 1, 1920), 192 Pacific Reporter, page 783.*—George L. Greenfield was a shoe merchant in the city of Portland, Oreg., where he maintained two stores in which he employed a considerable number of clerks. His clerks belonged to the Retail Clerks' International Protective Association, Local Union No. 1257, which is a part of and is represented by the Central Labor Council. On March 1, 1919, Greenfield entered into an agreement with the clerks' union, good for a 12 months' period, in which stipulations were made as to hours of labor, holidays, times for meals, and payment for overtime. He also agreed to maintain a closed shop. About November 15, 1919, Greenfield required certain of his employees to work four hours a week overtime without additional compensation; he also failed to maintain a strictly closed shop, and on January 13, 1920, he wholly repudiated his contract. The union called a strike on January 19, and at once proceeded to picket plaintiff's shops. The pickets bore banners and wore scarfs on which it was declared that plaintiff was unfair to organized labor, and they accosted prospective customers and endeavored to persuade them not to deal with the plaintiff.

The State of Oregon passed a law, chapter 346, Laws of 1919, declaring labor unions to be lawful organizations; restricting the powers of any court of the State in the granting of injunctions: declaring the labor of a human being not a commodity or article of commerce; and prohibiting the indictment, prosecution, or trial of any person or combinations of persons for any act in furtherance of the bettering of his or their conditions, unless such act should be forbidden by law if done by an individual.

Greenfield brought action on January 23, 1920, for an injunction against the union to stop the picketing, alleging that the pickets were ruining his business, and as the defendants were insolvent he had no adequate remedy at law. The circuit court granted his petition, and an injunction was issued and the defendants appealed, declaring that under the law they could not be enjoined from picketing. The court upheld the constitutionality of the law and modified the judgment granting the injunction. The opinion is in part as follows:

The vital question presented is the application, construction, and constitutionality of chapter 346, Laws 1919.

Although we agree with the trial court in its findings as to what the pickets said, yet, as we construe the record, they spoke in an ordinary tone of voice and not in a loud or unusual manner. Policemen were present and there is no evidence of any complaint or arrests, or that there was any violence or disturbance of the peace. In fact, the pickets were placed in front of each store for the sole

purpose of advising people entering or departing therefrom that "this place is unfair to organized labor. Please do not patronize it. Friends of union labor and all workingmen will not patronize this place. All others should not." That was the sum and substance of their offering. The words were uttered in the usual and ordinary tone of voice used by people speaking to others on a public street.

It is also shown by the affidavits of three of his employees that the plaintiff had violated his contract with them in respect to the payment for overtime, although this was denied by his manager. In other words, there was a dispute between an employer and employees growing out of an employment, within the terms and provisions of chapter 346, Laws 1919.

Because a strike was declared and the union employees walked out, plaintiff claims that the relation of employer and employee ceased to exist.

The contract between plaintiff and the defendant union, as stated, did not expire until March 1, 1920. The strike was called on January 19, 1920. At that time, according to the finding of the trial court, all of the employees of the plaintiff at both of his stores, except four, were members of the defendant union. The complaint in this suit was filed on January 23, 1920. Based upon such facts, we hold that the relation of the employer and the employee and the terms and conditions of employment continued to exist after the strike was called, bringing the case under sections 2 and 3 of chapter 346.

Assuming that to be true, plaintiff contends that such sections are unconstitutional. Section 2 of chapter 346 is identical with paragraph 1464, Arizona Civil Code of 1913, and with section 20 of the Clayton Act. If it is unconstitutional, so are the two latter laws. The Clayton Act was passed in 1914. In so far as we are advised its constitutionality has never been attacked and no Federal court has ever declared it unconstitutional.

Again, section 2 of chapter 346 is identical with paragraph 1464 of the Arizona Civil Code of 1913, the constitutionality of which was sustained in the opinion of the Supreme Court of that State on December 14, 1918. Chapter 346 was enacted by the Oregon legislative assembly of 1919, and in the absence of the referendum, became the law of this State 90 days after its passage. In other words, at the time of its adoption section 2 of chapter 346, which is a copy of paragraph 1464 of the Arizona Civil Code of 1913, had been construed and its constitutionality was sustained by a decision of the Supreme Court of Arizona.

The question was raised in the case of *Truax v. Corrigan*, 20 Ariz. 7, 176 Pac., 570 [p. 222].

By the terms of the contract, the defendant union had notified all members of labor unions that the plaintiff had signed an agreement with it and in effect that he was "fair to organized labor." After plaintiff broke the contract the strike became and was legally justified, and the defendants then had at least the legal right to notify members of the union that he was "unfair to organized labor." It was a justifiable strike for a lawful purpose, and, as we construe the record, it was done in a peaceful and lawful manner. It was called because the plaintiff breached his contract and to further and protect the interests of the union and its members. Any damage to

plaintiff therefrom was incidental to the strike and was *damnum absque injuria*.

The decree of the circuit court will be modified, and one will be entered here permitting the defendants during business hours to place and maintain one picket only, on the outer edge of the sidewalk, at each public entrance to plaintiff's stores, with authority to each picket to wear a banner or scarf inscribed with the words, "Unfair to organized labor, Local Union No. 1257," and in the usual ordinary tone of voice used by one individual in addressing another on the public street to say to any prospective customer: "This place is unfair to organized labor. Please do not patronize it. Friends of union labor and all workmen will not patronize this place"—but not in any manner to impede or interfere with the right of any one to enter or depart from the said stores or any passer-by. Any picket so placed is hereby enjoined from the doing of any other act or thing which is intended to or would divert or turn away any patron or prospective customer from plaintiff's places of business. Otherwise the defendants and each of them, their agents, servants and employees, are hereby enjoined and prohibited from interfering with, intimidating, or harassing the plaintiff or any of his employees at his said place of business or from the use of any violence, threat, or intimidation to induce any customer or patron to withhold or withdraw patronage from the plaintiff.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—EFFECT OF CLAYTON ACT—*Langenberg Hat Co. et al. v. United Cloth Hat and Cap Makers of North America et al.*, *United States District Court, Eastern District of Missouri (June 11, 1920)*, 266 *Federal Reporter*, page 127.—The defendants are a labor union, and its members brought about a strike throughout the entire trade for the purpose of unionizing it. During the strike unlawful picketing was indulged in and acts of violence were committed. The employers sued for an injunction, and a temporary restraining order was granted. In making the injunction permanent the court referred extensively to the *Kinlock Telephone case*, p. 212, saying in part:

I think upon the merits that no necessity exists for any lengthy dissertation upon the law which applies to the facts adduced in evidence. Lately this court, in the case of *Kinloch Telephone Co. et al. v. Local Union No. 2 of International Brotherhood of Electrical Workers*, 265 *Fed.*, 312, took occasion to discuss some of the things which can not lawfully be done by striking employees as well as many of the things which those employees may lawfully do. In that case I took occasion to lay down a test of what is lawful and what is peaceful by stating that to my mind the plain and simple language of the Clayton Act (38 Stat., 730) itself disclosed what is lawful and what is peaceful; conversely, "he who runs may read" what is unlawful and what is unpeaceful.

The test which I stated in that case, and which I now repeat (and that is almost in the language of the Clayton Act itself), could be put in the form of a question: Would any ordinary citizen be per-

mitted to do the acts complained of in this case if no strike or labor dispute existed? If he could do those things, absent a strike, then of course he could do them, present a strike; in other words, if any ordinary citizen, when no strike exists, can do a given act against the rights, person, peace, or property of another, and not commit thereby a breach of the peace, or an act of lawlessness, then the striking employee can do the same act when there is a strike existing.

This case, by the great weight of the evidence, shows an outrageous condition of mass picketing under a situation and condition which no stretch of the imagination can denominate as either peaceful or lawful. There were numerous instances of threats, abuse, and abusive language, of domiciliary visits and physical assaults upon and directed at employees and potential employees; that is, those who desired to become such. These I need not detail; suffice it to say that the record in the case simply reeks with things of this sort. I can hardly conceive of a more outrageous situation in this behalf than that which has been presented by the evidence adduced in this case.

The cases which I have cited, and many others with which the books are fairly filled, hold that the Clayton Act does not justify the doing of the things which the record in this case shows were done. Not alone were these unlawful and unpeaceful acts committed by defendants, or some of them, and those acting in concert and combination with them, before the issuance of the injunction in this case, but afterwards, while it was in force, in utter contempt of its prohibitions.

Without further comment, I am of the opinion that the temporary injunction in this case should be made perpetual. Let a decree be drawn accordingly.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—VIOLATION—*Ash-Madden-Rae Co. v. International Ladies' Garment Workers' Union et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 258.*—The plaintiffs are various manufacturing concerns of Chicago engaged in the manufacture of women's garments. The defendants are the International Ladies' Garment Workers' Union, which has a number of local unions in Chicago whose members are a part of the plaintiffs' employees, Sol Seidman, the vice-president of the union, and various other individuals. Seidman came to Chicago from New York and assumed charge of the affairs of the union in Chicago and later assumed charge of and conducted the strike. The union sent a letter to the various plaintiffs presenting certain demands and stating that in event the letter was not answered a strike of their employees would be declared. The letters were not answered and the strike was called. The strikers proceeded to picket the plaintiffs' establishments and to resort to various violent methods of persuasion in an attempt to prevent plaintiffs' employees from working. The plaintiffs sued for and obtained injunctions restraining the strikers from doing the unlawful acts and from picketing, which in Illinois is unlawful.

After the issuance of the injunctions, of which he had full notice. Sol. Seidman advised the strikers and the picketing committee which he had organized to disregard the injunctions and to continue to picket the establishments. Upon consultation with his lawyers he was advised that picketing although lawful in New York was not lawful in Illinois. He thereupon ceased to advise the violation of the injunction. Action was brought against him for contempt of court for the violation of the injunction and he was found guilty and sentenced to 75 days in jail. He and the other defendants appealed to the appellate court, declaring that although they had violated the injunction they could not be punished because the injunction was erroneous and invalid. The appellate court reversed the decision and the plaintiffs appealed. The supreme court reversed the appellate court and remanded the case. The opinion of the supreme court as handed down by Judge Farmer is in part as follows:

It is so universally settled law as to require no citation of authorities that the orders and judgments of a court having jurisdiction must be obeyed until reversed or set aside in a direct proceeding for that purpose, and in a proceeding for contempt for violating an injunction it can not be urged that granting the injunction was erroneous. Unless absolutely void, it is binding on the parties and must be obeyed. The appellate court did not reverse the judgment of the circuit court because it found defendant in error had not violated the injunctions. In its opinion that court says, "It is evident appellant (defendant in error here) was guilty of a technical violation of the injunctions," but because he honestly thought the injunctions were unlawful, and refrained from further violations when he was advised to the contrary, the court was of opinion punishment by imprisonment should not have been imposed, and that court reversed and set aside the judgment of the circuit court, without remanding the case, which was a discharge of defendant in error. In any view we can take of the case, the judgment of the appellate court can not be sustained. The judgment of the circuit court was not reversed as a result of the appellate court finding the facts different from the circuit court, for there is no substantial dispute as to facts, and the appellate court made no finding of facts, as is required by statute when it reverses a judgment without remanding the case, as a result of finding the facts different from the trial court. The reason for the reversal of the judgment of the lower court, as stated in the opinion, is that punishment by imprisonment should not have been imposed. Reversing for that supposed error would require the modification of the penalty imposed or remandment to the circuit court.

The court granting the injunction is clothed with a large discretion in enforcing obedience to it, and in a proceeding for its violation the extent of the punishment to be inflicted rests in the sound legal discretion of the court, and courts of appellate jurisdiction will not interfere with the exercise of such discretion except for its abuse. [Cases cited.]

The judgment of the appellate court is reversed, and the case remanded to that court, with directions to render such judgment, not

inconsistent with the views expressed in this opinion, as it may deem lawful and proper.

Reversed and remanded, with directions.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INJUNCTION—VIOLATION—*Kayser v. Fitzgerald et al.*, *Supreme Court of New York, Special Term (Oct. 4, 1919)*, 178 *New York Supplement*, page 130.—The plaintiff is a glove manufacturing corporation of New York with factories at Sidney and Amsterdam. The defendants are three labor unions, the Dyers and Finishers' Union, the Glove Makers' Union, and the Warpers and Warp Hands' Federated Union of America, and the officers and members of said unions. The defendant R. F. Stump was president of the warpers' union and was the leader and superior officer of the striking unions. The defendants H. T. Wilpers and Hannah Chrisman were presidents of the unions, and the defendant Otto Boelke was a member of one of the unions in Amsterdam.

In May, 1919, a large percentage of plaintiff's employees in the Sidney and Amsterdam factories went on a strike. The plaintiff sued for and obtained a preliminary injunction, which later was made permanent. This proceeding was a petition for a rule to show cause why Stump, Wilpers, Chrisman, and Boelke should not be punished for contempt of court for the violation of the injunction.

It seems that after the injunction was issued it was widely published, and copies of it were sent to each of the strikers and the defendants. After being notified of the injunction the defendants at various times advised their subordinate strikers that the injunction "did not amount to anything." They organized a paid picket of 35 members at Sidney and proceeded to march up and down the streets and shout opprobrious epithets at plaintiff's loyal employees. They also resorted to other means of annoying plaintiff's employees, even going so far in some instances as to commit assault and battery. In rendering an order that the defendants be fined and imprisoned for violating the injunction the court said in part:

It is true, of course, that men have a right to strike, and that they have a right to cooperate together, and the organization and co-operation which men form is not against public policy, but is to be commended when their purposes are legitimate and lawful: but while they have that absolute right, other men who are willing to work have an equal right to pursue their labors unmolested, and the plaintiff has just that same right to employ whomsoever it pleases, provided it can get men to enter such employment, and this right can not be interfered with by threats, intimidation, or coercion by the defendants, whether they act singly or as a result of an organization or conspiracy.

In this case the evidence points unmistakably to the fact that the purpose of the defendants was not by peaceful persuasion to endeavor to prevent men from entering the employment of the plaintiff and working; but, on the other hand, it seems as though the defendants took the course they did, and by means complained of, to compel the plaintiff to accede to their demands, or else destroy its business, and in doing that they exceeded their rights under the decisions of this State.

In order to constitute intimidation it is not necessary that there should be any direct threat, still less any actual act of violence. It is enough if the mere attitude assumed by the defendants is intimidating, and this may be shown by all of the circumstances of the case. (*New York Central Iron Co. v. Brennan*, 105 N. Y. Supp. 869.)

What constitutes peaceful picketing may be answered by any fair-minded man, if this question is asked: "Would this be lawful if no strike existed?" Would it be lawful for one or more men to use offensive, abusive, insulting, or threatening language to another or others; for one to call another a "rat," a "scab," a "yellow dog," a "yellow rat," or a "Hun," or by any other name commonly accepted as offensive or degrading, or calculated to provoke the other to break the peace in resentment, or to so intimidate them that he or she would refuse to work?

Because such occurrences are liable to be the result of passions inflamed by such controversies, there is an insistent and undeniable demand that all persons having part in a strike, who are trying to exercise their rights under the law to maintain the strike, should be persistent in their efforts to keep the controversies within lawful bounds, and to guard that these inexcusable results do not follow. Otherwise, in the estimate of the public generally, they will be held to some considerable measure of responsibility.

These propositions are so elemental that, but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful.

I find, therefore, that the three men and women named deliberately disobeyed the order of the court. This makes it a case of criminal contempt. The only question left is as to the proper punishment to be inflicted upon them for what they have done. The facts being as they are in this case, every consideration of law and order requires such a sentence as will prevent these acts in the future.

An injunction is not sacred as coming from any man, but to disobey it is a serious thing, because it is disobeying the law, which, in this country, workmen themselves helped to make and should help to uphold.

An order may therefore be made:

(1) Directing that Robert F. Stump be imprisoned for the period of 30 days, and that he be fined the sum of \$250.

(2) That Otto Boelke be imprisoned for the period of 30 days, and that he be fined the sum of \$250.

(3) That Harry T. Wilpers be imprisoned for the period of 20 days, and be fined the sum of \$250.

(4) That Hannah Chrisman be fined the sum of \$250.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—VIOLATION—WHAT MAY BE ENJOINED—*Ex parte Tucker, Supreme Court of Texas (Mar. 31, 1920), 220 Southwestern Reporter, page 75.*—Tucker was an officer and member of the International Brotherhood of Electrical Workers' Department, Local No. 388, of Palestine. A dispute arose between this union and the Palestine Telephone Co. As a result of the activities of the union the telephone company succeeded in procuring an injunction against said union, enjoining it from, among other things, "vilifying, abusing, or using opprobrious epithets to or concerning any party or parties in the employ of the plaintiff" and "from any and all conduct" toward such employees, or concerning them, "which might be calculated to provoke or inspire a breach of the peace." Tucker was later heard in a conversation to apply slanderous epithets to female operators in the company's employ. He was prosecuted for contempt for the violation of the injunction and placed in confinement, whereupon he brought this action for a writ of habeas corpus to secure his discharge. He was also indicted for slander. The court in allowing the writ of habeas corpus and ordering Tucker's discharge said in part:

The existence of any power in a court of equity to supervise one person's opinion of another, or to dictate what one person may say of another, is plainly and emphatically refuted by the eighth section of the Bill of Rights.

That section, in part, reads:

"Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

The purpose of this provision is to preserve what we call "liberty of speech" and "the freedom of the press," and at the same time hold all persons accountable to the law for the misuse of that liberty of freedom.

It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say, or that his sentiments on any subject or concerning any person should be supervised before he could utter them. Nothing could be more odious, more violative or destructive of freedom than a system of only licensed speech or licensed printing. The experience of the English nation and some of the American colonies under the tyranny of such systems is the reason this provision in the Bill of Rights is one common to the constitutions of the American States, and for its incorporation, in like words, in the first amendment to the Federal Constitution. Hallam characterized the liberty of the press as finally gained in England as but exemption from a licenser.

There can be no justification for the utterance of a slander. It can not be too strongly condemned. The law makes it a crime. But there is no power in courts to make one person speak only well of another. The Constitution leaves him free to speak well or ill, and if he wrongs another by abusing this privilege he is responsible in damages or punishable by the criminal law.

Equity will protect the exercise of natural and contractual rights from interference by attempts at intimidation or coercion. Verbal or written threats may assume that character. When they do they amount to conduct or threatened conduct and for that reason may properly be restrained. Cases of that sort, or of analogous nature, are not to be confounded with this one.

That part of the injunction which attempted to control the relator in his speech was beyond the power of the court to issue and therefore void.

The relator is discharged.

LABOR ORGANIZATIONS — STRIKES — PICKETING — INTIMIDATION — RIGHT TO CONDUCT BUSINESS A "PROPERTY RIGHT" — CLAYTON ACT —
King et al. v Weiss & Lesh Mfg. Co., United States Circuit Court of Appeals, Sixth Circuit (June 11, 1930), 266 Federal Reporter, page 257.—The Weiss & Lesh Mfg. Co., of Tennessee, employed some 150 employees, of whom 20 were white men and about 130 were colored. A strike of the company's employees was declared, and the plant was picketed by most of the white men. The next day because most of the colored men did not go through the picket lines the plant was shut down. In order to keep the colored men from going through the picket line the white men resorted to threats and intimidation. The company at once got a temporary restraining order to prevent further picketing of the plant. As soon as this was done the colored men went back to work. Later the restraining order was, after a hearing, changed to a temporary injunction. King and the other defendants appealed, claiming, first, that no intimidation was resorted to by the pickets; and, second, that there was no ground for the issuance of an injunction because no property right had been injured or threatened. The court resolved both these points against the defendants and affirmed the injunction. The opinion on these points is as follows:

The substantial complaint now made is that the weight of evidence was against the existence of any violence, or intimidation, or unlawful threats, but, on the contrary, showed that the strikers kept within their legal rights, whether measured by the Clayton Act (sec. 20, act Oct. 15, 1914, Comp. St. 1243 d) or by the general principles independently applicable. More specifically, the complaint is that the district judge gave undue weight to the fact that the strikers and the pickets were white men and the intimidated employees were colored; that he considered, as constituting unlawful intimidation, words and acts to which there would have been no rightful objection, if addressed to or used against white men; and thereby held that, in such cases, the defendants' rule of conduct must be varied according to the color of the nonstrikers. We do not so interpret the action of the district judge. Whether or not we can take judicial notice ourselves of the supposed fact, certainly we can not disregard the finding of the trial judge that it is a fact that, in that community and at the

time in question, speech and action by white men would intimidate and terrify the typical colored laboring man, when the same things would not have serious effect upon the typical white laborer. The question is not one of color; it is one of individual or class intimidation.

Not only must we apply the familiar rule that we will not overturn the fact findings of the trial judge, save in a very clear case, but we must recognize that a judge who has lived a lifetime in a community, and knows its atmosphere and feelings and prejudices, is more competent than we are to draw a correct inference as to what is and what is not intimidation as against one class in that community.

We understand defendants' counsel also to take the position that since section 20 of the Clayton Act prohibits an injunction, excepting in case of injury to property or property rights, the issue of the injunction was in conflict with this act, because the right of the plaintiff to continue its business, free from unlawful obstruction, was neither "property" nor a "property right." There is no sufficient basis for this contention. The Clayton Act did not undertake to make new definitions of "property" and "property right." It used these terms in their then accepted and well-understood definitions. It was dealing with the facts that between the recognized property right of the employer to conduct his business and the other recognized right of the employees to strike, more or less conflict would arise; and it was prescribing the kind and degree of injury to this employer's right which should be deemed rightly appurtenant to the employees' conflicting right, and which should therefore not be deemed unlawful. No court has held, since the passage of the Clayton Act, so far as we find, that it was intended to forbid an injunction in aid of an employer's right to keep his business running, in any case where the injury to that right, which the defendants were inflicting, is beyond the limits which the act purports to authorize. That the right to prosecute a lawful business without unlawful obstruction is either property or a property right has always been recognized, and is at the foundation of equity jurisdiction in this entire class of cases. It is sufficient to cite *Hitchman v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145], as an example of the unquestioned acceptance of this basis of jurisdiction.

LABOR ORGANIZATIONS—STRIKES—PICKETING—STATUS OF EMPLOYEES ON STRIKE—CONSPIRACY—INJUNCTION—*Vonnegut Machinery Co. v. Toledo Machine & Tool Co. et al.*, *United States District Court, Northern District of Ohio* (Feb. 7, 1920), 263 *Federal Reporter*, page 192.—The Vonnegut Machinery Co., an Indiana corporation, sued the Toledo Machine & Tool Co., an Ohio corporation, and 10 individuals and the Central Labor Union, of Toledo, for an injunction to restrain the breach of a contract. The complainant had a contract with the Toledo company whereby the latter was to deliver certain machinery in a specified time. The Toledo company, owing to a labor dispute with the other defendants and the unions which resulted in a strike and picketing accompanied by violence, was unable to make the

agreed deliveries; whereupon this action was brought for conspiracy to restrain interstate commerce, and for an injunction to restrain the strike, the picketing, and the interference with the contract. In allowing a temporary injunction Judge Killits, speaking for the court, said in part:

"The testimony first before the court suggested that the character of the picketing sought to be restrained was wholly objectionable, unlawful, and utterly beyond the sanctities of even an extravagant construction of the privileges of the act of October 15, 1914, commonly known as the Clayton Act (Comp. St. 1243d, 8835f). It showed that the pickets used language which was minatory, insulting, abusive, and in some instances downright obscene; that their conduct was that which would call upon a court, without hesitation, to order and to enforce immediate restraint. It was of a character which could not be sustained by any valid legislation.

It is because the passions of an acute labor controversy tend to mount beyond control, releasing conventional restraints upon social intercourse, that practical people question the possibility of peaceful persuasion through the practice of picketing.

That defendants were working in concert, in behalf of themselves and associates in the defendant machinists' union, to accomplish just what actually was effected, a crippling, by intimidating means, the lawful business of the defendant company, there is no room for doubt.

Without accepting as established the extreme characterization of the conduct of pickets found in the testimony, we find that proof enough of its objectionable character is in the record to indicate clearly the wisdom of a temporary injunctive order. There is no evidence, however, that it should run against defendants Quinlivan and the Central Labor Union.

The interesting and unique question in this case, however, is whether we have a situation here contemplated by and within the provisions of the first paragraph of section 20 of the so-called Clayton Act (act Oct. 15, 1914, Comp. St. 1243d), and consequently one in which the court's injunctive powers are limited in view of any construction of the force of that measure. Concretely the query is whether at the foundation of this case is a controversy between employer and employees respecting terms and conditions of employment.

What is the scope of the language "terms and conditions of employment," for these words, from section 20 of the act in question, need interpretation here? The court should not attempt an inelastic definition. One should be given which would keep step with the advance in sentiment, as conditions change, to make good the very proper demand that the laboring man should receive consideration from his employer which will maintain his health and self-respect and secure to him the full measure of the fruits of his toil, while preserving to him all those opportunities for social intercourse and self-improvement which should be his to enjoy that he may realize his aspirations. But even a most liberal definition in this direction has its limitations. The mind, in considering the words "terms and conditions of employment," unconsciously, but directly, goes to a contemplation of such things as hours of labor, wages, classification of

employees, sanitary and physical conditions controllable by the employer, opportunities for reasonable redress of grievances, and for bargaining respecting the conditions of employment, whether collectively, as enlightened public sentiment as well as convenience approves, or individually. This view is well supported in this case by the character of the new contract which the labor organization tendered in writing to the defendant company, and which had been under consideration before the strike. Its fifteen paragraphs deal exclusively with subjects, as "terms and conditions of employment," which come within the above limitations. At the time of the strike the factory was what is known as an open shop and the proposed new agreement with the defendant labor organization recognizes, as a condition tendered by the latter itself, that the factory should remain open.

The court then discussed the reasons for the strike, which involved no matter of wages, hours, physical or sanitary conditions, or any question of rights of bargaining, "but simply and solely because they did not like a customer with whom the employer was doing business."

The opinion continued:

Considering, as we must, the insufficiency of the reason given for leaving their employer's service to bring defendant company's striking workmen within the provisions of the Clayton Act, it follows necessarily that they must be regarded, from the day of their abandonment of that service, to be strangers to their late employer's business. If, indeed, the law just considered at length favors striking employees for a time after the crisis by continuing to them the status of employees, notwithstanding they were not at work and idle because they preferred to strike, these particular men were not to be so considered, respecting defendant company, after August 13.

The picketing in question, therefore, presents a not unusual, but, in the judgment of this court, the always unlawful, situation of persons who stand in no special relationship to an employer—persons who have no privileges not common to all men—attempting to interfere with the business of such employer by propagandic activities directed against his working force, or his product, or both. Having left their employment for no reason which the law specially favors, the labor defendants here, and their associates, had only the rights and were under the disabilities of the general public respecting the conduct of the business of the Toledo Machine & Tool Co. The defendant, Toledo Lodge No. 105, International Association of Machinists, had no more liberty in law or public policy, in the circumstances of this case, to "picket" the defendant company's factory to change conditions of labor therein than any other association of men enjoyed to bend the defendant company to its will.

It is clear in the judgment of the court that the evidence before the court on the motion tends to show that (a) employees of the defendant company, in whose behalf the labor defendants here are acting, struck, August 13, for a reason which was not under the favor of any law; (b) that thereby all employment relations between them and defendant company terminated absolutely; (c) that the labor

defendants and those represented engaged forthwith in a conspiracy to unlawfully obstruct the business of defendant company; (*d*) that the picketing shown in this case is a continuing overt act in the consummation of the purpose of such conspiracy; (*e*) that the conduct of the several defendant pickets is, independent of its purpose, unlawful, in that it is intimidating and coercive in character, intended to bring about, and is accomplishing, the annoyance and incensing of employees of defendant company and of those seeking employment with said company. A temporary injunction shall issue.

LABOR ORGANIZATIONS—SUSPENSION—INTERNAL CONTROL—RIGHTS OF MEMBERS—*Gardner et al. v. Newbert et al.*, *Appellate Court of Indiana, Division No. 2* (Nov. 17, 1920), *128 Northeastern Reporter, page 704*.—Newbert and his companions were the plaintiffs in the lower court. They are all members of a local union called Lakeside Lodge, No. 39, International Brotherhood of Boiler Makers and Iron Ship Builders and Helpers of America. The international brotherhood was organized in Chicago on October 1, 1880, and consisted at that time of nine lodges or locals. On August 13, 1890, it granted a charter to Lakeside Lodge, No. 39, and gave it exclusive jurisdiction over a great part of Cook County, Ill., and Lake County, Ind. Later in 1917 its jurisdiction was restricted to Lake County, Ind., by the supreme international lodge in convention and its location was transferred to Whiting, Ind. The local's membership comprised some 243 members and the lodge was one of 600 then belonging to the international. The charter of lodge No. 39 was reissued in 1909 and is now in full force. The government of the union is vested in the supreme international lodge which has full jurisdiction over the subordinate lodges or locals. The rules of the lodge provide for the payment of death and accident benefits in certain amounts to members in good standing. The constitution of the supreme lodge forbids the suspension or expulsion of any member without a hearing and without notice. On April 18, 1918, Weyand, the acting president, without previous notice or hearing sent a telegram to Lakeside Lodge, No. 39, informing it that its charter was revoked and that it had been expelled from the international. At about the same time another lodge No. 39 was chartered and sought to operate in the territory of the Lakeside Lodge, No. 39. Newbert and other members of the Lakeside lodge brought action for an injunction against the officials of the international lodge to prevent them from interfering with their rights as members of the Lakeside Lodge, No. 39, and of the international lodge. The defendants demurred to the complaint and when the demurrer was overruled they refused to amend or plead further. Therefore judgment was entered for the plaintiffs representing the local union, and defendants appealed. In affirming the decision the court said in part:

The complaint states a cause of action, and the demurrer thereto was properly overruled.

It has been repeatedly held that courts have jurisdiction to protect a member from unlawful or arbitrary suspension or expulsion, or of proceedings to compel reinstatement to membership, with all the rights and privileges thereunto belonging, to a member who has been unlawfully suspended or expelled, providing property rights are involved. (Martin's Modern Law of Labor Unions, sec. 313; Froelich v. Musicians' Mutual Benefit Assn., 93 Mo. App. 383; Otto v. Journeymen Tailors' Protective etc. Assn., 75 Cal. 308, 17 Pac. 117, 7 Am. St. Rep. 156.)

This doctrine applies with equal force to unincorporated unions and to those which are incorporated.

It is averred in the complaint that Lakeside Lodge No. 39, is possessed of property of the value of about \$4,000, which it holds in trust for appellees, and of which appellants seek to deprive appellees, and that there is a provision in the constitution and by-laws of the brotherhood that entitles members in good standing to death benefits and disability benefits. These are property rights which must be lost to the member in event of suspension or expulsion from the order, and they are such vested rights as can not be disturbed without charges and due trial. Such a rule or law must certainly prevail, when it is contended, as in this case by appellees, that each and all of the members were in good standing, and have at all times complied with the rules, regulations, constitution, and by-laws of the brotherhood, and of their subordinate lodge, and that the officers of such subordinate lodge have in all respects complied with the rules, regulations, constitution, and by-laws of the brotherhood.

It is averred in the complaint that the appellees had no notice whatever of the intended suspension of their lodge and of its members until the receipt of the telegram above sent out from the acting international president. It has been repeatedly held that the expulsion of a member from a fraternal benefit association, without notice or opportunity to be heard, is void. The suspension being void, appellees' legal status was not changed, and they were not required to prosecute an appeal within the order, before resorting to the courts for relief.

In the case at bar the attempted suspension was of a local lodge, but such suspension, if effective, of necessity deprived appellees of their standing and benefits and property rights in the order.

The motion to modify the judgment was properly overruled. Judgment is affirmed.

LABOR ORGANIZATIONS—SUSPENSION—INTERNAL CONTROL—RIGHTS OF MEMBERS—POWER OF COURTS—*Bricklayers, Plasterers, and Stonemasons' Union v. Bowen et al.*, Supreme Court of New York, Equity Term, Monroe County (Aug. 2, 1920), 183 New York Supplement, page 855.—The plaintiff organization was incorporated in 1881, and shortly after became a local union of the National Union of Bricklayers of the United States of America. It was granted a charter and became known as Local No. 39. These unions were thus associated

together for nearly 40 years. In the spring of 1919 some differences arose between the president and executive officers of the national union, which had by then become the Bricklayers, Masons, and Plasterers' International Union of America, and the president and certain members of the Local No. 39, with the result that the international's officers removed Mr. Clyde, the local's president, from office, and suspended a number of the local's members. Later, the Local No. 39 itself was suspended. All this was done without notice or hearing. The international then, without consulting Local No. 39, started another local in the same locality, No. 53, and required all members of Local No. 39 to join Local No. 53 or be suspended. This action was brought to restrain the officers of the international from removing the local's officers, suspending its members, or interfering with its affairs. In granting the relief sought the court rendered its decision in part as follows:

In connection with these matters the defendants, or some of them, undertook to obtain plaintiff's charter, seal, books, records, money, and property generally, and in some instances succeeded. By these transactions Local No. 39 has become largely disrupted, its activities halted, and its usefulness interfered with, while large numbers of its members are not only in danger of losing certain pecuniary benefits, but are debarred from working at their trade, and deprived of their accustomed means of livelihood. The law governing disputes arising in voluntary associations is simple and well settled. It proceeds upon the theory that the members are, in a sense, one family, and entitled to settle their family jars without outside interference, and in their own way. Thus it is held that, where proceedings for the expulsion of a member of such an association have been conducted in accordance with its laws, the courts will in the first instance assume that the acts charged constituted cause for removal within the meaning of those laws.

Such associations are not, however, above the law of the land, nor altogether a law unto themselves.

Therefore the law is vigilant to prevent a violation of the constitution and by-laws of the association involved, and to see to it that suspension or expulsion is only had after fair notice to the offending member and full opportunity to be heard in his own behalf. In other words, the law insures to every member of such an association a fair trial, not only in accordance with the constitution and by-laws of the association, but also with the demands of fair play, which in the final analysis is the spirit of the law of the land.

The constitution and rules governing the relations of these parties provide an elaborate and well-conceived scheme, called the code of procedure, for the trial of charges against members by members, against local unions by members, and against local unions by sister locals. These provisions do not, however, either in terms or by reasonable intendment, furnish a procedure for the investigation of charges by the international union or its officers against a local, its officers, or members. By the constitution, all the executive and judicial powers of the union, when not in session, are delegated to

the president, first vice president, and secretary, who together constitute separate boards, denominated the executive board and the judiciary board. It appears that the duties of the latter board are at times transferred to State judiciary boards, which within their own State assume exclusive control of such matters. Briefly, however, the judiciary board is largely an appellate tribunal, although it seems to have been given original jurisdiction for the trial of charges referred to it in the first instance against unions or members. Both the code of procedure referred to and the provisions relating to the judiciary board specifically require the filing of charges, and an opportunity for the defendant therein to be heard in his defense, as a prerequisite to any valid determination against him.

The fact that no such restriction upon the power of the executive board is in terms contained within the book does not relieve it from like obligation of fair play. Not only does the entire scheme of these articles indicate, but both good conscience and law demand, that no member shall be deprived of his rights and privileges until he has had notice of the charges against him and been given opportunity to meet them.

Coming to the establishment of Local 53 and the suspension of those members of Local 39 who neglected to affiliate themselves therewith, the defendants seems to have either overlooked or else to have deliberately ignored an express limitation placed upon them by their constitution.

"Under no circumstances will a charter be granted to any body of men in any city, town, or village where one or more unions already exist without the consent of a majority of the other unions being first obtained."

No. 39 was the only local in the city of Rochester, and by this section was protected from a competing union being established without its consent by the executive board in that city. Apparently the executive board acted upon the assumption that it had ceased to exist. Manifestly this was error. It had not been dissolved nor expelled, nor had its charter been revoked. It was only suspended from the exercise of its privileges until the international, in convention assembled, could investigate and act upon the complaints against it. That convention might, after investigation and trial, restore its right of active operation, either with or without conditions, or might revoke its charter and disband it entirely; but until it had been finally dissolved its territory could not be lawfully invaded nor it ruined by such indirectness.

The establishment of Local 53 (so called) was under the circumstances wholly unauthorized; it acquired no status as a local union, and the suspension of those members of Local 39, who refused to transfer their membership to it, was wholly void and inoperative.

There remains only the question as to the right of plaintiff to appeal to this court for redress. It is well settled that the courts will not interfere in the affairs of such associations, where there is a remedy provided by their own rules, regulations, and by-laws, until that remedy has been availed of and exhausted. (*O'Connor v. Morrin*, 109 Misc. Rep. 379, 179 N. Y. Supp. 599; *Lafond v. Deems*, 81 N. Y. 507, 514.) The constitution of the international makes no provision whatsoever for an appeal by locals or individuals from the

decrees and mandates of the executive board, and indeed there could not well be such an appeal, except to the general convention at its biyearly meeting. In the interim there is no authority superior to that of the executive board, and to provide for an appeal to that board from its own actions would be but an idle form.

Mr. Clyde has been removed from his office, and in addition he, with certain of his associates, has been suspended for 15 months or thereabouts from all benefits of the union, including an opportunity to work at his trade. From such suspension and its consequent damage there is absolutely no redress within the union. Those other members who believed the executive officers of the international union to be in the wrong, and therefore remained loyal to Local 39, are in the same situation and are equally without redress, except they consent to join another local, the illegal and clandestine character of whose origin and operations can not be doubted.

The prayer of the plaintiffs for a judgment restraining the suspension of the members and the dissolution of the union was therefore granted.

LABOR ORGANIZATIONS—SYMPATHETIC STRIKES—CLOSED SHOP—CONSPIRACY—BREACH OF CONTRACT—*Lehigh Structural Steel Co. et al. v. Atlantic Smelting & Refining Works et al., Court of Chancery of New Jersey (Aug. 26, 1920), 111 Atlantic Reporter, page 376.*—The Lehigh Structural Steel Co. entered into a contract to fabricate and erect a steel building for the Atlantic company. The steel had been fabricated, delivered and paid for, and the contract to erect the building had been sublet to the Donnell-Zane Co. The Lehigh Steel Co. belonged to an association known as the Iron League. This association had a contract with the International Brotherhood of Bridge and Iron Workers of America which it is claimed required the exclusive use of union labor in construction work done by the members of the Iron League. The Donnell-Zane Co. was not a party to this contract and did not acquiesce in or adhere to it. On another construction job it had used nonunion labor; therefore, in retaliation, after work had gotten under way on the Atlantic company's building, Timothy Tierney, business agent of Local No. 11 of the above union, called a strike. There was no reason for the strike except, perhaps, punishment and to bring about a closed shop. The employees on this job were all union men, working union hours for union pay. In short, all union requirements were met and complied with so far as the erection of the Atlantic company's building was concerned. The strike was therefore purely sympathetic. The Donnell-Zane Co. thereupon proceeded with the erection of the building with nonunion labor. The union labor in the employ of the Atlantic company then threatened a general strike if union labor was not exclusively employed to erect the building. The Atlantic company through one Lehman, its sole representative, demanded of Donnell-

Zane to comply with the union's demands in order to keep the union labor in the former's employ from striking. This Donnell-Zane refused to do. The Atlantic company sued for an injunction to prevent Donnell-Zane from using nonunion labor, alleging that the contract for the construction of the building made this provision, but it was unable to support its case and the petition was dismissed. Later the Lehigh company received a notice from the Atlantic company ordering the former to cease work on the building and to notify its subcontractor, Donnell-Zane Co., to this effect.

The Lehigh company and Donnell-Zane Co. thereupon brought this action to secure an injunction to prevent the Atlantic company from breaching its contract and also to prevent the union from interfering with its contract by maintaining a strike. In granting the injunction, Chancellor Backes, who rendered the decision, spoke in part as follows:

The principle of the closed shop, i. e., the monopolization of the labor market, has found no judicial sponsor. In whatever form organized labor has asserted it, whether to the injury of the employer, or to labor, or to labor unions outside of the fold, the judiciary of the country has responded, uniformly, that it is inimical to the freedom of individual pursuit guaranteed by the fundamental law of the land, and contravenes public policy. On the other hand, public policy favors free competition, and the courts have been keen to recognize the right of organized labor to compete for work and wage and economic and social betterment, and to use its weapon, the strike, to realize its lawful aspirations, but none has gone to the length of sanctioning a strike for a closed shop, which has for its object the exclusion from work of workmen who are not members of the organization. There is a wealth of literature and authority upon the subject in England and in this country. (*Walker v. Cronin*, 107 Mass. 555; *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457.)

The conclusion upon the case as presented is that the New York contract violates public policy, and that the sympathetic strike is without just cause or excuse, and is unlawful.

Lehman and the Atlantic company say they were not parties to the sympathetic strike, and consequently not parties to the conspiracy of the unions. That they were, it seems to me, admits of no doubt. They were and are fixed in mind not to allow the work to be done by nonunionists, and to this end brought suit to restrain the complainants, and, when they failed, ordered the complainants off the job for no other reason than that they were going to complete it with the labor of the unanointed. Their excuse is that they feared the wrath of organized labor, and were acting in self-defense. In other words, they breached their contract to avert a general strike of the trades-unions on the work. That that is not a legal excuse for breaching the contract needs no argument, and that it furnishes a legal excuse for joining the oppressors of the complainants is even less defensible. Their protection lies in the law, not in the graces of those who transgress the law. Their further contention that they were moved to their course by causes wholly independent of the

motives of the unions, that they were prompted solely by a desire to escape a labor squabble, and to have their building completed expeditiously, is irreconcilable with their activities and the means they used to accomplish the unlawful aim of the unions, in common with the unions, to make the sympathetic strike effective, viz, by preventing the complainants from employing nonunion men. Their motives may not have been coextensive with that of the unions; they may have been wholly indifferent as to the success of the ultimate object of the sympathetic strike, but a common ground upon which they met the unions, a common motive that actuated them, and made them coconspirators, was the enforcement of the closed shop at Brills.

Lehman and the Atlantic company ask upon what theory they can be deemed coconspirators, inasmuch as the proofs show the strike was called by the unions without their knowledge and without consultation or intimidation? The answer is: They joined the conspiracy later on, after the strike, when, out of fear of a general strike, they broke their contract to help it along. This was decided in *Aberthaw Const. Co. v. Cameron*, 194 Mass. 208, 80 N. E. 478 [Bul. No. 71, p. 391], a case strikingly similar to the one at hand.

The Atlantic company next takes the stand that the remedy of the complainant Lehigh company is at law for damages, citing *McGann v. La Brecque Co.*, 109 Atl. 501. The general rule is that compensation in damages is the relief for breach of a contract, and that the remedy is at law, and that the measure of damages is the immediate loss, the incidental losses, which are often the heavier, being regarded as too remote to bring into the calculation. Where, however, as here, the complainants are not suing for a breach, but to prevent a breach of a contract by unlawful means, and to serve unlawful ends, to the injury of the complainants' business, the remedy at law is inadequate. The damages for such an injury are incapable of ascertainment at law, and justice demands that the injury be prevented by injunction. The many instances in which equity has intervened by injunction to restrain injury by strikes testify to the jurisdiction. As to the irreparableness of the injury to the complainants' business by breach of the contract due to the strike, the findings of the master in the *Aberthaw* case may be profitably quoted:

"Any failure of a contractor to fully perform a contract, regardless of the reason or party in fault, impairs his reputation for efficiency, and consequently is a 'damage to his good will.'" * * *

There will be an injunction restraining the strike and the breach of the contract. The form of the injunction will be settled on notice.

MANUFACTURERS' ORGANIZATIONS—DISCIPLINING OF MEMBERS—
LOCKOUTS—REFUSAL TO OBEY ORDER—*American Men's and Boys' Clothing Mfrs.' Assn. (Inc.) v. Proser et al.*, *Supreme Court of New York, Appellate Division, First Department (Dec. 19, 1919)*, 179 *New York Supplement*, page 207.—The plaintiff is an incorporated association composed of clothing manufacturers whose purpose was to improve trade conditions, foster the welfare of the men's and boys' clothing industry, and to settle trade disputes. The associa-

tion had a certificate of incorporation and by-laws. The by-laws provided the methods of control of the association and for the government of the members. Provisions were made for determining wages, hours, and working conditions and for the arbitration of disputes as well as for the punishment and disciplining of the members of the organization.

The cutters (who belonged to a trade-union of certain of the members of the organization) went on a strike and refused to submit to arbitration. The association thereupon held a meeting and duly passed a resolution requiring all the other members of the organization whose employees belonged to the union but had not gone on a strike to "lay off" such employees until the cutters' union submitted to arbitration. The reason for this was that the union employees who had not struck were encouraging and financially assisting those who had struck. A copy of the resolution was sent to the defendants who are a copartnership and were members of the association and who were therefore bound by the action of the organization. The defendants chose, however, to disregard the resolution and refused to "lay off" its union employees. Thereupon, following the prescribed procedure as set forth in the certificate of incorporation and by-laws of the organization, the association accused the defendants of disobedience and bad faith, held a hearing, and fined the defendants the sum of \$2,000, to which extent the association alleged that its influence and prestige had been impaired. This suit was brought for the collection of the \$2,000 fine. The defendants demurred to the complaint on the ground that it failed to set forth a cause of action and the demurrer was overruled and the defendants appealed. In reversing the order overruling the demurrer and sustaining the defendants' demurrer the court said in part:

We think the plaintiff was without authority in law to fix the arbitrary assessment by way of a fine, and the plaintiff is not entitled to recover it. (10 Cyc. 363.)

It is quite competent for such an association as the plaintiff to fix penalties by way of fines for derelictions of its members; but the penalties must be determined according to some method, to which the member has agreed, at least impliedly by joining the association, not only as to the imposition of the fine, but also as to the maximum amount thereof; otherwise, the association would be allowed to assess its own damages, which would be clearly unjust and improper. And a by-law imposing an excessive fine would be set aside as unreasonable. (*Hagerman v. Ohio Building & Savings Assn.*, 25 Ohio St. 186; *Lynn v. Freemansburg B. & L. Assn.*, 117 Pa. St. 1, 11 Atl. 537, 2 Am. St. Rep. 639.)

To hold that an association of this character might assess such amount as it saw fit for any infraction of its rules or by-laws, important or unimportant, would make possible a course that would work serious loss to members and invite an abuse of authority. A fixed,

reasonable fine, in the nature of liquidated damages for injury sustained because of dereliction, would be sustained. It follows that the complaint fails to set forth a cause of action. The demurrer is therefore well taken, and the order overruling it should be reversed.

MINE REGULATIONS—USE OF DYNAMITE—CONSTITUTIONALITY OF STATUTE—*Richards v. Fleming Coal Co., Supreme Court of Kansas (Mar. 8, 1919), 179 Pacific Reporter, page 380.*—The laws of Kansas provided that the use of dynamite or other detonating explosives in coal mines was prohibited unless such explosives were used according to rules and regulations agreed to between employer and employees and approved by the State mine inspector. (Laws 1909, ch. 175, sec. 1; Gen. Stat. 1915, sec. 6326.) The defendant company and Richards and other employees had an agreement, but it did not make any mention of dynamite nor was it approved by the State mine inspector; therefore the use of dynamite in the defendant's mine was prohibited. Richards was about to make a blast with some dynamite with some dry cell batteries, which he was compelled to use as the plunger battery was out of order, when the wires he had attached to the dynamite accidentally touched the batteries causing the charge to explode in his hand. For the injuries thus sustained he brings action for damages, and the defendant contends that, as he was violating the statute when he was injured, he can not recover. This view was adopted by the trial court, and the case was dismissed without prejudice, whereupon Richards appealed, contending that the statute is unconstitutional. On this point the court said in part:

The plaintiff contends that the act is unconstitutional because it delegates to mine operators and miners the power to make rules and regulations for the use of dynamite in coal mines, which rules and regulations may be different in different localities.

Powers similar to the one given by the statute under consideration have been granted to agencies of the State by other statutes, and those statutes have been expressly or impliedly held valid. Among these are the statutes giving to the board of railroad commissioners, and subsequently to the public utilities commission, power to fix freight and passenger rates, to compel railroads to give sufficient service, etc. In most of the States statutes giving similar powers have likewise been held constitutional. These cases will be found collated in 12 C. J. 847-853. The act now questioned giving to mine operators and miners the power to make rules and regulations concerning the use of dynamite in coal mines, subject, however, to the approval of the State mine inspector, is not unconstitutional.

The judgment of the court below was therefore affirmed.

MUNICIPALITY ENGAGING IN BUSINESS—ICE PLANT—PUBLIC PURPOSE—*State ex rel. Kansas City v. Orear, City Comptroller, Supreme Court of Missouri (Mar. 15, 1919), 210 Southwestern Re-*

porter, page 392.—At a general election held in Kansas City, November 5, 1918, a bond issue of \$400,000 was favorably voted upon for the purpose of enabling the city to raise funds for the construction and operation of an ice plant to supply ice to the Government offices and to the inhabitants of the city. The comptroller refused to issue such bonds or offer them for sale, whereupon the State brought this action for the city to secure a writ of mandamus to compel him to act. Though this is not strictly a "labor case," it is noted here on account of the very general interest, industrial and economic, in the subject of public ownership.

Orear gave two reasons for not issuing the bonds; first, that there was no authority in the city charter permitting the city to engage in the business of manufacturing ice; and second, that the engaging in the making and selling of ice is a private and not a public business and therefore a business wherein the money of the public raised by taxation can not be used. The court after considering these reasons came to the conclusion that they were sound and that the bonds could not be issued. The opinion is in part as follows:

That there must be authority in the charter of Kansas City, either express or clearly implied, permitting that municipality to engage in making and selling ice before it can legally do so is settled by the repeated adjudications in this State. (*State ex rel. v. Kansas City Terminal Railway Co.*, 260 Mo. 495, 168 S. W. 1144.)

While, by reason of the novelty and far-reaching importance of the question presented, we have mentioned as requisite an apt and sufficient charter provision, nevertheless in the view we are constrained to take of this case, it makes no difference whether the issuance of the bonds in question is warranted by a specific provision of the general welfare clause of the Kansas City charter or not. The question before us cuts deeper than that. If such bonds can not be issued lawfully, the charter permitting, we must needs refuse to compel respondent to issue, sign, or sell the same; for, even if such issuance is warranted by either an express or implied provision of the charter, the further question arises whether such a charter provision, when thus construed, is not itself bad, for that it contravenes the constitutional and statutory requirement that the charter of Kansas City shall be in harmony with and subject to the constitution and laws of the State. (Sec. 16, art. 9, Const.) Since the last question, if found against the contention of the relator, is decisive of the point whether the ice factory bonds are valid we need not trouble ourselves or take up time in further discussing the other one.

May a town or city in this State, its charter permitting, lawfully engage in the business of making and selling ice to the inhabitants of such city?

Our constitution explicitly says, "Taxes may be levied and collected for public purposes only." (Sec. 3, art. 10, Const.) We have held that this was the law before the provision was ever put into the constitution. (*State ex rel. v. St. Louis*, 216 Mo. 47, 115 S. W. 534.)

It is obvious, therefore, that in the final analysis the question becomes, Is the making and sale of ice to all inhabitants of a city who desire to buy a public or a private business? It is public, of course, in the sense that the police power of the city extends to regulating the cleanliness and sanitary methods of making, handling, and vending ice. It is not public in the sense that it is such a utility as comes under the supervision of the public service commission. That it is not the latter is persuasive, but, we concede, not conclusive, in the view against its public nature.

The court then discussed a number of cases involving similar or apposite propositions, and concluded:

We are of the opinion that the business of making and selling ice by Kansas City to the inhabitants of that city is not, under the situation shown by the conceded facts, so far a public purpose as to warrant the expenditure therein of public money obtained as the proceeds of municipal bonds, the payment of which, with the interest thereon, must be met by the levy and collection of public taxes.

Judge Woodson submitted a dissenting opinion, holding that in view of modern conditions of life in cities, involving the transportation and preservation by refrigeration of large and essential parts of the food supply, such action as was contemplated was for the general welfare of the city and within the police power of the municipal government. He said, in part:

I have always understood, and in my opinion it is no longer a debatable question in this State and country, that all laws enacted for the preservation of the public health and well-being of a city or State are derived from the police power of the State, and that it is an inherent attribute of sovereignty, and is unabridged by any constitutional provision that can be found in the State or Federal Constitution.

PENSIONS—PUBLIC EMPLOYEES—CONSTITUTIONALITY OF STATUTE—DEDUCTIONS FROM SALARIES—*Higgins et al. v. Sweitzer, county clerk, et al., Supreme Court of Illinois (Feb. 18, 1920), 126 Northwestern Reporter, page 207.*—Higgins and several other persons were employees of Cook County and were employed in various public hospitals. A law was passed providing for the creation of a pension fund for the retirement of public employees (Laws 1915, ch. 342). Pursuant to this law certain deductions were made from the salaries of the employees of the county. This is an action by Higgins and others for an injunction to restrain the county clerk and others from making the deductions. It is urged that the act is unconstitutional as contravening the constitution, article 10, section 10 of which authorizes the county board to fix the compensation of county officers. The court upheld the constitutionality of the law, saying in part:

It is contended by appellants that the act is unconstitutional and void and does not apply to appellants, as they are employees of constitutional offices and officers. These positions are not offices created by the constitution and are nowhere mentioned in the constitution. The Cook County Hospital is provided for by section 62 of chapter 34 of our statutes (Hurd's Stat. 1917, p. 798), as is the Oak Forest Hospital. Section 61 of the same act (sec. 62, Hurd's Rev. St. 1917) provides that the compensation paid such employees as appellants shall be fixed by the board of county commissioners "when not otherwise provided by law."

It is also contended that the act is unconstitutional, in that it takes the property of appellants without due process of law. It has been frequently held in this State that the right to prospective salary of an office or position is not a property right. The pension fund act in this case has the effect of reducing, by the act of the legislature, the compensation paid to the appellants here, and it was held in *Helliwell v. Sweitzer*, 278 Ill. 248, 115 N. E. 810 [Bul. No. 246, p. 183], that in so doing it in no sense invaded any property rights of the persons affected.

PENSIONS—RETIREMENT FUND—CONSTITUTIONALITY OF RETROACTIVE AMENDMENT TO POLICE PENSION FUND—VESTED RIGHTS—*Beutel v. Foreman et al.*, *Supreme Court of Illinois* (Apr. 15, 1919), 123 *Northeastern Reporter*, page 270.—Beutel and other policemen had been in the service of the Chicago police force for 20 years and were therefore qualified to receive a pension of one-half of their salary. Beutel put in his application for pension in March, and before it was acted upon an amendment was passed to the pension law requiring that pensioners be of the age of 50 years before they become entitled to a pension. The trustees of the pension fund refused to grant Beutel a pension, as not having attained the required age, and he brought action for mandamus to compel the payment, which was granted by the lower court. The defendant trustees appealed and the decision was reversed, the court saying in part:

While it is true that a statute is not generally deemed to be retroactive, but prospective only, in its force, a statute will be given a retroactive effect when it was clearly the intention of the legislature that it should so operate. In the construction of statutes it is the duty of the court to take the words found in the statute, and to give each its ordinary, usual meaning. We agree that, fairly construed, the amendment to section 3 of the police fund act (Hurd's Rev. St. 1917, ch. 24, secs. 391-419k), read in connection with the other sections of the act, was intended to be retroactive and to apply to all persons who were entitled to pensions under said act, and that therefore it included the defendant in error within its provisions.

Counsel for defendant in error earnestly insist that the pension act in force previous to July 1, 1917, gave him a contract and property right in his pension at the time he filed his application for the

same, and therefore the amendment in question must be held to be unconstitutional, because of violating a property right vested in him. The legislature can not pass a retrospective or an ex post facto law impairing the obligation of a contract, nor can it deprive a citizen of any vested right by a mere legislative act. This is a principle of general jurisprudence.

Counsel for plaintiffs in error contend that no person entitled to a pension has a vested legal right in said pension; that pensions, considered in connection with vested rights must be held to be bounties of the government, which that government has the right to give, withhold, or recall at its discretion, while counsel for defendant in error argue that this court in *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431, and *People v. Abbott*, 274 Ill. 380, 113 N. E. 696, has held that the pensions to employees of municipalities "are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services," and that therefore those decisions which hold that a pension is not a vested right, under such circumstances as exist here in the claim of defendant in error, can not be upheld. Counsel are in error in their argument that the decisions of this court last referred to intended to hold that the right of pension was a vested right under the circumstances found in this record.

We can reach no other conclusion in this case than that, by the great weight of authority in this and other jurisdictions, as between the State and members of the police department of one of the municipalities of this State, the State may take the right of pension away, under such circumstances as shown by this record, without affecting the contract right of the pensioners or violating the constitution.

RELIEF ASSOCIATIONS—DEDUCTIONS FROM WAGES—CONSTITUTIONALITY OF STATUTE—SUIT FOR PENALTY—*Baltimore & O. S. W. R. Co. v. Bailey*, *Supreme Court of Ohio* (Mar. 25, 1919), 124 *Northeastern Reporter*, page 195.—This is an action by one Bailey, a switchman and a former employee of the railway company, to recover certain penalties imposed by an Ohio statute (secs. 9012–14 of the General Code), upon any corporation which maintained a relief association for its employees and required them by deductions from their wages involuntarily to contribute to said relief fund. The defendant admitted that it maintained a relief association and that by the contract of membership in it it sought to limit its liability for injuries sustained by its employees, but contended that in this case Bailey voluntarily joined the association and agreed to the deductions from his wages. Upon submission to a jury it was determined that the payments to the association by deductions from Bailey's salary were involuntary and without his consent. It was contended by the defendant railway that the Ohio statute above referred to was unconstitutional under the fourteenth amendment to the United States Constitution.

and that in enacting the Federal employers' liability act the United States Congress had legislated on the subject and therefore the Ohio statute could not apply. In answering these arguments and affirming a judgment in favor of the plaintiff the court said in part:

It is also contended that these statutes violate the fourteenth amendment to the Constitution of the United States. It is sufficient as to this to say that a similar contract was under investigation by the Supreme Court of the United States in *C., B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328. The Federal Supreme Court held in the McGuire case that a State has power to prohibit contracts limiting liability for injuries, made in advance of the injuries received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract, and that such a statute does not impair the liberty of contract guaranteed by the fourteenth amendment.

The Federal statute declares void any contract or device whatsoever to exempt a carrier from any liability created by the Federal employers' liability act, but provides that in any action brought against such common carrier under the act it may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee.

The Ohio statute likewise prohibits the making of any contract to exempt the company from liability to the employee, and prevents the company from compelling employees to join any association or from withholding any part of the employee's wages for the payment of dues in any society or association.

There is nothing whatever in that act [Federal employers' liability act], or any other to which our attention has been called, by which Congress in any wise regulates relief departments, whether voluntary or involuntary. That is a subject wholly aside from that of giving rights of action for injuries while engaged in interstate commerce. The Ohio statute here in question does not abridge or affect in any way the rights of action secured by the Federal act or the procedure under it. The provisions of sections 9012 and 9014, General Code, on which this suit is predicated, simply prevent a company from compelling an employee to join any association, or from withholding any part of his wages for payment of dues, and prescribe the penalty for violation thereof. They do not in any way conflict with the provisions of the Federal act.

It must be kept in mind that in this case the plaintiff is not suing to recover damages for injuries. He sues for a penalty fixed against the company for withholding part of his wages from him against his consent for the payment of dues in the association.

Congress has denounced all contracts of every kind to exempt a company from liability for injury, but allows a set-off of any amount contributed to insurance that has been paid to the injured employee.

We do not think that we would be justified in holding that Congress has thereby impliedly permitted involuntary associations which employees are required to join, and to which they are compelled to pay dues, and has prevented the State by implication from prohibiting such compulsion and such withholding by an exercise of its police

power for the protection of its citizens. Such an implication would not only be strained, but would be contrary to the obvious spirit of the Federal statute in which the provisions are found.

Judgment affirmed.

RELIEF DEPARTMENT—REFUND OF DUES—*Philadelphia, B. & W. Ry. Co. et. al. v. Campbell, Court of Appeals of the District of Columbia (Feb. 3, 1919), 47 Washington Law Reporter, page 114.*—Campbell was employed by the company named and other roads embraced in the Pennsylvania system from 1897 until 1913, when he was discharged. In 1900 he was admitted to the Pennsylvania Railroad Voluntary Relief Department and regularly paid his dues until he was discharged. During this time he paid as dues \$439.90 and received as accident and sick benefits the sum of \$83.60. He now claims that the difference between the total amount paid in and the benefits received, \$356.30, together with interest and costs, is due him, inasmuch as he is no longer in the employment of the company. Judgment was in his favor in the trial court, from which the company appealed.

The decision necessarily turned on a construction of the provisions found in the regulations governing the relief department, and these had been construed by the court of appeals to warrant a return in such a case (*Vermillion v. P., W. & B. R. Co., 42 App. D. C. 579, 42 Wash. Law Rep. 790, 43 Wash. Law Rep. 66*). The trial court had followed this decision, but on this appeal the court of appeals reversed itself, reading the regulations in a different light.

The opinion concludes:

The interpretation placed upon the regulations in the *Vermillion* case would in time work to the ruin of the relief department. The department is formed and maintained as a mutual benefit association; and the dues are based upon the probable obligations it will have to meet in the payment of its members for death, accident and sick benefits. The monthly contributions paid by a member into the relief fund, like dues paid to an insurance company, constitute the price which the member pays for the protection afforded him by the relief department. They make up the joint fund from which the benefits are paid, not only to himself, but to his fellow members. In many cases, the payment of benefits to a member will be in excess of the contributions of such member to the relief fund; and in others, as in the present case, they will fall short of the contributions. But the plan is so arranged that the total contributions of the members will meet approximately the total liabilities. This could not be accomplished equitably if a member in severing his connection with the company, for any reason whatever, could recover as decreed in the present case.

The decision on the *Vermillion* case, *supra*, is overruled, and the decree in the present case is reversed with costs, and the cause re-

manded for further proceedings not inconsistent with this opinion.
Reversed and remanded.

TIPS—ANTITIPPING LAW—CONSTITUTIONALITY—*Dunahoo v. Huber*, Supreme Court of Iowa (Mar. 17, 1919), 171 Northwestern Reporter, page 123.—Dunahoo was arrested for receiving a tip while engaged as an employee in a barber shop. The prosecution was for the violation of section 5028u of the Supplemental Supplement of 1915, which prohibits "every employee of any hotel, restaurant, barber shop, or other public place" from accepting or soliciting any gratuities or tips or other things of value. Dunahoo applied for a writ of habeas corpus which was granted and the defendant constable appealed. The constitutionality of the statute was attacked on several grounds, the most important being that it did not afford "any person within its jurisdiction the equal protection of the laws," as required by section 1 of the fourteenth amendment to the Constitution of the United States. In declaring the statute unconstitutional the court said in part:

Under this act the proprietor of a hotel, restaurant, or barber shop, even though engaged in the same employment, would be perfectly free to accept tips or gratuities or anything of value, while the employee working at his side and engaged in the same occupation might be prosecuted for having committed a crime should he do the same thing. That the proprietor would not likely be made the recipient of such a so-called courtesy does not answer the criticism. The present case illustrates the vice of this statute. There were two chairs in the barber shop. The employer, one Murphy, worked at one of these, and defendant at the other. Murphy undertook to pay defendant \$15 per week and 60 per cent of what he received for his work above said sum, and defendant was to have, according to the custom of the trade, such tips and gratuities as might be handed him. A customer gave him 25 cents in excess of the charges, and he was prosecuted. Had the same amount been handed to Murphy, his employer, no offense could have been charged. Manifestly there is no reason for such discrimination. For the purpose of efficient and beneficial legislation, it is often necessary to divide the subjects upon which it operates into classes. Indeed the greater part of all legislation is of this character, but the authorities agree that the distinction in dividing must not be arbitrary, and must be based on differences which are apparent and reasonable. The classification should be based upon some apparent natural reason, some reason suggested by necessity, such as difference in situation and circumstances of the subjects, placed in the one class or the other as suggest the necessity or propriety of discrimination with respect to them.

Tipping may be an evil, but this does not justify discrimination between classes in order to put it down. In so far as the public is concerned, the evil of tipping the employer is quite as obnoxious to good morals as though it were done to the employee. Surely here there is no ground for discrimination.

WAGES—ASSIGNMENT—EFFECT OF NEW EMPLOYMENT.—*Raulines v. Levi*, *Supreme Judicial Court of Massachusetts* (Jan. 7, 1919). *121 Northeastern Reporter*, page 500.—Edward J. Raulines had assigned his wages to one Levi to secure the payment of a debt. The statute in the case provided that assignments of wages in a sum in excess of \$300 were to be void after two years from the making thereof. Levi had paid out on Raulines's account the sum of \$171.40, which added to a previous indebtedness of Raulines to him made \$405.40. The assignment was made on August 14, 1916, and under the statute became void on August 14, 1918. Raulines filed a bill in equity on December 21, 1917, to enjoin Levi from enforcing the assignment and asking that the assignment be delivered up and canceled. At that time Raulines was working for a different employer from the one when the assignment was made. In granting the injunction the court said:

It is manifest the assignment ceased to have legal force as security for a debt with the termination of the contract of service existing between the plaintiff (Raulines) and his employer at the time the assignment was made; and it is equally plain that thereby it was not merely suspended in its operation to revive and attach to every new contract of service as often as made during its statutory life. The action of the defendant in serving notice of the assignment upon the new employer of the plaintiff was oppressive, and was calculated and intended to embarrass and hinder him in the lawful exercise of his trade.

At the time the bill was filed the assignment had become void by the plaintiff's change of service, and since the bill was filed it has determined by limitation of time. On either ground the plaintiff is entitled to an injunction and to a surrender and cancellation of the instrument as prayed for with costs, and it is

So ordered.

WAGES—MECHANICS' LIENS—RELEASE OF LIEN FOR LABOR—CONTRACT.—*Manson & MacPhee v. Flanagan*, *Supreme Judicial Court of Massachusetts, Middlesex* (June 18, 1919), *123 Northeastern Reporter*, page 614.—One Fisher agreed to build a four-family house for defendant. The plaintiffs, Manson & MacPhee, agreed to do all the stair work on the house and provide the materials therefor for the total sum of \$120. When the work was completed plaintiffs demanded their money but Fisher failed to pay. Plaintiffs upon the completion of the house went to defendant and declared that they would enforce their lien unless the sum due them was paid. The defendant thereupon agreed to pay the amount for the release of the lien. Defendant, Flanagan, then refused to pay the money, stating that the amount included both labor and materials, whereas only a

lien for labor could be enforced. In affirming judgment in favor of the plaintiff the court first quoted the law as follows:

If such agreement is for labor performed or furnished and for materials furnished under an entire contract and for an entire price a lien for the labor alone may be enforced, if the value of such labor can be distinctly shown, but it shall not be enforced for an amount greater than the entire contract price.

It then said:

Under this section a subcontractor may maintain a lien for labor if its value can be distinctly shown, even if the contract was entire and there was an entire price for both labor and materials, and although no notice of an intention to claim a lien for material was given. [Cases cited.]

There was evidence that the value of the labor could be distinctly shown, and that at the time when the defendant agreed to pay the plaintiffs they could have filed a valid lien for the labor performed or furnished under their contract in the erection of the building. The defendant's promise to pay the plaintiffs was based upon a legal consideration, and although the lien could be enforced for the labor only, and the value of the labor formed but a small part of the entire claim, the mere inadequacy of the consideration in the absence of fraud is no defense to the plaintiffs' right to recover.

WAGES—MINIMUM WAGE LAWS—POWERS OF COMMISSION—INJUNCTION—*G. O. Miller Telephone Co. et al. v. Minimum Wage Commission, Supreme Court of Minnesota (Mar. 19, 1920), 177 Northwestern Reporter, page 341.*—The Minimum Wage Commission of Minnesota pursuant to its authority vested in it by law held certain hearings and rendered a report thereon as a result of which it issued two orders, Nos. 10 and 11, in which it declared the minimum living wages at which women and minors should be employed. The orders were alike except that No. 11 applied only to learners and apprentices. In order No. 10 the weekly wage was \$11 on the basis of an eight-hour day or 48 hour week and applied to telephone company employees as well as others. The Miller company sued in equity for an injunction to prevent the commission from enforcing the orders which it had issued. Two other telephone companies appeared as interveners. A temporary injunction was granted and the commission appealed. In reversing the decision and dismissing the injunction the court spoke in part as follows:

The minimum wage act is Laws 1913, ch. 547 (Gen. St. 1913, 3904-3923). It was before the court in *Williams v. Evans*, 139 Minn. 32, 185 N. W. 495, 166 N. W. 504 [Bul. No. 246, p. 193], and its constitutional validity sustained. An examination of its provisions leads to the conclusion that the legal minimum wage which it au-

thorizes the commission to fix is not a blanket minimum wage throughout the State for women or for minors, without reference to wage conditions in the different occupations, but is a minimum wage based on the different occupations and fixed after an investigation and determination of wage conditions therein.

An examination of the minimum wage statutes of other States indicates that occupation is a common basis of classification.

Order No. 10 recites that after investigation the commission is "of the opinion that the wages paid to one-sixth or more of the women and minors employed in this State are less than living wages." The recited fact gives the commission no authority to fix a minimum wage. The test is prescribed by section 5 of the statute which provides that the commission may establish legal minimum rates of wages "if after investigation of any occupation [it] is of opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than living wages." It reaches a single occupation in which one-sixth of the workers are paid less than a living wage.

It did not intend that the commission should be without jurisdiction over an occupation in which one-sixth were receiving less than a living wage because of the fact that five-sixths of the total number of employees in all occupations in the State were receiving more than a living wage. It intended to reach each occupation in which wage conditions were harsh. The orders of October 23, 1914, involved in *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, seem to have been upon this interpretation of the statute.

The statute does not require a formal finding or a recital of the opinion of the commission after investigation. To make the order it is necessary that the commission have an investigation and reach the opinion which the statute requires, but the statute does not require a formal recital or finding. The one made might have been omitted.

Objection is made to the order because it gives women and children the same minimum wage. The statute intends a separate investigation and determination for women and minors. There may be a different minimum for each. The minimum may be the same for each. The facts alleged, as we must take them, do not show that the order is invalid because the commission made one minimum applicable to both classes. Again, the plaintiff can not complain if the minimum for neither class which it employs is too high.

Complaint is made of the order because it fixes a minimum of \$11 for 48 hours per week, which is to be increased by 23 cents an hour for each hour of work in excess of 48 hours; and the claim is that it amounts to a fixing of the hours of labor and of pay for overtime.

The commission has no authority to fix legal hours of labor. The statute fixes 10 hours as a standard day's work for hire, unless a shorter time is agreed upon. (G. S. 1913, 3831.) It is the contract labor day. It fixes a shorter daily and weekly limit for women in certain employments. (G. S. 1913, 3851.) The order does not fix the hours of labor. It takes 48 hours a week as the basic period of labor upon which to compute a minimum wage. An 8-hour day is a quite customary work day in industries. It is the period fixed by statute

for State labor. (Laws 1919, ch. 40; Laws 1917, ch. 422 (Gen. St. Supp. 1917, 9321-1).

Reference was then made to a contention that the order worked hardship in cases in which exchanges were in dwellings, stores, etc., and the service occupied only a portion of the operator's time.

As to this, the court said:

The order, alone or in connection with note 2 bearing on telephone companies, is not construed as fixing a minimum wage for services of the kind mentioned. It is, as we have said before, the purpose of the minimum wage act to reach occupations which furnished the substantial livelihood to workers therein and consume their ordinary work period and not to include workers who do some slight or intermittent daily or weekly service.

The commission in fixing minimum wages makes a distinction between cities of 5,000 or more inhabitants and cities of less than 5,000. For cities of 5,000 or more the minimum is \$11 per week of 48 hours with 23 cents per hour for additional time, and for cities of less than 5,000 the minimum is \$10.25 with an added 21½ cents for additional time. We can not say that this is an arbitrary classification. Section 6 of the statute contemplates that because of differences in the cost of living the minimum may not be uniform throughout the State. And again, the plaintiff has no cause of complaint unless the minimum which it is required to pay is too high.

Order No. 11 fixes the minimum wages for learners and apprentices. The statute does not define learner and apprentice except in so far as section 20 provides that a learner or apprentice may mean either a woman or a minor. The definition is left to the law. The order provides for a minimum for apprentices under 18 years of age and fixes a different minimum for the first three months and for the second three months and for the third three months. From what appears in the pleadings we can not hold that this is an invalid classification or that it is an invalid administrative regulation.

The minimum wage commission is an administrative body. It does not determine hours of labor or prescribe conditions of employment or work out the rights of the employer and employee except in so far as its fixing of a minimum wage under conditions prescribed by the statute has such effect. Legislative power is not delegated to it nor judicial power conferred upon it. It has the administrative authority which is conferred by the statute. In performing the duties with which it is charged it must be permitted to proceed in a practical way so as to accomplish the lawful results intended. It must be permitted to exercise judgment and discretion in working out the details of administration and establish some sort of administrative regulations. This does not mean that it has either delegated legislative or judicial power. The legislature determines the policy of the statute. The review by a court of the orders of the commission is limited to such as are made without jurisdiction, or under a mistaken interpretation of the law, or are so arbitrary and unreasonable that they deprive a party of guaranteed property rights. The scope of review is such as has been announced from time to time, in cases involving various situations, and often recently, as in administering statutes enacted under the police power, duties are increasingly cast upon boards and commissions.

WAGES—NONPAYMENT—PENALTY—CONSTITUTIONALITY OF STATUTE—*Manford v. Memil Singh, District Court of Appeal, Third District of California (Apr. 17, 1919), 181 Pacific Reporter, page 844.*—L. V. Manford proceeded against Memil Singh, his employer, to recover wages and penalty as provided in chapter 663, Acts of 1911, amended by chapter 143, Acts of 1915 (repealed and superseded by ch. 202, Acts of 1919). Judgment had been in Manford's favor in the court below and Singh appealed, claiming that the statute was unconstitutional.

The question of constitutionality had been decided in favor of the law in *Moore v. Indian Spring Channel Gold Mining Co.*, 174 Pac. 378 (see Bul. No. 258, p. 147). However, the defendant claimed a distinction between the power of the legislature to enact such a law to govern corporations and its power to control the acts of individuals. He conceded that the act is valid "if it can be reasonably held that the prompt payment of employee's wages is a matter that affects the public generally."

In upholding the law as accomplishing this end, the court said, in part:

Its design is to protect the employee and to promote the welfare of the community. Without defeating that purpose, it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts. But it is to be observed that the most formidable objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employee is guilty of culpable conduct. The statute is not subject to such reproach. It contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim. Indeed, the fullest right to contract as to payment is but slightly restricted, and an employer can easily provide in advance for the contingencies that may arise under the statute. If he refuses to pay what is due as therein provided, it is not unjust that he should be subjected to a penalty.

WAGES—PREFERENCE—PRECEDENCE OVER PRIOR LIENS—*Florida Construction & Realty Co. v. Pournell, Supreme Court of Florida (Oct. 31, 1918), 80 Southern Reporter, page 54.*—The above mentioned company and the Florida Railway sued the Florida Railway Co. and recovered judgments against it in June, 1913, for the total sum of \$287,687.07. They also succeeded in having the Florida Railway Co. thrown into the hands of receivers. Pournell and four others were employed by the Florida Railway Co. as conductors, engineer, and foreman. Part of their pay was earned before the appointment of the receiver, but the greater part of it was earned under the receiver. They brought suit against the Florida Railway Co. and its receiver

for the amounts due them for services rendered and recovered judgment. The receiver sold some of the railway's property, receiving for it the sum of \$35,000. Pournell and his coworkers, referred to in the opinion as the interveners, demanded that their judgment for wages be paid before the lien of the prior judgments is discharged. Their demand was granted and this court on appeal affirmed the judgment, rendering in part the following decision:

The main contention here is that claims of interveners (Pournell et al.) for services rendered in operating the insolvent railroad should not have preference over the prior judgment creditors in the proceeds from the sale of the property after the payment of taxes.

It appears that the services rendered by the interveners were necessary to the business of the insolvent railway company, and that such services were rendered during the receivership, or perhaps a small part thereof within a short time prior thereto, when the insolvent condition of the defendant company existed, as shown in the proceedings taken by the judgment creditors, and that the receiver was asked for and appointed to operate the railroad for the protection and benefit of the prior judgment creditors and at their instance. Under these circumstances an equitable preference existed in favor of the interveners.

WAGES—REFUSAL TO PAY—RECOVERY—*State ex rel. Stephens v. State Corporation Commission, Supreme Court of New Mexico (Nov. 21, 1918), 176 Pacific Reporter, page 866.*—Stephens had been employed by the State corporation commission as an assistant rate clerk when he was discharged. The commission then refused to pay the salary due him for the month of October, 1917. The fiscal year closed on November 30, 1917. The State, in the interest of Stephens, applied for a peremptory writ of mandamus, which was granted on November 27, 1917. The commissioners, finding a balance of \$170 on the fifth fiscal year contingent expense fund, proceeded to buy postage stamps with it and then answered the writ by saying that there were no longer any funds with which to pay Stephens' salary of \$150. The commission later made out a voucher against the fifth fiscal year contingent expense fund but after the close of the books for the fifth fiscal year and as a result the voucher was dishonored. The court then directed that the voucher be made to draw upon the sixth fiscal year contingent expense fund. The commission appealed. In allowing the writ the court rendered in part the following decision:

The first point arising for consideration is as to whether or not mandamus was the appropriate remedy to compel the issuance to relator (Stephens) by the corporation commission of the salary voucher in payment for such services for the month of October, 1917.

Here there was no question that the appellee (Stephens) had been employed by the commission as assistant rate clerk at a salary of \$150 per month; that he had performed the services required under such employment, and that he was entitled to a voucher therefor clearly. Mandamus was the appropriate remedy to compel the issuance of such voucher; in fact, mandamus was the only adequate remedy open to him.

The appellee showed beyond a question of doubt, however, that, in order to exhaust the contingent expense account, it was necessary, on the last day of the fifth fiscal year, to purchase postage stamps in excess of the amount of his claim, which stamps were for use, and could only be used, during the sixth fiscal year, and were consequently a legitimate charge against the appropriation for that year. In legal contemplation it is as though the appellee had traced just so much money, instead of postage stamps, into the contingent expense account for the sixth fiscal year.

In directing the voucher to be designated as payable from the contingent expense account for the sixth fiscal year, the court, sitting on the equity side, brushed aside all subterfuge and form, and looked at the naked facts as they really were. Its action, in effect, restored to the contingent expense account of the fifth fiscal year for the payment of this voucher, a fund which passed into the contingent expense account for the sixth fiscal year, and which in equity and good conscience should be restored.

WAGES—RETROACTIVE PAY—DISCHARGE—VOLUNTARY SEPARATION FROM SERVICE—*Kowalski v. McAdoo, Director General of Railroads, Supreme Court of New Jersey (July 11, 1919), 107 Atlantic Reporter, page 477.*—Kowalski was employed by the Pennsylvania Railroad Co. as a gang leader. He had been in the service of the company for some seven years. On May 15, 1918, he was arrested and locked up for the theft of a pair of shoes from a railroad car. He was convicted and paid a fine of \$25. His pay prior to his arrest had been 32 cents per hour. By an order, No. 27, May 25, 1918, and Supplement No. 4, July 25, 1918, the Director General of Railroads increased the wages of the railroad employees and provided that said increases were to be retroactive from January 1, 1918. The provision of Supplement No. 4 is as follows:

The increase in wages and the rates established shall be effective as of January 1, 1918, and are to be paid according to the time served to all who were in the railroad service, or who have come into such service, and remained therein. A proper ratable amount shall also be paid to those who for any reason since January 1, 1918, have been dismissed from the service, but shall not be paid to those who left it voluntarily.

Kowalski brought action for the back pay to which he claims he is entitled. He received judgment and the defendant appealed. In affirming the judgment the court said, in part:

The only point made and contended for by counsel of appellant in the court below and now here was, and is, that the plaintiff has disintitiled himself to any of the increase of wages from January 1, 1918, to May 15, 1918, because the plaintiff on May 15, 1918, was arrested and locked up for an alleged theft of the goods of his employer, and that this in effect was a voluntary leaving by the plaintiff of his employment.

There is no pretense that the plaintiff did not render loyal and efficient service to his employer from January 1, 1918, to May 15, 1918, before he committed the alleged theft. The fact that he was arrested and locked up on a criminal charge was wholly without any significance, unless it was shown that the plaintiff created the situation for the purpose of abandoning the employment of the railroad company. And this does not appear from the evidence. But, on the contrary, it appears that the plaintiff's arrest was caused by the railroad company, his employer, and it is, therefore, inconceivable upon what plausible ground it can be even argued that the plaintiff left his employment voluntarily.

It was further pointed out that a discharge for theft or for inefficiency would not bar a claim to the increase, and the judgment was affirmed.

WAGES—SEAMEN—CONSTITUTIONALITY OF STATUTE—CONSTRUCTION—*Strathearn S. S. Co., Limited, v. Dillon, United States Supreme Court (Mar. 29, 1920), 40 Supreme Court Reporter, page 350.*—Dillon was a British subject who shipped on a British vessel in Liverpool under shipping articles providing for a voyage of not over three years ending at Liverpool, England. Under the agreement he was to receive no wages until the end of the voyage. When the vessel arrived at the port of Pensacola, Fla., he demanded of the master of the vessel one-half of the wages he had thus far earned. This was done in accordance with the provisions of section 4530 of the United States Revised Statutes. The master refused to grant the request, and Dillon brought suit to recover \$125, the full amount earned up to that time. This action was brought in the United States district court and under a United States statute. Here the decision was against Dillon, but the court of appeals reversed the court below, whereupon the company appealed. In rendering the decision of the Supreme Court in favor of Dillon, Mr. Justice Day, delivering the opinion of the court, stated the decision in part as follows:

The district court found against Dillon upon the ground that his demand was premature. The circuit court of appeals reversed this decision, and held that Dillon was entitled to recover. (256 Fed. 631, 168 C. C. A. 25.) A writ of certiorari brings before us for review the decree of the circuit court of appeals.

Section 4 of the seamen's act is an amendment of section 4530 of the Revised Statutes; it was intended to supplant that section, as amended by the act of December 21, 1898.

The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one-half of the wages those cases in which the contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the Federal courts to foreign seamen. No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the provisions of the act to American seamen, this feature would have been wholly superfluous.

Apart from the text, which we think plain, it is by no means clear that if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subserved, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute. In the case of *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84 [Bul. No. 258, p. 141], we found no purpose manifested by Congress in section 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in section 4. Under section 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforceable in the courts.

We come then to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this court. The matter was fully considered in *Patterson v. Bark Eudora*, 190 U. S.

169, 23 Sup. Ct. 821 [Bul. No. 50, p. 195], in which the previous decisions of this court were reviewed, and the conclusion reached that the jurisdiction of this Government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this Government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

But, it is insisted, that Dillon's action was premature, as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the district court, but it was ruled otherwise in the court of appeals. Turning to the language of the act, it enacts in substance that the demand shall not be made before the expiration of five days, nor oftener than once in five days. Subject to such limitation, such demand may be made in the port where the vessel stops to load or deliver cargo. It is true that the act is made to apply to seamen on foreign vessels while in United States ports, but this is far from requiring that the wages shall be earned in such ports, or that the vessels shall be in such ports five days before demand for one-half the wages earned is made. It is the wages of the voyage for which provision is made, with the limitation of the right to demand one-half of the amount earned not oftener than once in five days. The section permits no demand until five days after the voyage has begun, and then provides that it may be made at every port where the vessel stops to load or deliver cargo, subject to the five-day limitation. If the vessel must be five days in port before demand can be made, it would defeat the purpose of the law as to vessels not remaining that long in port, and would run counter to the manifest purpose of Congress to prevent a seaman from being without means while in a port of the United States.

We agree with the circuit court of appeals of the fifth circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the circuit court of appeals for the second circuit held in the case of *The Italier*, 257 Fed. 712, 168 C. C. A. 662, that demand, made before the vessel had been in port for five days, was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But, the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States.

We find no error in the decree of the circuit court of appeals, and the same is affirmed.

WAGES—SERVICES RENDERED BY REQUEST—PRESUMPTIONS—QUESTION FOR JURY—*Williams v. Jones, Supreme Court of Kansas (July 5, 1919), 182 Pacific Reporter, page 391.*—Jones owned a farm and desiring to absent himself from the State for a period requested Williams to look after his stock, alfalfa, and corn. This Williams did according to his agreement with Jones. The agreement of the parties made no mention of what Williams was to receive for his services or how much. Jones claims Williams was to receive nothing for his services, while Williams claims it was agreed that he was to be paid for his labor. Judgment was rendered in favor of Williams and on appeal the decision was affirmed. The court said in part:

Their actual intention was a matter to be determined by the jury from all that took place between them and the accompanying circumstances. The findings in question were not that the defendant had said in so many words that he would pay for the plaintiff's services, but that in the situation the jury found to exist an agreement to that effect was reasonably to be implied.

A mere request or direction to the plaintiff to do the work would be enough to warrant an inference that it was to be paid for, in the absence of evidence that it was to be gratuitous, or that the plaintiff was to be compensated in some other manner. (13 C. J. 241-243, 787; 6 R. C. L. 587, 588.)

WAGES—TIME OF PAYMENT—AMOUNT OF WAGES—ACTIONS FOR NONPAYMENT—CONSTITUTIONALITY OF LAW PROVIDING PENALTY—*Davidow v. Wadsworth Mfg. Co., Supreme Court of Michigan (July 20, 1920), 178 Northwestern Reporter, page 776.*—Like a number of other States, Michigan has a law providing for and regulating the payment of wages of employees in certain employments and fixing a penalty for the violation of such law.

The statute here involved is act 59, Public Acts of 1913, entitled: "An act regulating the time of payment of wages to employees * * * and providing a penalty for a violation thereof."

The third section of the act follows:

SEC. 3. Any employer, mentioned in section 1 of this act, who, unless prevented by act of God, proceedings in bankruptcy or orders of process of any court of competent jurisdiction, or circumstances over which such employer has no control, shall fail to make payment of the wages due to any such employee, as provided in section 1 of this act, shall, as liquidated damages for such failure, pay to such employee for each day that the amount due him remains unpaid, ten per cent of the amount due him in addition thereto, and said damages may be recovered in any court having jurisdiction of the suit to recover the amount due to such employee.

Davidow had worked for the defendant company as a stenographer from April 20, 1917, to August 11, 1917, at which time he was discharged. When this occurred there was due him the sum of \$12.32, the wages for four days. The defendant failed to pay this amount and to date of the trial it still remained unpaid. Judgment was rendered for plaintiff in the sum of \$12.32 plus 10 per cent per day, amounting in all to a sum in excess of \$500. The company appealed, claiming the law was unconstitutional. The court accepted this contention and modified the decision, limiting the plaintiff's recovery to \$12.32 and interest. The opinion is in part as follows:

It will be observed that by the title of the act the purpose of the legislation is to regulate the time of payment of wages to employees of manufacturing, mercantile, etc., companies or corporations. The title contains no hint even that failure to comply with the terms of the statute will render the employer liable to pay more than the amount of wages due the employee by way of liquidated damages. The subject of liquidated damages is not mentioned in the title. It is stated in the title that the act provides a penalty for a violation thereof. But there is a marked difference between a penalty and liquidated damages. Section 21 of article 5 of the constitution of this State provides that "no law shall embrace more than one object, which shall be expressed in its title." Should the subject of liquidated damages have been named or expressed in the title? While it was not designed to require the body of the act to be a mere repetition of the title, yet it might be urged that so vital a matter as the addition of 10 per cent of the amount due for each day that the amount remains unpaid should have been indicated in the title.

The question whether the burden imposed by this statute upon the defaulting employer is in any sense liquidated damages may well be considered. Were we dealing with a contract between private parties where similar language was used, we would not hesitate to hold that the sum here imposed was a penalty and not liquidated damages. (*Jaquith v. Hudson*, 5 Mich. 123.)

Here there is no penalty provided for in the act. A penalty must be expressly created and imposed by statute, and can not be raised or extended by implication. (13 Am. & Eng. Ency. of Law (2d ed.) 55, and cases cited.) It has been held that where liquidated damages are claimed for the nonpayment of a sum of money, and such damages exceed the lawful rate of interest, they are necessarily in violation of the law of usury, and will not be allowed. See 13 Cyc. 101, note 56. Here by the terms of this anomalous statute there is no attempt to impose a penalty, but the term "liquidated damages for such failure" is used.

We are of the opinion that the statute under consideration constitutes class legislation of the most objectionable kind. The classification is arbitrary and oppressive and without any valid reason for its basis. It seeks, under the guise of liquidated damages, to impose a penalty for the benefit of the employee, not provided for in the act, which is confiscatory and unreasonable.

The judgment of the court below will be reversed, and, as the case is here upon case made, judgment may be entered in this court for

the plaintiff for the sum of \$12.32, with interest thereon from August 13, 1917, with costs to appellant.

WAGES—VACATIONS—RIGHT OF EMPLOYEE TO PAY DURING VACATION—*Vaile v. Walker Const. Co., District Court of Appeals, Second District, California (Dec. 1, 1919), 186 Pacific Reporter, page 602.*—This action is upon a contract of employment wherein Vaile seeks to recover a certain sum of money which he claims is due him as wages. In defense of this action the defendant employer claims that Vaile is not entitled to be paid for time spent by him on vacation, and that he should not be permitted to calculate such wages as a part of the sum he claims is due him. On this point the court ruled as follows:

Appellant's contention that plaintiff was not entitled to compensation for periods of time in each year covered by his service during which he was on vacation is without merit. The evidence shows that the vacations taken by him were not only in accordance with the prevailing custom in the employment in which plaintiff was engaged, but that defendant, as such employer, in each case assented thereto, and, except as to the last year, paid his full salary, thus recognizing his right to take a vacation without any deduction from his salary.

WORKMAN'S COMPENSATION—ADMIRALTY—CONSTITUTIONALITY OF AMENDMENT TO JUDICIAL CODE—*Knickerbocker Ice Co. v. Stewart, United States Supreme Court (May 17, 1920), 40 Supreme Court Reporter, page 438.*—William Stewart, while employed by the Knickerbocker Ice Co. as a bargeman, and while he was doing work of a maritime nature fell into the Hudson River and was drowned. His widow elected to take compensation under the State workmen's compensation act and was allowed an award. The employer appealed from this award, first to the appellate division of the New York Supreme Court and thence to the court of appeals, but in each case the award of the industrial commission allowing compensation was affirmed. Thereupon the employer took the case to the United States Supreme Court on a writ of error. The Supreme Court reversed the decision of the New York Court of Appeals and remanded the case for further proceedings. A dissenting opinion was rendered by Mr. Justice Holmes, in which Justices Pitney, Brandeis, and Clarke concurred. These same justices dissented in the opinion handed down in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524 (see Bul. No. 246, p. 203).

When New York first passed a workmen's compensation law its constitutionality was assailed in the United States Supreme Court

in the Jensen case, in which the State courts had affirmed an award for maritime injuries, and the law was declared unconstitutional because it compulsorily included employers engaged in maritime work as well as those engaged in industrial enterprises. This inclusion of maritime cases was held to be an invasion of the exclusive jurisdiction vested in the Federal courts under section 2, Article III, of the Federal Judicial Code. Subsequent to the decision rendered in the Jensen case Congress amended clause 3 of section 256 of the Judicial Code, which contains a saving clause allowing suitors to choose whether to sue in admiralty or at common law by adding thereto the following: "And to claimants the rights and remedies under the workmen's compensation laws of any State," so that the third clause reads as follows:

The district courts shall have original jurisdiction as follows:

* * * * *

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation laws of any State.

The ice company in this case contended that the New York workmen's compensation law did not in any way apply to it notwithstanding the amendment to the Judicial Code above quoted. It based its case almost entirely upon the decision in the Jensen case, and maintained that Congress had no authority to make the workmen's compensation laws of any State applicable to admiralty or maritime cases. In this contention the company was upheld by the Supreme Court, which declared the aforementioned amendment to the Judicial Code unconstitutional and void. Mr. Justice McReynolds, who rendered the majority opinion, said in part:

The act [amendment to clause 3, sec. 256, Judicial Code] only undertook to add certain specified rights and remedies to a saving clause within a code section conferring jurisdiction. We have held that before the amendment and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount Federal law—within that field they had no existence. Were the words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record. The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee probably indicates the general legislative purpose. And, with this and the accompanying circumstances, the words must be read.

Having regard to all these things, we conclude that Congress undertook to permit application of workmen's compensation laws of the several States to injuries within admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out in *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

The dissenting opinion, as presented by Mr. Justice Holmes, after reciting the reference to the amended sections of the Judicial Code, continues in part as follows:

Those sections in similar terms declared the jurisdiction of the district court and the exclusive jurisdiction of the courts of the United States, "of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the workmen's compensation laws of any State." I thought that claimants had those rights before. I think that they do now, both for the old reasons and for the new ones.

I do not suppose that anyone would say that the words, "The judicial power shall extend to all cases of admiralty and maritime jurisdiction," Constitution, Article III, section 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the obligation can change it, and I suppose Congress can do as much as the judges who introduced the rules, for we know that they were introduced and can not have been elicited by logic alone from the medieval sea laws.

But if Congress can legislate it has done so. It has adopted statutes that were in force when the act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the several States—not an unfamiliar form of law. [Cases cited.] An act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore if it were necessary, the words "rights and remedies under the workmen's compensation laws

of any State" should be taken to refer solely to laws existing at the time, as it certainly does at least include them.

The only question before us is whether the words in the Constitution, "The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction" prohibit Congress from passing a law in the form of the New York workmen's compensation act, if not in its present form, at least in the form in which it stood on October 6, 1917. I am of the opinion that the New York law at the time of the trial should be applied and the judgment should be affirmed.

It is interesting to note in connection with the foregoing decision that of the Supreme Court of California, in the case *Sudden & Christenson v. Ind. Com.*, 188 Pac. 803, rendered March 13, 1920, some weeks prior to the action of the Supreme Court of the United States, involving the same points. The California court reached the same conclusion of unconstitutionality, using the same reasoning, and arguing against the findings of the Court of Appeals of New York from which the ice company had appealed.

WORKMEN'S COMPENSATION—AGRICULTURAL LABOR—FISH FARMING—*Krobitzsch v. Industrial Accident Commission et al.*, *Supreme Court of California* (Nov. 19, 1919), 185 *Pacific Reporter*, page 396.—Krobitzsch conducted a trout farm on which he raised trout for domestic use, and to take charge of which he employed one Starkey. While Starkey was engaged in removing some brush and fernbrakes from the vicinity of a flume he fell from the wagon with which he was hauling away the brush and was injured by a pitchfork falling upon him. Later he died from his injuries, and upon making claim therefor his widow was granted an award of compensation and for funeral expenses under the workmen's compensation act of 1917. The employer applied for certiorari to review the award, declaring that it should not have been granted as the work Starkey was doing when injured was "fish farming," an occupation claimed to be excluded from the benefits of the compensation act by virtue of section 8, subdivision "a," part of which reads as follows:

* * * Excluding any employee engaged in household domestic service, farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising. * * *

The court refused to accept this construction of the statute and affirmed the award, saying in part:

We are of the opinion that the petitioner is not entitled to exemption under the provisions of this act. It seems clear beyond question that the legislature did not intend to use in a general sense the terms employed in describing the excluded classes. If that had been the

intention of the legislature, it would not have used the terms "farm, dairy, agricultural, viticultural, or horticultural labor," for "farm labor" would, in the broad sense, include labor engaged in dairying, agriculture, horticulture, stock raising, and poultry raising and anything which can be defined as cultivation of the soil. (19 Cyc. 456: 2 C. J. 988.) The very wording of the clause of the act upon which petitioner relies shows that the legislature was giving a restricted meaning to the term employed and was segregating into certain definite and exclusive classes all kinds of "labor" which, in the broad and unrestricted sense, would come under the head of farming. "Farm labor" must, we think, be taken in its ordinarily accepted meaning as labor engaged in the production of hay, grain, vegetables, and the like by the tillage of the soil.

WORKMEN'S COMPENSATION—AGRICULTURAL LABOR—ICE HARVESTING—EMPLOYMENT FOR PECUNIARY GAIN—*Mullen v. Little, Supreme Court of New York, Appellate Division, Third Department (Jan. 8, 1919), 173 New York Supplement, page 578.*—Mullen was employed by Little as a farm laborer and was engaged at the time of the injury in unloading ice from a sleigh into an ice house by means of a skid. The skid was a makeshift affair and was too long, so that when ice slid over it the end which rested on the sleigh flew up into the air as the ice left the end inside the ice house. A piece of ice became wedged in the doorway and Mullen attempted to release it with his foot. When the piece became disengaged the skid flew up into the air and threw Mullen into the ice house injuring him. He was awarded judgment in the lower court, and on appeal the decision was reversed because Mullen was deemed guilty of negligence. In reply to Mullen's plea that the compensation law applied and therefore proof of negligence was no bar to recovery, the court said:

The plaintiff urges that the question of contributory negligence is eliminated, for the reason that the case falls within the workmen's compensation law (Consol. Laws, c. 67), and, if so, section 11 makes that question unimportant. Ice harvesting is a hazardous employment under that act, but such employment was not in this instance "carried on by the employer for pecuniary gain," within the meaning of the statute (sec. 3, subd. 5). The plaintiff was in reality a farm laborer (sec. 3, subd. 4), and the ice was being stored for use on the farm, and only as incidental to farm purposes. Hence the case is not within the act.

WORKMEN'S COMPENSATION—AGRICULTURAL LABOR—THRESHING MACHINES—*Jones et al. v. Industrial Commission of Utah et al., Supreme Court of Utah (Jan. 30, 1920), 187 Pacific Reporter, page 833.*—The appellant Jones and a number of other farmers together purchased a threshing machine and employed Rowley to assist in

operating it. The machine was purchased primarily for the purpose of threshing the crops of the owners. While the machine was being used to thresh the crop of a son and renter of one of the owners, Rowley was so injured that he died.

The owners of the threshing machine had not elected to come under the compensation law at the time of the accident. Afterwards, acting upon legal advice, they procured insurance under the industrial act and engaged in custom work during the remainder of the season. The industrial commission held that inasmuch as the work being done at the time of the injury was for a nonowner the machine was being used for commercial threshing and that Rowley was not an agricultural laborer such as to exclude his dependents from compensation under the workmen's compensation act. An award for compensation was accordingly made. The owners appealed and the award was annulled. The decision is in part as follows:

The statute expressly excludes from its operation "agricultural laborers and domestic servants." (Compensation Laws, section 3111, as amended in Session Laws 1919, page 156.)

The number of adjudicated cases respecting questions analogous to the one here presented is exceedingly limited. This should not be a matter of wonder when we consider that workmen's compensation laws are, in most cases, of comparatively recent origin. We have found no case substantially identical in its facts with the present case. The nearest analogy we have been able to find are cases in which threshing machines or other farm machinery have been devoted entirely to custom work for the community, instead of being used principally on the crops of those who own the machine. Even as to those cases there is a marked conflict among the authorities. Some of the cases hold that when a farm machine, such as a hay baler, corn shredder, or threshing machine, is used even for custom work, the business is farm work, and the employees employed thereon are farm laborers. Other cases take the contrary view. We find no case whatever which holds that the work is not farming, and the employees not farm laborers, where the machine is used primarily by the owners for use on their own farms.

In the instant case we need not go to the full extent to which the Supreme Courts of Minnesota and Iowa and the Industrial Accident Commission of California have gone, for, as manifestly appears, the employers in all of those cases were engaged in custom work for the farmers of the community, or, as our own industrial board calls it, "commercial business." There is no pretense that owners of the machine in the cases referred to purchased the same primarily for their own use as farmers, or that they were owners of farms upon which the machines could be used. Notwithstanding this the courts and commissions referred to held that they were engaged in farming business and their employees farm laborers.

We hold, however, that in the case at bar, the commission itself having found that the owners of the machine purchased the same primarily for the purpose of threshing their own grain and used it principally for that purpose, such primary purpose becomes con-

trolling in determining the nature and character of their business within the meaning of the industrial act.

For the reasons stated the findings, conclusions, and award made by the defendant commission are set aside and annulled.

WORKMEN'S COMPENSATION—ATTORNEY'S FEES—EFFECT OF CONTRACT—*Rawlings v. Workmen's Compensation Board, Court of Appeals of Kentucky (Mar. 2, 1920), 218 Southwestern Reporter, page 985.*—Rawlings, an attorney at law, was employed without solicitation of the business on his part, by Maxwell and four others to represent them before the workmen's compensation board in proceedings for compensation. He made a written contract with each of the five employees for a fee within the statutory limits as allowed under section 4942 of the Kentucky statutes, which is as follows:

All fees of attorneys and physicians and charges of hospitals under this act shall be subject to the approval of the board. No attorney's fees shall be allowed or approved against any party or parties not represented by such attorney nor exceeding an amount equal to 15 per cent of the amount of the first \$1,000 or fraction thereof recovered, or 10 per cent of the excess of such recovery, if any, over \$1,000. The board may deny or reduce the attorney's fee upon proof of solicitation of employment.

In granting the employees their awards the board refused to grant Rawlings the fee fixed by the contracts, but awarded him a materially reduced sum. He sued for a writ of mandamus against the board to compel the payment of the contract fee. Judgment was rendered for the board, and he appealed. In affirming the decision the court of appeals said in part:

Our construction of this section is that the board in the exercise of a sound discretion and after a careful consideration and understanding of the facts and circumstances may reduce the contract compensation agreed to be paid an attorney, although it does not exceed the statutory amount or there be any evidence that the employment was solicited and, of course, if no contract was entered into between the attorney and the client, would likewise have the power to fix the fee at a reasonable sum.

We think the legislature intended in this section: (1) To limit the fees that attorneys might have; (2) to give to the board the power to reduce the fee below the statutory limit, even when it was agreed to by contract, and (3) to deny altogether the fee if it should appear the employment was solicited. The whole purpose and intention of the act was to lodge large power and discretion in the board, except in cases where the powers were specifically described by the statute.

We are also of the opinion that the remedy of an attorney who feels himself aggrieved by the action of the board in allowing a smaller fee than he considers himself entitled to have is by appeal from the action of the board to the circuit court. Where a party has

an adequate remedy by appeal it is well settled that mandamus will not lie.

WORKMEN'S COMPENSATION—ATTORNEY'S FEES—RECOVERY OF COMPENSATION—*Johanson v. Lundin Bros. et al., Supreme Court of Minnesota (Dec. 19, 1919), 175 Northwestern Reporter, page 302.*—Johanson was injured while in the employ of Lundin Bros. In settlement of compensation the employer agreed to pay Johanson \$11 per week until his disability should cease. This agreement was approved by the district court. Payments were discontinued on March 6, 1917, because as the employer stated Johanson had recovered from his disability. Johanson's attorney secured an order to show cause and a hearing was had thereon, wherein a receipt for \$22, dated April 20, 1917, and signed by Johanson, releasing the company from all further liability for the payment of compensation was produced. The attorney then asked leave to file his application for attorney's fees, which was granted. Thereafter proceedings were had on the application, and it was disallowed upon the ground that he was not entitled to recover attorney's fees under the workmen's compensation act. The court declared that attorney's fees are not allowed in ordinary civil actions and can be allowed only when authorized by statute.

WORKMEN'S COMPENSATION—AWARD—BASIS—AVERAGE WEEKLY WAGES—*Remo v. Skenandoa Cotton Co. et al., Supreme Court of New York, Appellate Division, Third Department (Nov. 12, 1919), 179 New York Supplement, page 46.*—Remo was injured by an accident arising out of and in the course of his employment with the cotton company, and upon bringing the proper proceedings he was awarded compensation under the workmen's compensation act. The award was based on an average weekly wage computed according to subdivisions 1 and 2 of section 14 of the workmen's compensation act (Consol. Laws, ch. 67), which provide that the average weekly wages of an employee who works at the same occupation for a year shall be arrived at by multiplying the daily wage by 300 and dividing by 52. Remo worked at night, 12 hours per day or 60 hours per week, but he only worked five nights a week. The employer and its insurance carrier appealed from the award, declaring that the average weekly wages were incorrectly computed. They state that as Remo had worked only five days a week his average weekly wages should have been computed according to subdivisions 3 and 4 of section 14 of the act. The employer submitted a statement showing Remo's actual earnings plus a 12 per cent bonus which the company allowed its employees to have amounted to \$826 for the year preced-

ing the injury. This statement was undisputed. The court adopted the employer's view of the matter and ordered the award modified, saying in part:

According to the statement, the correctness of which is undisputed, the claimant earned, during the year prior to the accident, with bonus figured in, the sum of \$826, which, divided by 52, made an average weekly wage of \$15.89. As the claimant regularly worked no more than 5 days a week, the methods of calculation given in subdivisions 1 and 2 of section 14 of the workmen's compensation law could "not reasonably and fairly be applied." Therefore the provisions of subdivisions 3 and 4 of that section, which require that the sum which "shall reasonably represent the annual earning capacity" be taken as a basis, and divided by 52, to determine the average weekly wages, became applicable. As said in *Matter of Littler v. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554:

"If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation. (Section 14, subd. 3.) The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness?"

Since the actual annual earning capacity of the injured employee was \$826, and his weekly wages were \$15.88, the amount which should have been allowed to the claimant was two-thirds thereof, or the sum of \$10.59 per week for 244 weeks.

The award should be modified accordingly. All concur.

WORKMEN'S COMPENSATION—AWARD—BASIS—BOARD—*Picanardi v. Emerson Hotel Co., Court of Appeals of Maryland (Nov. 13, 1919), 108 Atlantic Reporter, page 483.*—The appellant, Picanardi, was employed by the defendant as a baker at a wage of \$50 per month and board. While engaged at his work he got his hand caught in a bread mixer and injured, resulting in a permanent partial disability. The State industrial accident commission awarded him compensation without, however, taking into consideration in the computation of the weekly amount to be paid, the value of the board which he received in part payment for his services. He appealed to the Baltimore city court and from that court to the court of appeals, but in each case the award was affirmed on the ground that the money value of the board not having been fixed at the time of the hiring the board could not be regarded as part of the wages. The opinion was rendered by Judge Burke, who quoted with approval from the opinion in the court below in part as follows:

I can only repeat that I think we are not permitted to suppose that the legislature meant to have the funds provided to pay losses calculated upon a smaller basis than that allowed for the calculation

of the losses themselves. That is equivalent to saying that "average weekly wages," under section 35, in which the scale of benefits is fixed, means wages in money or other things which have been given a fixed money value at the outset, just as it does in the earlier sections concerning the making up of the State accident fund and the provision of adequate insurance. This is confirmed by the letter of the statute. In section 17 "percentage of pay roll" and "percentage of wages" are used as synonymous terms. And we seem to have a similar identity of measure in section 35 itself, for there it is provided that the allowance of "50 per cent of the average weekly wages" for permanent total disability shall not be less than a minimum of \$5 per week, "unless the employee's established weekly wages are less than five dollars per week." It would be straining these last words to interpret them as including board of undetermined value if such an element entered into the employee's agreement.

Continuing, Judge Burke said:

The compensation to which the appellant was entitled as provided by section 35 of the act was 50 per cent of his average weekly wages. It is clear the legislature did not intend, as to insurance in the State accident fund, that board was to be included as wages, unless its money value was fixed by the parties at the time of the hiring. And for the reason stated by Judge Bond in his opinion, it would be unreasonable to hold that it was intended that the premiums and rates of insurance from which the fund to pay losses were derived were to be calculated upon a narrower basis than that adopted for the allowance of compensation. The appellant has referred us to certain cases decided upon the compensation laws of Great Britain and California. By those acts the compensation is based not upon wages but upon the earnings of the employee. Wages and earnings are not synonymous terms. The latter is a much more comprehensive term, and the cases cited have not been found helpful in the construction of the Maryland act.

Being of opinion that the construction placed by the court below upon the act is in accordance with the intention of the legislature the judgment will be affirmed.

WORKMEN'S COMPENSATION—AWARDS—BASIS—CONCURRENT CONTRACTS—*In re Howard, Appellate Court of Indiana (Dec. 12, 1919), 125 Northeastern Reporter, page 215.*—Howard was a janitor working for three employers under separate contracts of service. Employer A conducted an insurance agency and paid Howard \$1.25 per week to clean his office; employers B and C each had flat buildings for which they hired Howard as janitor, the former paying him \$12.50 per week and the latter \$4.25 per week. Howard's aggregate earnings as janitor from the three employers was \$18. While washing the windows of A's office, Howard lost his hold and fell to the sidewalk, dying from the injuries thus received. His widow sued for compensation under the workmen's compensation act and was

granted an award, but the question of the amount of the award was certified to the appellate court for decision. The compensation act (Acts 1915, p. 392) provides compensation at the rate of 55 per cent of the "average weekly wages" in the "employment in which he was working at the time of the injury" with a minimum weekly compensation of \$5.50. The question is: Should Howard's widow be given compensation on the basis of his earnings from employer A, \$1.25 per week, for whom he was working when killed, which would allow her the minimum of \$5.50 per week, or should she be awarded compensation on the basis of the aggregate earnings, \$18 per week, from all three employers, which would allow her \$9.90 per week? The court held that the aggregate earnings from all three employers should be used as a basis for computing the compensation, citing *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 491 (see Bul. No. 224, p. 237), and *Gillen v. Ocean Accident & G. Corp.*, 215 Mass. 96, 102 N. E. 346 (Bul. No. 152, p. 200).

After stating the facts and announcing that "the question presented is one of first impression in this State," the court said in part:

If Howard had been in the joint service of the three employers, then, under section 49 of the workmen's compensation act, all of the employers would have contributed to the payment of the compensation in proportion to their respective wage liability. He was not in the "joint service" of his employers but in the employment of all, under concurrent contracts of service. There is no provision in the act for the joint liability of employers who hold independent, concurrent contracts with the same employee. If the legislature had intended to make concurrent employers all liable for compensation in a case like the one at bar, it would in all probability have made special provision as it did with reference to joint employers. Therefore, if the widow of Howard is to be compensated on the basis of the total average weekly earnings of Howard, it must be by employer A, whom he was serving at the time of his injury and death. The amount she should receive must depend upon the construction of clause (c) of section 76, supra. The term "average weekly wages" used in section 40 of said act is defined in said clause (c) of section 76 to be "earnings of the injured employee in the employment in which he was working at the time of the injury." Does this definition mean that the average weekly wages of Howard is the amount he was receiving from the one employer for whom he was washing windows at the time, or does it mean the amount he was receiving in his employment as janitor? What is meant by the words "in the employment"? Webster defines "employment" as "occupation, business, which engages head or hands." Worcester says, "employment" means "business, occupation, object of industry, engagement, vocation, calling, or profession." If we apply these definitions to the word "employment" as used in clause (c) of section 76, as we must, then, under the facts of this case, Howard's employment was that of janitor, and he was engaged in that employment for three employers and was injured while so employed.

It follows that the compensation to be paid to the widow should be based upon the total earnings received by Howard from his three employers.

WORKMEN'S COMPENSATION—AWARD—BASIS—DEDUCTIONS FROM WAGES—UNION DUES—MINE SUPPLIES, ETC.—*Springfield Coal Mining Co. v. Industrial Commission, Supreme Court of Illinois (Feb. 28, 1920), 126 Northeastern Reporter; page 133.*—William Wiley was killed by an accident arising out of and in the course of his employment as a coal miner for the Springfield Coal Mining Co., and his administratrix brought proceedings for compensation. The facts are all agreed to, the only dispute being the basis for the computation of the average weekly earnings to determine the compensation. The terms of the deceased's employment required him to pay for all the powder, tools, carbide, etc., which he purchased from the mining company and used in the mining of coal. These materials were not paid for when purchased, but were deducted from the wages on pay days. At the same time union dues, fines, and assessments were also deducted from the wages and paid over to the miners' organization. Deceased's average annual gross earnings were \$933.21 and the average weekly gross earnings \$17.96; the average annual net earnings after the deduction of \$181.01 for supplies, union dues, etc., were \$752.20 and the average weekly net earnings \$14.46. The company contends that the compensation should be computed on the basis of the average net earnings. An award was entered based on the average gross earnings and the company appealed. In affirming the award the court held in part:

The measure of the responsibility which the employer assumes is the compensation provided by the various sections of the compensation act as declared by section 11 of the act. The question in this case is to be determined by the provisions of paragraphs (a) and (g) of section 10 of the act and the first two lines of that section, providing as follows:

"SEC. 10. The basis for computing the compensation provided for in sections 7 and 8 of the act shall be as follows:

"(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages, or earnings if in the employment of the same employer continuously during the year next preceding the injury.

* * * * *

"(g) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment."

After carefully examining the various provisions of section 10 we are satisfied that the lower court properly construed the statute under the evidence in this record. It is clear that the gross earnings of the deceased are the proper basis for fixing the compensation, unless the provisions of paragraph (g) require a different construction. We are of the opinion that that paragraph requires no reduction of the compensation allowed by the commission in this case on account of the various items deducted from his wages on pay days by plaintiff in error. The dues, fines, etc., are not customarily or otherwise paid by the employer to the employee "to cover any special expense entailed on him by the nature of his employment." They are not paid to the employee at all by the employer or to the organization, within the meaning of that paragraph. The employee, through his employer, pays them himself to his organization from his wages, and his employer simply deducts them from his wages and turns them over to the organization as agent for the employee; hence there is no payment of such a sum by the employer to the employee "to cover any special expense entailed on him by the nature of his employment." The nature or character of his employment does not impose upon him any special expense for such dues, fines, etc. It is his obligation to his organization that imposes or entails such expense.

The miners are required, in order to pursue their occupation or trade of mining coal, to equip themselves with drilling machines, shovels, lamps, carbide, powder, fuse, squibs, picks, wedges, and sledges, and a box in which to keep such tools and supplies. This is the custom where coal mining is conducted by the use of powder or other explosives. Their expenses were not in this way lessened any more than they would have been had such articles been bought from outsiders. They receive so much a ton for mining coal. Their wages are not increased nor decreased or in any way affected by the fact that they buy the various articles aforesaid from the plaintiff in error instead of buying them from an outsider. We can not understand how the making of a contract by the operator to sell or furnish any one or more of said articles, to be paid for out of the miners' wages, can have the effect to reduce their compensation under said paragraph, when the same would not be the case if the miners bought the same articles from an outsider. The correct rule to be applied in this case will be readily understood by noting that such payments as were made by plaintiff in error in this case to the miners' organization were really payments of the deceased himself to his organization through plaintiff in error as his agent, and the amounts deducted by plaintiff in error for the articles sold or furnished to the deceased were really payments by the miner to the plaintiff in error, and none of them were sums "which the employer had been accustomed to pay the employee to cover any special expense entailed on him by the nature of his employment."

WORKMEN'S COMPENSATION—AWARD—BASIS—METHOD OF COMPUTATION—*King's Case*, *Supreme Judicial Court of Massachusetts* (Nov. 28, 1919), 125 *Northeastern Reporter*, page 153.—Arthur N. King, an employee of the Globe Newspaper Co., was fatally in-

jured in the course of his employment. His widow brought proceedings for compensation and recovered an award and the employer and its insurer appealed. The award was \$10 for 400 weeks. King was employed each week from Monday to Saturday noon by the Atlantic Printing Co. and received a weekly wage of \$28. On Saturday nights he worked for the Globe Newspaper Co., receiving \$9.20 for each night's work. The industrial accident board in making the above award did so on a basis of a weekly wage of \$31.52, that being the average weekly amount earned by a person in the same grade, employed at the same work by the same employer (St. 1911, ch. 751, pt. 5, sec. 2). The compensation law allows compensation at the rate of $66\frac{2}{3}$ per cent of the average weekly wages, with a maximum weekly compensation of \$10. The employer claimed that the weekly compensation should have been \$6.13, which is $66\frac{2}{3}$ per cent of an average weekly wage of \$9.20, the only amount which King actually ever earned while in its employ in any one week. The court affirmed the decision granting the award, but ordered that the weekly compensation be reduced from \$10 to \$6.13. The opinion, in part, is as follows:

In computing wages under the workmen's compensation act regard may be had to the average weekly amount earned by one in "the same grade, employed at the same work, and by the same employer, when, by reason of the shortness of time of the employment, or by reason of its nature or terms, it becomes impracticable to compute the employee's average weekly wages earned during the 12 months preceding his injury by dividing this amount by 52." King had been employed each Saturday night during the year by the newspaper company and the shortness of time during which he had been in its employ did not make it impracticable to ascertain his weekly earnings received from the newspaper company during the preceding year. Nor were the nature and terms of his employment of such a character as to render the computation of the compensation impracticable. He was regularly employed by the newspaper company, his wages were established, and for each Saturday night's work he received a fixed sum. The amount earned by an employee in a particular employment should govern in all cases in computing the compensation to be paid under the workmen's compensation act unless the computation becomes impracticable; and the wages which determine the compensation, with the exceptions referred to, are the wages earned in the employment where the injury happens. The cost of the insurance to the employer is determined by the wages of the employee received in this employment and it is to be presumed that this is shown by the pay roll. (Gagnon's case, 228 Mass. 334, 338, 117 N. E. 321.)

It may be proper to add that the provision of the British workmen's compensation act, providing for compensation based on concurrent contracts of service with two or more employers, is not found in our act. It follows that the compensation should be computed on the employee's earnings for the preceding year received from the newspaper company.

The decree is to be modified by striking out the words "ten dollars" and inserting in place thereof \$6.13; and, so modified, it is affirmed.

WORKMEN'S COMPENSATION — AWARD — BASIS — TIME LOST BY STRIKES—*Rakie v. Jefferson & Clearfield Coal & Iron Co., Supreme Court of Pennsylvania (Oct. 23, 1918), 105 Atlantic Reporter, page 638.*—Charles Rakie was killed on September 29, 1916, while working as an employee in the defendants' mine. The workmen's compensation law of the State of Pennsylvania requires that in the computation of an injured man's average weekly wages the wages earned during the six months next preceding the accident must be used as a basis. In addition to this stipulation the compensation board has adopted a set of rules governing the computation of wages by which it is the practice to deduct all Sundays, holidays, and half holidays and days when the workman has been absent from work due to no fault of his own. In upholding the reasonableness of this rule the court rendered in part the following decision:

In the six months preceding his death there were 184 calendar days during 88 of which the mine was closed [on account of a labor dispute] and deceased did not work. The record contains a finding of the referee, adopted by the compensation board, that "the deceased's idleness during this period was not due to any fault of his own." To arrive at a divisor, for the purpose of determining the average daily earnings of deceased, in order to calculate his weekly wage so as to ascertain the compensation payable to claimant, the before-mentioned 88 days, together with Sundays and holidays occurring during the six months in question, were deducted in accord with the relevant standing rule of the board.

The first question raised involves the propriety of the rule above referred to. We have recently sustained its validity (see *Jensen v. Atlantic Refining Co.*, 105 Atl. 545, not yet officially reported), and on the findings of the referee there can be no question of the rule's applicability to the present case. The learned court below erred in deciding otherwise.

The next "question involved" is correctly stated by appellant thus:

"In case of the instantaneous death of an employee by accident, does the period of compensation begin with the day of his death or is it deferred to begin 14 days thereafter?"

There is room for argument as to the proper construction to be placed upon the act of June 2, 1915 (P. L. 736), in this regard, but taking into consideration all the pertinent provisions of the statute, particularly sections 306 (clauses "d" and "f"), 307, and 311 of article 3 and sections 410 and 422 of article 4, we are not convinced the court below erred in determining that the 14 days must elapse and compensation in this case be counted from October 14, 1916.

The widow was therefore awarded benefits for 300 weeks, in the absence of prior death or marriage, after which awards to her three minor children were to become effective.

WORKMEN'S COMPENSATION—AWARD—BASIS—TIPS—*Bryant v. Pullman Co., Supreme Court of New York, Appellate Division, Third Department (June 30, 1919), 177 New York Supplement, page 488.*—The claimant, Bryant, was injured while in the employ of the Pullman Co. and brought proceedings for compensation under the workmen's compensation act. His salary exclusive of tips was \$1 per day. The company contends that in determining the amount of compensation to be paid the tips should not be computed. From an award in favor of Bryant the employer and its insurer appealed. In affirming the judgment the court said in part:

It is urged, however, that the award rested upon a wrong basis as to tips received by the porter, which were treated as a part of his wages, and an ingenious, but unsuccessful, attempt is made to distinguish this case from *Sloat v. Rochester Taxicab Co.*, 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. It is improbable that the company could employ a porter for \$1 a day if other compensation was not in contemplation. The company puts its patrons in the hands of underpaid porters expecting that the patrons will not suffer the porter to remain underpaid but will help the company pay for the services rendered by them. Such is the common understanding.

Award unanimously affirmed.

WORKMEN'S COMPENSATION—AWARD—LUMP-SUM SETTLEMENT—NECESSITY FOR EMPLOYER'S CONSENT—*McMullen v. Gavette Const. Co., Supreme Court of Michigan (Dec. 22, 1919), 175 Northwestern Reporter, page 120.*—McMullen was injured by an accident arising out of and in the course of his employment with the Gavette Construction Co. He had been employed as a carpenter, and the result of his injuries was such as to render him incapable of ever again following that occupation. He was allowed compensation under the workmen's compensation act at the rate of \$10 per week on April 9, 1917. On January 20, 1919, by reason of the very large sum necessarily expended for medical services and by reason of his physical condition McMullen petitioned for a commutation of the compensation into a lump sum. This petition was refused, but the industrial accident board ordered an advance payment of \$1,750. From this advance-payment lump-sum award the defendant and its insurer appealed, declaring (1) that the board could not grant a lump-sum award without the consent of the employer, and (2) that to grant a lump-sum award would in effect nullify the provisions of the act allowing compensation to an employee's depend-

ents in event of his death. The court sustained the order of the board, saying in part:

There appears to be very little necessity for construing this statute. In plain, unmistakable terms it provides for a lump-sum agreement by the parties with the approval of the industrial accident board, and it also provides that the board may, at any time, in any case, provide for a commutation of deferred payments, if its discretion is moved by special circumstances attending the case. While the first provision makes it plain that the consent of the employer is to be given, there is no language in the second provision from which any such conclusion could be drawn.

The argument is made under the first and third sections that if, after a lump-sum advancement is made, the injured party should die, leaving no dependents, the employer would be deprived of the right to retain the future payments, and under the second section that the dependents would be deprived of them. In view of this we are asked to nullify this section of the statute as being inconsistent with the body of the act. It was evidently the intention of the legislature in passing this act to provide for the misfortunes of the employees by accident, and in doing so it was evidently in the mind of the legislature that in most cases the employee's misfortune would be better served by making periodical payments rather than lump-sum payments, and that policy was adopted and carried out in the act. But to that rule the legislature created an exception, namely, that lump-sum advancements might be made where special circumstances exist, which, in the discretion of the board, made it probable that the interest of the employee would be better served by so doing. We see no inconsistency between these provisions. The exceptions may in many cases be very beneficial to the injured man and his dependents, and it is therefore in furtherance of the central idea which underlies the legislation.

But it is insisted that there have been no circumstances shown here which justify action under this statute. It was shown, on the hearing, by medical testimony, that plaintiff is permanently incapacitated for work in his trade as a carpenter. It was further shown that he might be able to do some kinds of work where he could sit, such as clerical work or telegraphing. It is further shown that his medical and hospital expenses were over \$900, and that in order to obtain the same his father mortgaged his farm.

We think the showing was ample to authorize the board to invoke the aid of this statute, and their order must be sustained, with costs to the plaintiff.

WORKMEN'S COMPENSATION—AWARD—POWERS OF COMMISSION—LUMP SUMS—*Reteuna v. Industrial Commission, Supreme Court of Utah (Nov. 14, 1919), 185 Pacific Reporter, page 535.*—Domineck Borda sustained injuries arising out of and in the course of his employment with the Independent Coal & Coke Co., which caused him to become insane. Reteuna was his guardian and as such entered into agreement with the coke company whereby he was to

receive the lump sum of \$2,500 in full settlement and discharge of all liability of the employer under the workmen's compensation act. This agreement was not approved by the industrial commission, which awarded compensation at the rate of \$12 per week until such time as the commission would order otherwise. Reteuna, as Borda's guardian, petitioned to the district court for permission to make the lump-sum settlement of \$2,500 with the employer. This permission was granted and Reteuna petitioned the industrial commission to give its approval to the agreement. This the commission refused to do, and Reteuna brought an action to review the decision of the commission. In denying the writ of review and affirming the award the court held in part as follows:

The commission is charged with the duty of fixing the compensation to be received by an injured employee. Also, after having made such award, the commission has continuing power and authority to modify or change such order of award as in its opinion may be justified. By the provisions of section 3145, under special circumstances, when deemed advisable, it may commute the periodical payments to one or more lump-sum payments. Considering the objects sought to be accomplished by the enactment, that it is not damages as ordinarily understood to be paid by the negligent employer for an injury to an employee, but that it is compensation to protect the injured party and those dependent upon him regardless of the question of negligence, and that the State is an interested party, then it must necessarily follow that the authority and discretion of the commission, as the authorized agent of the State, in determining whether the interests of the parties concerned in any particular case would be best subserved by a commutation or payment in a lump sum, must be absolute, and not subject to review by the courts. In other words, the question for determination is one of discretion under all the peculiar circumstances of the particular case, and must be so considered, and each case determined upon the particular facts surrounding it. It is not a question, as pointed out by the attorney general, of evidence or the weight of evidence. It must be assumed that the commission, in making the original award, familiarized itself with the facts surrounding the applicant, his particular needs, and, based upon such facts, made its decision that the payments should be made periodically as authorized by the act.

Considering the entire record, there is ample testimony to support the conclusion of the commission to refuse to approve the settlement, considered purely as a question of fact; and, there being such testimony, this court will not review the commission's findings.

If it be contended that the conclusions herein reached of necessity abridge the freedom of contract, it is sufficient answer that the authority of the legislature to enact a workmen's compensation law is no longer open to question; that the provisions of such law, if constitutional, enter into and become a binding part of all contracts made between employers and employees.

It follows that the writ should be denied and the petition dismissed. Such is the order.

WORKMEN'S COMPENSATION — AWARD — REVIEW — AGREEMENTS — POWERS OF COMMISSION—*Industrial Commission of Colorado v. London Guarantee & Accident Co. (Ltd.) et al., Supreme Court of Colorado (Nov. 3, 1919), 185 Pacific Reporter, page 344.*—Ray Brown was awarded compensation for an injury by the industrial commission. The accident company took the case to the district court, and while there pending Brown entered into a stipulation with the company to receive in settlement of his claim a sum less than that allowed in the award of the commission. This stipulation was filed in the district court, which rendered judgment thereupon. The industrial commission objected to this decision and brought the case to the supreme court for review. The supreme court reversed the judgment of the district court, saying in part:

The commission was made a party to the proceeding in the district court, as was required by the statute, and, being a party there, it had the right to bring the case here for determination of the questions raised by it. Inasmuch as the statute provides that the commission be made a party to the proceedings in the district court, it can not be supposed that the cause there may be conducted solely by the other parties. The commission has a function to perform in the district court, and that manifestly is to defend its award in the interest both of the claimant and of the State. The workmen's compensation act is an acknowledgment by the State of a duty to aid the injured employees in securing compensation for their injuries and to prevent the delays and miscarriage of justice which sometimes occurred in personal-injury actions in the courts. As has been frequently pointed out, the State has an interest in the recovery of just compensation by injured employees to the end that they do not, because of their injuries, become public charges. It is that fact which induced the lawmakers to give to such commissions the power to approve settlements as a condition of their becoming binding on the parties to them.

It is further urged by the commission, and with force, that the district court's powers on an appeal are limited to those named in the statute. We have several times held that the findings of the commission are binding unless set aside for one or more of the reasons named in the statute. The policy of the law, clearly disclosed in its provisions, is to give the district court power to set aside the commission's orders only when made without jurisdiction, by the usurpation of power, or when procured by fraud, or when the findings of fact are not supported by the evidence.

It may well be that the employee's rights would be fully protected by the district courts, but the lawmakers have seen fit to commit to the industrial commission that important duty. We have merely to apply the law as we find it.

We are therefore of the opinion that the award by the district court, on the stipulation, violated not only the spirit but the express provision of the law.

WORKMEN'S COMPENSATION—AWARD—RIGHT TO COMPEL PAYMENT—MANDAMUS TO SCHOOL BOARD—*Woodcock v. Board of Education of Salt Lake City et al., Supreme Court of Utah (Jan. 13, 1920), 187 Pacific Reporter, page 181.*—Rae E. Woodcock was injured in the course of her employment as a school-teacher by an accident arising out of and in the course of employment. She applied to the industrial commission for compensation and was allowed an award against the defendant school board, but a demand for payment of the award was refused. The time for taking an appeal having expired, she brought proceedings for a writ of mandamus to compel the defendant to pay the award. Defendant demurred on the ground that Miss Woodcock could not as an individual sue for a writ of mandamus against it. The court overruled this demurrer, saying:

Counsel for the board insist that in view that in the original act (Comp. Laws Utah, 1917, 3130), creating the commission and providing for the payment of compensation to injured employees, it is provided that, in the event that any employer shall fail to pay the compensation awarded to an injured employee within the time specified in section 3130, the compensation awarded "may be recovered in an action in the name of the State for the benefit of the person * * * entitled to the same," therefore the plaintiff should at least have joined the State with her as a party plaintiff. After considering all the provisions of the act in connection with other statutory provisions, we are of the opinion that it was not the intent or purpose of the legislature to prevent the injured employee from prosecuting an action or proceeding in his own name if he felt so disposed. The language quoted from the section is directory rather than mandatory. There is nothing in the act which indicates that the action referred to in section 3130 was intended to be exclusive. From the language employed we are constrained to hold that the action or remedy in that section referred to was intended to be cumulative and not exclusive. This view is strengthened by the fact that under our statute, unless there is some express provision to the contrary, it is not only proper for the real party in interest, if he be competent and sui juris, to bring all actions in his own name, but the statute requires him to do so. Then again, under our statute mandamus is a special proceeding which the party beneficially interested may always institute and maintain in his own name and behalf. We are of the opinion, therefore, that while under section 3130, supra, the commission could have commenced the action in the name of the State for the benefit of plaintiff, she nevertheless had the right to bring the action or proceeding and to prosecute the same to full determination in her own name.

WORKMEN'S COMPENSATION—BENEFITS AS A PREFERRED CLAIM—EXTENT OF PREFERENCE—*Steel & Iron Mongers (Inc.) v. Bonnite Insulator Co., Court of Chancery of New Jersey (Mar. 5, 1919), 106*

Atlantic Reporter, page 380.—The plaintiff company brought proceedings against the defendant, an insolvent company, and a claimant, a former employee of the latter company who had been injured and awarded compensation, interposes his claim for compensation, alleging that it is under the law a preferred claim. The claimant rested his right to preference upon the provisions of section 22 of the workmen's compensation act (C. S. of N. J., 1st Supplement, p. 1650), which reads as follows:

The right of compensation granted by this act shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor.

The receiver of the insolvent company allowed preference for the compensation only to the extent of two months, on the ground that the preference allowed to unpaid wages under section 83 of the act concerning corporations (revision of 1896, 2 C. S. N. J., p. 1650) was similarly limited. The claimant contends that the entire compensation should be regarded as preferred, and appealed. The court sustained the receiver's position, saying in part:

It is difficult to understand precisely what the legislature meant by the language used in section 22 of the workmen's compensation act. If it had been intended to give a general preference to the amounts awarded as compensation, clear language expressing such purpose might have been used. The term "right of compensation" used in section 22 must, of course, refer to the amounts awarded as compensation. The same preference then is given to the claimant for such amounts as is allowed by law for a claim for unpaid wages for labor. The claim for unpaid wages for labor allowed in the case of insolvent corporations is prescribed by section 83 of the corporation act, and is for claims for labor for a period not exceeding two months prior to the institution of proceedings in insolvency. Labor is therefore given but a limited preference. A holding that the entire amount of the award for compensation under the workmen's compensation act is entitled to preference would require a disregard of the limited preference given to labor, and of the fact that if such had been intended apt and clear language was available to express such an intent. While the award may not in all respects be considered as wages accruing, the award being in reality for injuries sustained, yet in order to make effective, in any way, the provisions of section 22, I think that, for the purpose of that section, the award must be considered as in the nature of wages, and the preference is confined to the amount accrued and unpaid, computed at the weekly rate for the two months preceding the institution of proceedings in insolvency.

The action of the receiver upon the claim, therefore, will be sustained.

WORKMEN'S COMPENSATION—CASUAL EMPLOYEES—LOANED EMPLOYEE—DEATH BY ASPHYXIATION—*Tarr v. Hecla Coal & Coke Co. (Employers' Liability Assurance Corporation, Intervener)*, *Supreme*

Court of Pennsylvania (Jan. 5, 1920), 109 Atlantic Reporter, page 224.—Tarr was employed as a miner by the H. C. Frick Coke Co. A fire broke out in the mine of the Hecla company and on its application it was loaned the services of Tarr, who was experienced in fighting fires. While thus engaged for the Hecla company Tarr lost his life by asphyxiation. His widow was awarded compensation under the workmen's compensation act, payable by the Hecla company, and it appealed. The appeal was dismissed and the intervener appealed. In affirming the award the court said in part:

The referee concluded, as a matter of law, that claimant's deceased husband came to his death by reason of injuries sustained in an accident while in the course of his employment with the defendant company and award compensation, which was affirmed by the compensation board and court below.

The facts found by the referee justify the award. A master may loan his servant, with the latter's consent, to another under such circumstances as to create for the time a new relation of master and servant; the regular servant of one may thus for the time being become the special servant of another, and that was done here.

The deceased when injured was working in the interest of the defendant on its premises and under its control, and clearly, for the time being, its servant. That his wages had not been fixed is unimportant; the law will imply a reasonable compensation. The finding of a temporary employment by defendant is not inconsistent with the finding of a general employment by the Frick Coke Co., and being one of fact we are concluded thereby.

"Persons whose employment is casual in character and not in the regular course of the business of the employer" are excluded from the workmen's compensation act (art. 1, 104 P. L. 1915, p. 736); but we can not adopt the suggestion that this case comes within the exception. Putting out mine fires is as much in the regular course of the business as clearing passageways or pumping water. There are two necessary elements to constitute the exception: (1) The employment must be casual in character, and (2) it must be outside of the regular course of the business of the employer. As we find this within such course, it is not necessary to determine whether the employment was casual in character or otherwise. This statute must be liberally construed (*Pater v. Superior Steel Co.*, 263 Pa. 244, 106 Atl. 202), which it would not be by holding that the extinguishment of fire in a coal mine was a work outside of the regular course of the mining business. Being overcome by noxious gases while working in a mine is an "accident" within the workmen's compensation law. (*Gurski v. Susquehanna Coal Co.*, 262 Pa. 1, 104 Atl. 801.)

The award was therefore affirmed.

WORKMEN'S COMPENSATION — CASUAL EMPLOYMENT — "ODD JOB" WORKER—*Bedard v. Sveinhart, Supreme Court of Iowa (July 2, 1919), 172 Northwestern Reporter, page 937.*—This was an action for damages under the workmen's compensation act. Judgment was ren-

dered in favor of the defendant employer on a directed verdict and the plaintiff appeals. Bedard was employed by the defendant, a real estate agent, to do various odd jobs about the houses which he rented. The defendant had engaged Bedard to place shingles on a house. Bedard completed this job and went to work on another for another man. Later he reported to defendant and told him that the chimney on the building which he had been shingling needed some cement and that he would put it on for nothing if defendant would get the cement. Bedard was injured while coming down from fixing the chimney. Judgment was rendered in favor of the defendant on the ground that Bedard was only a "casual employee." In upholding this decision the court rendered in part the following opinion:

It is conceded that the provisions of this act do not apply to a "casual employee"; that is, to one whose employment is of a casual nature. It appears that he had discovered that a little cement was needed at the base of the chimney on the roof which he had been shingling, which fact he reported to his employer. He proposed that his employer get the cement for him and he would put it on for nothing. He was at that time already at work upon another job for another man. When he received the cement from the defendant he left the other job temporarily and made the repair upon the defendant's chimney. In coming down from this work he received his injury. He testified also that in the course of his conversation with the defendant it was agreed that he would work for the defendant at other jobs as they might arise for 40 cents an hour. It is not claimed that there was any particular reference to any particular job.

The trial court held that the plaintiff was a "casual employee" within the exception to the workmen's compensation act. We think the holding was clearly right. If this was not a "casual employment," it would be hard to apply the term to any employment. The word "casual" is defined in the dictionaries as "coming without regularity; occasional; incidental;" "coming at uncertain times or without regularity in distinction from stated or regular;" "a laborer or an artisan employed only irregularly." (See Webster and Century Dictionaries.) We do not find the authorities cited by the appellant as being applicable to the facts disclosed by this record. The following authority supports the holding of the trial court: *Blood v. State Industrial Commission*, 30 Cal. App. 274, 157 Pac. 1140.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—SEASONAL WORK—*State Accident Fund v. Jacobs*, Court of Appeals of Maryland (Mar. 5, 1919), 106 Atlantic Reporter, page 255.—Julia Jacobs brought proceedings for compensation for the death of her son, and an award was ordered, from which order the State Accident Fund appealed, contending that the deceased was not entitled to compensation because he had been only a casual employee. Plaintiff's son was fatally injured by being thrown against a post as he was driving

a wagon loaded with canned tomatoes out of the packing factory of his employer. The injured man, who was a farmer and teamster, had been employed to do hauling for the factory whenever he was needed for that service. He had become engaged early in the season to do any necessary hauling required of him at a certain rate per day, the work being a necessary part of the employer's business. The court in declaring that this work was not casual rendered a decision, in part as follows:

There can be no dispute as to the fact that the appellee's son was an employee, within the definition of the act, at the time he was injured; but it is contended that his employment was so irregular that it should be characterized as only "casual," within the meaning of the act, and therefore expressly excluded from its operation.

The question whether an employment is casual must be determined with principal reference to the scope and purpose of the hiring, rather than with sole regard to the duration and regularity of the service. One who enters into a contract of employment for an entire season is not a casual employee merely because he may be required to work for only short and irregular periods. When there is a continuing engagement to serve the employer in his business at such times as the particular and essential service may be needed, the employment is not "casual" according to any of the judicial definitions of that term. In this case the service required and rendered was occasional, but it was rendered in pursuance of an engagement covering the whole of the working season at the employer's plant.

WORKMEN'S COMPENSATION — CLAIM — PROCEDURE — EFFECT OF CLAIM FOR MEDICAL SERVICE.—*Central Locomotive & Car Works v. Industrial Commission et al.*, *Supreme Court of Illinois* (Dec. 17, 1919), *125 Northeastern Reporter*, page 369.—One Lindstrom sustained an injury to his eye while in the employ of the car works. He received the injury on October 12, 1913, on which date he went to the paymaster and asked for a permit to call on the doctor. The permit was granted and the medical treatment was provided, after which Lindstrom returned to his work. The injured eye steadily became worse until he was told in April, 1916, that the injured eye would have to be removed in order to save the remaining eye. In May or June, 1916, Lindstrom went to Bruce, the general manager of the employer company, and inquired whether he was to receive any compensation for his injury. Prior to this Lindstrom had made no claim for compensation other than the demand for medical treatment on the day of the accident. The industrial commission awarded compensation and the circuit court affirmed the award, but on appeal the supreme court reversed the lower court's decision. The opinion of the supreme court is in part as follows:

Section 24 of the workmen's compensation act (Laws 1913, p. 351) provides that—

"No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made within six months after such payments have ceased."

It is argued by defendant in error that claim for compensation was made on October 13, 1913, when he asked for a permit to visit the company doctor; that the claim to the doctor's services was a claim for compensation. Section 8 of the act provides:

"The amount of compensation which shall be paid to the employee for an injury not resulting in death shall be: (a) The employer shall provide necessary first aid medical, surgical, and hospital services; also medical, surgical, and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of \$200. The employee may elect to secure his own physician, surgeon, or hospital services at his own expense."

The legislature in using the word "compensation" made no distinction between medical services and money payments. When the defendant in error made claim for medical services, he made claim for compensation, and when medical services were rendered at the employer's expense payments were made under the provisions of the act. The defendant in error's claim was acceded to when the services of the doctor were rendered, and no claim for any other compensation was made within six months after the accident or within six months after the services of the doctor ceased, as required by section 24, where payments have been made under the provisions of the act.

The defendant in error contends that it was impossible for him to make any more specific and definite claim for the loss of the sight of his eye than he did make before he knew or had reason to believe that the sight would be lost; that the law does not require an impossible thing to be done; that in a case where the injury at first appears slight but afterwards develops graver symptoms, the injury results when the diseased condition culminates; and that a claim made as soon as the loss of the eye was definitely ascertained was within the provisions of the act. Cases have been cited from Massachusetts and Nebraska holding that the time within which notice must be given or claim made runs from the culmination of the injury, and not from the physical accident which caused it. (*Brown's case*, 228 Mass. 31, 116 N. E. 897; *Johansen v. Union Stockyards Co.*, 99 Neb. 328, 156 N. W. 511 [Bul. No. 224, p. 340].) The statutes construed in those cases referred to the injury for determining the time of giving notice or making claim. On the other hand, the Supreme Court of Michigan, whose statute also provides for notice within a certain time after the happening of the injury, holds the time to run from date of the accident. (*Cooke v. Holland Furnace Co.*, 200 Mich. 192, 166 N. W. 1013 [Bul. No. 258, p. 219].)

The legislature has seen fit to fix the time for making claim for compensation at six months after the accident. By another section of the statute, provision is made for reviewing the award and for reestablishing, increasing, diminishing, or ending the compensation if the disability of the employee shall have recurred, increased,

diminished, or ended. These provisions are within the domain of legislative power, and the court is without authority to modify them. If they operate unjustly, the remedy is in the amendment of the law.

WORKMEN'S COMPENSATION—COMPULSORY SYSTEM—EXCLUSIVE STATE FUND—ELECTION—PAYMENT OF PREMIUMS—*Camanus et al. v. New York & P. R. S. S. Co., United States Circuit Court of Appeals, First Circuit (June 3, 1919), 260 Federal Reporter, page 40.*—The workmen's relief commission, which administers the workmen's compensation law of Porto Rico, in compliance with the provisions of said law, fixed the New York and Porto Rico Steamship Co.'s quota of the annual premium tax to be contributed to the State fund at \$7,639.68. The steamship company protested, and in order to avoid criminal proceedings paid the first installment of the sum under protest. The company, appellee in the present proceedings, then sued for an injunction against the members of the workmen's relief commission to restrain them from requiring it to file certain statements or reports and to prevent them from assessing any premium or quota to be paid by the company into the workmen's relief fund. The United States district court granted the injunction, and the members of the workmen's relief commission appealed. The company, which owns a dock at San Juan and employs about 75 workmen, claimed that under the act it could elect whether or not it would be bound by the act and that having elected not to accept the act its provisions could not be enforced against it. In reversing the decision of the district court and dismissing the injunctions the court declared that the Porto Rico act was compulsory and that the company could be required to pay the legally assessed premiums. The opinion is, in part, as follows:

The gist of the district court's decision was that the Porto Rican Legislature had enacted an elective, and not a compulsory, workmen's compensation act, so far as employers are concerned, and that therefore the Porto Rican officials should be enjoined from enforcing the act as against a rejecting employer.

In considering the problems thus presented it is desirable to have in mind the legislative and constitutional status of compulsory workmen's compensation acts when this act was passed. It is a matter of general knowledge that for many years courts, lawyers, and legislators were divided in their opinion as to the constitutionality of compulsory workmen's compensation acts.

This question finally reached the Supreme Court of the United States in the two cases of *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232], and *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. No. 224, p. 252]. The decision was in favor of the constitutionality of compulsory workmen's compensation acts.

Under section 1 of the act of 1916, which is left unchanged by the amendment of 1917, a trust fund is created, starting with an appropriation of \$25,000 from the treasury of Porto Rico, and thereafter based upon insurance premiums levied upon employers who do not elect to reject the benefits of the act by filing with the workmen's relief commission a written statement expressing such election.

But the next Porto Rican Legislature that convened after the Supreme Court of the United States had in the above-cited cases held compulsory compensation acts constitutional passed the act in question of February 25, 1918. This is a new act. By section 32 all laws and parts of laws in conflict therewith are repealed. It does not purport to be an amendment of the old acts.

Section 7 requires "every employer subject to the provisions of this act * * * to report to the workmen's relief commission as soon as possible, within a period of five days from the date of the accident, all injuries suffered by his employees in the course of their employment." The words "subject to the provisions of this act" are given full effect, if applied only to employers employing not less than three laborers. There is nothing in these words indicating an election open generally to all employers. Refusal or neglect of an employer to make such report is punishable by a fine of from \$25 to \$50.

It is apparent that the act of 1918 is, as to all employees, excepting only the classes specifically excluded under section 2 and the victims of accidents caused by illegal acts or gross negligence given an option under section 21, compulsory. All rights of action against employers existing under the old law are, as to the great mass of victims of industrial accidents, taken away. Whatever the right of employers to elect, employees are limited to such remedies as the new act affords for compensation under the plan provided; and this compensation is to be paid from the treasury of Porto Rico. The great mass of victims of ordinary industrial accidents in Porto Rico are thus cut off by this act from their former rights against their employers, and are given in lieu thereof a right to claim compensation from the public treasury.

The commission also contended that the injunction should not issue, because the company had an adequate remedy at law and was not subjected to irreparable injury by the collection of the tax. This the court agreed to, saying that the Government of Porto Rico had taken over the liabilities of the company for accidents to its employees; further, if there were only reasonable doubt, a Federal court ought not to interfere with the operation of the law whose function it was to secure to the treasury of Porto Rico funds essential to the performance of the public duties of the government, and that the statute affords full relief for any unlawful assessment that might be made under it.

The decree of the district court was therefore reversed, and the bill ordered dismissed, with costs to the appellants.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ABROGATION OF COMMON-LAW RIGHTS OF ACTION AND DEFENSE—COMMISSION AS A JUDICIAL BODY—*Shea v. North-Butte Mining Co., Supreme Court of Montana (Mar. 8, 1919), 179 Pacific Reporter, page 499.*—Murty Shea was in the employ of the defendant and was injured while at his work. He brought suit in an action for damages, and the defendant demurred to the complaint on the ground that the case was covered by the workmen's compensation act and that a common law suit for damages would not lie. The demurrer was sustained by the lower court and the plaintiff Shea took a default and appealed on the ground that the workmen's compensation act is unconstitutional. In considering this argument Chief Justice Brantly rendered an opinion upholding the act, extracts from which are as follows:

Our own statute is elective. While it has been criticized that the schedule of rates of compensation provided for by it is not sufficiently liberal, and also on the ground that it makes an unwise and unjust discrimination against the dependents of aliens, yet that it operates more justly and satisfactorily than the old system is demonstrated by the fact that as soon as it became operative, on July 1, 1915, the great body of employers as well as employees in the various industries in the State accepted its provisions, and have since been subject to them, as administered by the industrial accident board created by the act for that purpose.

Under these circumstances, the rule that an act of the legislature will not be declared invalid because it is repugnant to some provisions of the constitution, unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force.

It is said that the act is repugnant to section 6 of article 3 of the constitution, which declares that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay."

It is true that the legislature can not destroy vested rights. Where an injury has already occurred for which the injured person has a right of action the legislature can not deny him a remedy. But at this late day it can not be controverted that the remedies recognized by the common law in this class of cases, together with all rights of action to arise in the future, may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident, so long as there is no impairment of the rights already accrued. This necessarily follows from the proposition, well established by the courts everywhere, that no one has a vested right in any rule of the common law. The technical defenses recognized by it in this class of cases, viz., contributory negligence, assumption of risk, etc., may be abolished or modified without transcending any constitutional guaranty. [Cases cited.]

This being so, there is no reason why technical rights of action arising out of the negligence of the employer may not be abolished by the legislature in the same way. And so it is held by the courts

of those States which have enacted compensation laws made compulsory, as in New York and Washington. If this is so, for a much stronger reason may it be asserted that there can be no objection to a compensation law which becomes binding upon the employer and employee at their election, but not otherwise. By way of inducement to the employer to accept the act, it is provided that if he refrains the technical common law defenses shall not be available to him. As an inducement to the employee, his guaranty of compensation for any injury arising out of his employment becomes absolute, whereas, if he refuses to do so, he still has his action at law subject to all the common law defenses. The employer can not object because he has by his affirmative act elected to waive all objections to the extent of his liability and his obligation to make compensation. The employee cannot thereafter object if he fails to give the required notice of his refusal to accept the conditions imposed.

The difference in the modes by which they may indicate their election is not objectionable on the constitutional ground that it discriminates against either employee or employer.

The former is not in this case making any complaint; the latter can not complain because it was competent for him to waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver did not violate public policy.

It is argued that the act is invalid in that it constitutes the industrial accident board a court, whereas the whole judicial power of the State is vested in the courts enumerated in section 1 of article 8 of the constitution. Several of its provisions are cited as evidencing the fact that the functions of this body are judicial. The fallacy of this contention is fully demonstrated by the case of *Cunningham v. Northwestern Imp. Co.* (44 Mont. 196, 119 Pac. 554). That case is decisive of counsel's contention. It is true that many of the functions of the board are judicial in character; but that it is not vested with judicial power in the sense in which that expression is used in the constitution becomes clear upon a moment's consideration. As used in the constitution, the expression "judicial power" means "the power of a court to decide and pronounce judgment and carry it into effect between persons and parties who bring a case before it for decision" (*Miller on the Constitution*, 314.) This power the board does not possess. It was created as a purely administrative body. It may hear evidence to enable it to make an award in a particular case, and to that end may call witnesses; but it is without power to render an enforceable judgment, and its determinations and awards are not enforceable by execution or other process until a judgment has been entered therein on appeal to a regularly constituted court. [Cases cited.]

The other contentions made by counsel are that the act denies a jury trial, and that it violates the clause of the fourteenth amendment to the Constitution of the United States guaranteeing to the citizen the equal protection of the laws. What we have said above in discussing the other questions heretofore determined disposes of these contentions.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—ALTERNATIVE REMEDIES—TAKING PROPERTY WITHOUT "DUE PROCESS OF LAW"—*Arizona Copper Co. (Ltd.), v. Hammer, United States Su-*

preme Court (June 9, 1919), 39 Supreme Court Reporter, page 553.—Five cases were brought up and heard by the Supreme Court together, each of them contesting the constitutionality of the Arizona workmen's compensation law (ch. 14, Laws of 1912, 1st special session). In each case the injured employee was engaged in a hazardous employment at the time of the injury, and in each case he was successful in recovering compensation. The respective defendants brought these writs of error to the Supreme Court. The chief ground for attacking the constitutionality of the statute is that it violates the fourteenth amendment to the United States Constitution in that it is alleged to deprive the defendants of their property without "due process of law." In upholding the statute Mr. Justice Pitney, speaking for the court, used, in part, the following language:

We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

The principal contention is that the Arizona employers' liability law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employee killed or injured. In determining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the fourteenth amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications.

We are unable to say that the employers' liability law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the

occupation, is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. [Cases cited.] In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. The statute requires that compensation shall be paid to the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid by the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the “equal protection of the laws.”

Under the “due process” clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject matter, and of the public interest involved, we can not assent to the proposition that the rights of life, liberty, and property guaranteed by the fourteenth amendment prevent the States from modifying that rule of the common law which requires or permits the workingman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed, but perhaps was unrecognized, by requiring that its cost be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among

several remedies. In *Consolidated Arizona S. Co. v. Ujack*, 15 Ariz. 382, 384, 139 Pac. 465, 466 [Bul. No. 169, p. 109], the supreme court of the State said:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. (Const. 4, 5, art 18.) (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. (Const. 7, art. 18.) (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. (Const. 8, art. 18.)"

It is said by counsel that the compensation act, because it limits the recovery, never is resorted to in practice unless the employee has been negligent, and hence is debarred of a remedy under the liability act. But it is thoroughly settled by our previous decisions that a State may abolish contributory negligence as a defense, and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course. Judgments affirmed.

Mr. Justice McKenna prepared a dissenting opinion, in which Chief Justice White, Mr. Justice Van Devanter, and Mr. Justice McReynolds concurred: Mr. Justice McReynolds also dissented specially, the Chief Justice, Mr. Justice McKenna, and Mr. Justice Van Devanter concurring therein. Mr. Justice Holmes concurred in the majority opinion in a separate opinion, giving additional reasons for upholding the law, and in this Mr. Justice Brandeis and Mr. Justice Clarke concurred. The dissents were based on the unrestricted liability to which the employer was exposed at the employee's option.

Mr. Justice McKenna began by recognizing the established doctrines of compensation for injuries as stated by the court in cases when other laws were before it. Accepting their validity, he continued:

The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the compensation laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can be done only by bringing its instances and theirs under the same generalization; that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation. In other words, there is a clear discrimination, a class distinction with its legal circumstances

and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification.

But I pass this discrimination and return to the law as a violation of the employer's rights considered absolutely and abstractly. It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. Consider what the employer does: He invests his money in productive enterprise—mining, smelting, manufacturing, railroad-ing—he engages employees at their request and pays them the wages they demand; he takes all the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable.

Mr. Justice McReynolds pointed out at length the differences between the Arizona statute and a compensation law proper, as he regarded it.

The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common-law rules have been set aside without a reasonably just substitute. The prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—CLASS LEGISLATION—RIGHT TO JURY TRIAL—DUE PROCESS OF LAW—MINORS—FEES FOR JUDGES—*Scott v. Nashville Bridge Co.*; *Supreme Court of Tennessee (June 22, 1920)*, 223 *Southwestern Reporter*, page 844.—The plaintiff, Scott, was injured while in the employ of the bridge company. The injury occurred in October, 1919, the workmen's compensation act having gone into effect on July 1. Scott, however, ignored this law and brought a common-law suit for damages in the circuit court of Davidson County to obtain redress for his injuries. The bridge company made a special plea setting up the compensation act as a bar to the suit; Scott demurred to this plea and the demurrer was overruled. The facts were then agreed upon and the court rendered judgment in favor of the defendant employer. Scott appealed, contending that the Tennessee workmen's compensation act was unconstitutional. The court, however, upheld the constitutionality of all but the thirty-second section of the act. The opinion is in part as follows:

The sole question involved in this case is the constitutionality of chapter 123 of the Public Acts of the General Assembly of 1919, commonly known as the "workmen's compensation act."

As to appellant's contention that the act is coercive because it deprives the employer of his common-law defenses if he elects not to accept the act, we do not think that the power of the legislature to abolish these common-law defenses can be seriously questioned. These defenses are creatures of judicial opinion, and are not guaranteed or protected by the constitution. This being true, the legislature may modify or abolish them, as it sees fit. Their complete abolition does not render the act in question compulsory as to employers.

The court next disposed of contentions based on the alleged discrepancy between the body of the act and its title, contrary to the constitution, rejecting these contentions. Continuing, it said:

It is next insisted that the act violates section 8 of article 11 of the State constitution because: (1) Coal mine operators and their employees are exempted from the operation of the act while all other mine operators and their employees are included; and (2) the act exempts domestic and agricultural servants, casual employees, and all other industries having less than 10 regular employees. The contention is that this classification is arbitrary, unreasonable, and discriminatory.

It has been held by this court that when the classification made and stated in a statute is challenged, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. It is also the rule that one who assails the classification contained in a statute has the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. [*Motlow v. State*, 125 Tenn. 547, 145 S. W. 177, and other cases cited.]

It is the general rule that statutes public in their character, and otherwise unobjectionable, may extend to all citizens or be confined to particular classes [citing laws regulating motor vehicles, coal mines and boiler inspection, which have been upheld].

Other acts could be cited, but this is sufficient to show that the legislature, for obvious reasons, has classified coal mining in a class by itself because it is attended with risks and dangers which distinguish it from all other mining industries.

It is next insisted that the act is violative of section 6 of article 1 of the State constitution, because it denies trial by jury. The section of the constitution referred to provides:

"That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors."

Section 32 of the act in question provides:

"The cause [claim for compensation] shall be heard by the circuit judge without a jury and as other nonjury civil cases are heard in the circuit court. Neither party shall have the right to demand a jury."

The constitutional provision above referred to only protects the right of trial by jury as it existed at common law. The act in question confers rights and remedies that were unknown to the common law. The act is elective. If the employee accepts the provision of the

act it thereby becomes a part of his contract of employment, and he waives his right to trial by jury and accepts the compensation and remedies provided by the act. A jury may be waived by parties falling within the provisions of the workmen's compensation act by their voluntary acceptance of the terms of said act. It has been invariably held that, under the voluntary or elective workmen's compensation acts, parties, by accepting the act, waive the right to a jury trial; hence there is no deprivation of that right. [*Hawkins v. Beakley* (D. C.) 220 Fed. 378 (sustaining the Iowa act), and other cases cited.]

It is next insisted that the act violates section 17 of article 1 of our State constitution, which reads as follows:

"That all courts shall be open, and every man, for any injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law and right and justice administered without sale, denial, or delay."

It is insisted by plaintiff that the act closes the courts to him that were open prior to its passage, and denies him a remedy by due course of law. We do not think such is the effect of the act. The provision of section 17 of article 1 of our State constitution is a mandate to the judiciary and was not intended as a limitation of the legislative branch of the Government.

It is next insisted that the act violates the fourteenth amendment of the Federal Constitution, because it deprives the plaintiff of his property without due process of law.

This question was settled adversely to the contention of the plaintiff in *New York Central Railroad Co. v. White* (243 U. S. 188, 37 Sup. Ct. 188 [Bul. No. 224, p. 232], and the case of *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 Sup. Ct. 553 [p. 330].

It is next said that the act is unconstitutional, in that it undertakes to make an election for and a binding contract upon a minor employee, when, by reason of such minority, he is unable to make such election or contract.

However, we think there is no question as to the power of the legislature to endow minors with the right to make contracts otherwise lawful, and after he has been so endowed he becomes, for the purpose of the act, an adult, or at least on the same plane. It was expressly so ruled in the case of *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209.

It is next said that the act is unconstitutional because it violates section 7 of article 6 of our State constitution. This section of the constitution is as follows:

"The judges of the supreme or inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office nor hold any office of trust or profit under this State or the United States."

Section 32 of the act provides as follows:

"For acting in each of such cases which is contested or litigated the county judge or chairman of the county court shall receive a fee of \$5, which shall be taxed as a part of the costs of the case against the unsuccessful party. For entering all orders, settlements, or com-

promises of claims which are not controverted or litigated the county judge or chairman of the county court shall receive as compensation a fee of two (\$2) dollars, which shall be taxed equally against both parties."

The county judge is a judge of an inferior court, within the meaning of the above-quoted section of the constitution, and his salary as judge can neither be increased nor diminished during the term for which he is elected.

We are of the opinion, therefore, that this provision of the act is unconstitutional and void, but we are further of the opinion that this infirmity in the act does not affect the validity of the entire act. We think the provision allowing a fee to the county judge or chairman for acting in certain cases may be elided. It is a well-settled rule of law that where the provisions of a statute are severable and distinct the unconstitutionality of one or more provisions will not vitiate those that are valid and constitutional.

The concluding contention of the plaintiff was that the provision of section 25 of the act which suspends benefits during the refusal of the claimant to submit to medical examination or accept medical treatment is unconstitutional. As to this the court said:

The plaintiff does not undertake to point out what provision of the constitution is violated by the provisions of section 25. We do not think it violates any section of the constitution.

The act was therefore upheld, with the exception of section 32, relating to the fees provided for the county judge or chairman of the county court.

WORKMEN'S COMPENSATION — CONSTITUTIONALITY OF STATUTE — CLASSIFICATION — HAZARDOUS EMPLOYMENTS — *State ex rel. Amerland v. Hagan et al.*, *Supreme Court of North Dakota* (Oct. 25, 1919), 175 *Northwestern Reporter*, page 372. — Amerland, the relator, is a private citizen engaged in the real estate and loan business at Fargo and employs two clerks whose sole duties are to keep books, write letters, and similar general office work. Invoking the original jurisdiction of the Supreme Court of North Dakota, Amerland brought suit to restrain Hagan, the commissioner of agriculture and labor, who is intrusted with the administration of the workmen's compensation law (Laws 1919, ch. 162), from enforcing the act in so far as he is concerned for the reasons that the act is unconstitutional and that the relator does not come within the provisions of the act. The title of the act states that it applies to hazardous employments. Amerland, the relator, declares he does not properly come within the provisions of the act, as his work is only clerical and his employees do only office work and that work, not being hazardous, can not be included under the law. He also states that the law is an unreasonable

exercise of the police powers of the State and that it is an unreasonable exercise of the legislative power to include an occupation among hazardous occupations which in fact is nonhazardous. He further alleged that the act was unconstitutional because it deprived him of his property without due process of law and because it interfered with his right of freedom to contract.

The attorney general appeared in behalf of the compensation bureau and filed a motion to dismiss. One of the members of the bureau who is an attorney also appeared for the bureau and filed a return in the nature of a demurrer. After fully discussing the petition of the relator the supreme court dismissed the action. Judge Bronson, rendering the opinion of the court, said in part:

It is clear from the terms of the act that the term "employer" includes a person engaged in a hazardous employment; that the term "employee" includes a person engaged in a hazardous employment under a contract of hire in the trade, business, profession, or occupation of his employer; that a "hazardous employment" is an employment of such employee by such employer in the business of such employer. In terms, therefore, the act covers the employment and the business of the relator as a hazardous employment. Under the act in question the employment of the relator is termed hazardous. The relator alleges that his employment is nonhazardous; this is denied by the respondents. The relator makes no record to prove that in fact the employment in question is nonhazardous. This court accordingly will not accept as conclusive, or even as a presumption, that the mere alleged declaration of the relator that his employment is nonhazardous overrides the legislative declaration, or proves thereby the arbitrary character of said legislative declaration. It is fairly well settled that the court will only hear objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.

Within recent years—in fact, within the last decade—the police powers of the State, as well as Federal legislation, have been applied to the problem of adequately enacting legislative rules and regulations for the protection of workmen. Now in a large number of States compensation acts of various kinds have been enacted, proceeding in the beginning more upon the elective or even private insurance plan to the later and now increasing compulsory State insurance plans.

No longer is it regarded without the police powers of the State to provide for compulsory insurance to protect workmen and their families from the hazard of modern industry. No longer is it considered that mere novelty in legislation is a constitutional objection.

But, again, it is argued that a proper exercise of the police powers does not warrant a legislative declaration that an employment is hazardous which in fact is nonhazardous. The question of whether compensation insurance may properly cover nonhazardous employments, if they may be so termed, is not before this court. The act involved concerns hazardous employments. The act by definition defines the classes that fall within the term "hazardous employment." The employment of the relator falls within the definition given.

Strenuously the relator contends that his business is nonhazardous and his employees are without risk.

Common observation, as well as ordinary reasoning, readily discloses that even the clerk or stenographer in the modern office, engaged in the course of his occupation, incurs risks vastly different from those applicable to similar situations in the comparatively similar business conditions that existed when the common-law principles concerning the law of negligence arose and were made applicable. His employment subjects him to possible risks on every side. It is possible to conceive that the employees of the relator are subject to risk, not only from dangers within the modern office building while at work, from apparatus and instrumentalities used by the employee, but also from injuries that may occur proceeding from without, such as through faulty construction of the building, such as in injury that occurred in Chicago through a ship of the air crashing through the roof. His employee may be injured while on duty wending his way through the crowds on the street, or while ascending to his work on the elevator.

It is no answer to state that this might likewise occur to one who is not so engaged or employed. It may likewise occur to one who is not engaged in an extrahazardous employment. It therefore is not within the province of this court to state as a matter of law that the employment of the relator is nonhazardous, which the legislature has declared to be hazardous. As a matter of law this court is not in the position to declare that it is not within the legislative province to classify the business of the relator as possessing elements of hazard.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—EQUAL PROTECTION OF THE LAWS—ELECTION—*Middleton v. Texas Power & Light Company, Supreme Court of the United States (Mar. 3, 1919), 39 Supreme Court Reporter, page 227.*—While in the employ of the light company, Middleton received serious personal injuries through the bursting of a steam pipe due to the negligence of his employer and its agents. Middleton sued for damages and the defendant interposed as a defense the Texas workmen's compensation act, to which the plaintiff Middleton excepted. His exception was overruled and the action was dismissed. On appeal to the court of civil appeals the decision was reversed, but on rehearing constitutional questions were certified to the Supreme Court of the State, which declared in favor of the dismissal of the action, and the court of civil appeals accordingly changed its decision. Writ of error was then taken to the United States Supreme Court on the constitutionality of the statute. Mr. Justice Pitney delivered the opinion of the court in favor of the constitutionality of the statute.

The law of Texas excludes certain classes of workers from its coverage, and the contention was made that this rendered the law discriminatory and invalid. The nature of these exclusions, and the

opinion that they were not unconstitutional, are set forth in the following quotations:

Of course plaintiff in error, not being an employee in any of the excepted classes, would not be heard to assert any grievance, they might have by reason of being excluded from the operation of the act. But plaintiff in error sets up a grievance as a member of a class to which the act is made to apply.

However, we are clear that the classification can not be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Tex. 110-111): "Employees of railroads, those of employers having less than five employees, domestic servants, farm laborers and gin laborers¹ are excluded from the operation of the act, but this was doubtless for reasons that the legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employees, known experience as to hazards and extent of accidental injuries to farm hands, gin hands, and domestic servants, were all matters no doubt considered by the legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that State laws shall cover the entire field of proper legislation in a single enactment.

The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. But in this case adequate grounds are easily discerned. As to the exclusion of railroad employees, the existence of the Federal employers' liability act of April 22, 1908 (ch. 149, 35 Stat. 65; ch. 143, 36 Stat. 291), applying exclusively as to employees of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases within its reach (*New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546 [Bul. No. 246, p. 260]; *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556 [Bul. No. 246, p. 265]), and the difficulty that so often arises in determining in particular instances whether the employee was employed in interstate commerce at the time of the injury (see *Pedersen v. Del., Lack. & West. R. R.*, 229 U. S. 146, 33 Sup. Ct. 648 [Bul. No. 152, p. 85]; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305; *Illinois Central R. R. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, etc.), reasonably may have led the legislature to the view that it would be unwise to attempt to apply the new system to railroad employees, in whatever kind of commerce employed, and that they might better be left to common-law actions with statutory modi-

¹ The law as amended in 1917 includes gin laborers; also employers of three or more employees.

fications already in force (Vernon's Sayles' Texas Civ. Stat. 1914, Arts. 6640-6652), and such others as experience might show to be called for.

The exclusion of farm laborers and domestic servants from the compulsory scheme of the New York workmen's compensation act was sustained in *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232], upon the ground that the legislature reasonably might consider that the risks inherent in those occupations were exceptionally patent, simple, and familiar. The same result has been reached by the State courts generally. Similar reasoning may be applied to cotton gin laborers in Texas; indeed, it was applied to them by the supreme court of that State, as we have seen. And the exclusion of domestic servants, farm laborers, casual employees, and railroad employees engaged in interstate commerce was sustained in *Mathison v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 148 N. W. 71 [Bul. No. 169, p. 318].

The exclusion of employees where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 167 [Bul. No. 169, p. 203], and has been sustained repeatedly by the State courts.

The discrimination that results from the operation of the act as between the employees of different employers engaged in the same kind of work, where one employer becomes a subscriber and another does not, furnishes no ground of constitutional attack upon the theory that there is a denial of the equal protection of the laws. That the acceptance of such a system may be made optional is too plain for question; and it necessarily follows that differences arising from the fact that all of those to whom the option is open do not accept it must be regarded as the natural and inevitable result of a free choice, and not as a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employees of their right to agree upon the terms of employment.

Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees taking them out of the operation of the act; but probably such an agreement might be held by the courts of the State to be inconsistent with the general policy of the act; the supreme court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee and enabling

them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. - And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the legislature deemed it proper, if not essential, that the payment of compensation to the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further, there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the State in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the State to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees of the equal protection of the laws within the meaning of the fourteenth amendment.

This disposes of all contentions made under the equal protection clause.

It is argued further that there is a deprivation of liberty and property without due process of law in requiring employees, willingly or unwillingly, to accept the new system where their employer has adopted it. Of course there is no suggestion of a deprivation of vested property in the present case, since the law was passed in April and took effect in September, while the plaintiff's injuries were received in the following December, after he had been notified of his employer's acceptance of the act. What plaintiff has lost, therefore, is only a part of his liberty to make such contract as he pleased with a particular employer and to pursue his employment under the rules of law that previously had obtained fixing responsibility upon the employer for any personal injuries the plaintiff might sustain through the negligence of the employer or his agents. But, as has been held so often, the liberty of the

citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of *respondeat superior*, the imposition of liability without fault, and the exemption from liability in spite of fault—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers. (N. Y. Central R. R. Co. v. White, 243 U. S. 188; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. 224, p. 252].)

All objections to the act on constitutional grounds being found untenable, the judgment under review is affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—EXTRATERRITORIALITY—PROCEDURE—FAILURE TO REJECT—*Carl Hagenbeck & Great Wallace Show Co. v. Randall*, Appellate Court of Indiana, Division No. 1 (Mar. 12, 1920), 126 *Northeastern Reporter*, page 501.—Randall was employed by the show company in Indiana under an oral contract of hire to take charge of a "privilege car," in which he sold food and soft drinks and conducted games of chance. This contract of hire was reduced to writing in Ohio by an agreement expressly stating that the forum of the contract was to be in the District of Columbia and that no workmen's compensation law of any State through which the show passed or in which it performed was to govern or affect the parties. The show company was an Indiana corporation with its principal place of business at Indianapolis. While the show train was moving over the Michigan Central Railroad from Michigan City, Ind., to Hammond, Ind., the train was wrecked in the State of Indiana, and Randall sustained injuries from which he died. His dependent mother brought proceedings for compensation and was granted an award by the industrial board under the workmen's compensation act. From this award the employer appealed. The court affirmed the award and rendered the following decision:

By the workmen's compensation act of 1915, the State of Indiana made sweeping changes in its laws relative to the rights and duties of the parties under an employment contract. A new public policy for the State was established; and it is a settled principle of the law that the public policy of a State is supreme, and, when once established, will not, as a rule, be relaxed even on the ground of comity

to enforce contracts which, though valid where made, contravene such policy. (*Lake Shore etc. R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599.)

The workmen's compensation act of this State (secs. 2-4, 15, Acts 1910) specifically provides that every employer in the State is presumed to have accepted the provisions of the act, and to have agreed to be bound thereby, unless such employer, 30 days before the accident resulting in injury or death, shall have given notice of exemption, and that no contract can operate to relieve any employer of any obligation created by the act. It is not contended that appellant gave the required notice, or any notice whatever. Appellant's show and show train were brought into Indiana, and appellant's business was being conducted in Indiana, just as had been contemplated by the parties at the time the employment contract in question was executed, and Randall, at the time of his death, was in the line of his employment as provided by such contract. Under such circumstances the public policy of Indiana as established by her compensation law did not give way because the contract of employment had been made in Ohio. Appellant's obligation under the Indiana act was superimposed upon the Ohio contract as a condition of its performance in this State. Appellant could not relieve itself of the statutory obligation by a foreign contract. The one way of exemption was by notice as provided by the act.

We therefore hold that the cause is governed by the Indiana workmen's compensation act. (*Davidheiser v. Hay Foundry & Iron Works*, 87 N. J. Law 688, 94 Atl. 309; *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620.)

Appellant does not attack the constitutionality of the workmen's compensation act, but in its brief asserts that the award by the industrial board in this cause amounts to an impairment of appellant's said contract of employment with Randall, in violation of section 10, article 1, of the Constitution of the United States, and that it deprives appellant of property, and denies it the equal protection of the laws, in violation of the fourteenth amendment of said Constitution. It is sufficient to say, in response to this complaint, that the constitutional prohibitions referred to do not extend to subjects affecting the general welfare of the public, and that the rights guaranteed by such constitutional provisions are subservient to the public welfare. (*Grand Trunk etc. R. Co. v. City of South Bend*, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809.)

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—POWERS OF COMMISSION—PAYMENT TO STATE IN CASE OF DEATH OF EMPLOYEE WITHOUT DEPENDENTS—*Bryant, Commissioner of Labor, v. Lindsay et al., Supreme Court of New Jersey (June 5, 1920), 110 Atlantic Reporter, page 823.*—On April 4, 1911, the State of New Jersey enacted a workmen's compensation law, the administration of which rested with the courts. In 1918 (ch. 149) a workmen's compensation bureau was established for the administration of this act. In the same year another act (ch. 203) was enacted providing

that in cases where an employee was killed while working for his employer but left no dependents the employer would be required to pay the sum of \$400, in addition to medical and burial expenses to the commissioner of labor to be used in the administration of the act under chapter 149, Acts of 1918, provided, had the employee left dependents they would have been entitled to compensation. The act also authorized the commissioner of labor to bring suit against a defaulting employer for the payment of the \$400 in proper cases. This act is neither specifically declared to be an amendment of nor a supplement to the workmen's compensation act, but it does specifically provide that it shall not apply to any employer who has not accepted the workmen's compensation act. This action was brought by the commissioner of labor under chapter 203, Acts of 1918, for the recovery of \$400 alleged to be due from the defendant employer. The court declared the act unconstitutional and rendered judgment in favor of the defendant. The opinion of the court is in part as follows:

It will therefore be seen that the legislation in question amounts to this: That whereas, under the workmen's compensation act, the liability of an employer in the case of an employee leaving no dependents was limited to "expenses of last sickness and burial, the cost of burial, however, not to exceed \$100" (see P. L. 1913, p. 306), the amended act now under consideration requires the employer to pay in addition to this the sum of \$400, not for any expense connected with the injury, the sickness, or the burial of the deceased employee, but to the State commissioner of labor as a functionary designated to receive the money and to apply it as part of a fund to pay the expenses of conducting the State labor bureau, another State agency. It is true that the State labor bureau is an agency expressly devoted to the investigation and settlement of questions arising under the workmen's compensation act, but, for that matter, so is the court of common pleas, at least in part, and the infirmity of this legislation, which is strongly urged upon us by the defendants' counsel, will appear somewhat more plainly if we consider that the act might as well have prescribed that the \$400 should in each case be turned into the State or county treasury, to be used in helping to defray the salaries of the various judges of the courts of common pleas. It seems quite obvious that this is nothing more or less than a tax imposed for the purpose of supporting the expense of a State agency. The act, as we have said, does not pretend to be either a supplement or an amendment of the workmen's compensation act; it is separate and distinct. Consequently it can not be supported upon the theory of a contract between employer and employee, conclusively presumed because of the absence of dissent, pursuant to the statutory procedure outlined in the compensation act.

The real question is whether the State can, in view of the fourteenth amendment to the Federal Constitution, constitutionally tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accidents. Such a tax has manifestly no relation to the police power; it is

plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within section 2 of the compensation act, we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. (*Southern Railway Co. v. Green*, 216 U. S. 400, 30 Sup. Ct. 287.)

From another standpoint the act seems to be simply a taking of the property of this class of employers without any compensation therefor. They are in effect penalized for employing men or women who are without dependents qualified to claim compensation. If we were permitted to comment upon the question of legislative policy which tends to dissuade an employer conducting a hazardous occupation from receiving into his service a workman who, if killed in that service, would not leave a widow and infant children destitute of support, it would be apposite to remark that this is the precise opposite of the policy of the United States in the selective-service draft. But, looking at the matter in its purely legal aspect, we are clear that it is an attempted exercise of the power of taxation which runs counter to our constitutional system, both National and State, and that it can not be supported on that theory or on any other that has been suggested.

The result is that there must be a judgment for the defendant.

WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY OF STATUTE—PROCEDURE—CHOICE OF REMEDIES—*Utah Copper Co. v. Industrial Commission of Utah et al.*, *Supreme Court of Utah* (Oct. 22, 1920), 193 *Pacific Reporter*, page 24.—Louis Rushton was killed while employed by the Utah Copper Co. He left as dependents a widow, nine minor children, and one unborn child. Under the State constitution of Utah the right of action for death can not be taken away or limited. The widow therefore had her choice of remedies; she could sue at common law for damages, or she could elect to take compensation under the workmen's compensation act (Comp. Laws 1917, secs. 3061-3165). She elected to accept compensation under the workmen's compensation law and was accordingly granted an award by the industrial commission for compensation for herself and her minor children. She was legally and regularly made the guardian of her children and was given permission by the court to elect as to which remedy she would pursue. The employer appealed to the district court, which affirmed the award. The employer again appealed to the supreme court alleging that under the State constitution the widow could not elect the method of recovery she would pursue, and any election by her could not be binding upon her minor children, especially the unborn child. The court affirmed the award saying in part:

It is further claimed by the appellant that the minor heirs, and particularly the unborn child of the deceased, are not bound by the

proceedings before the commission, and that as a result the award made must fail, for the reason that if permitted to stand it might expose the appellant company to a double liability, and would result in taking property without due process of law, and deny to appellant the equal protection of the law, in violation of both the Federal and the State constitutions.

Section 5 of article 16 of our State constitution reads as follows:

"The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

By the provisions of Comp. Laws, Utah, 1917, sec. 3127, it is provided that for injuries resulting in death the dependents of the deceased are given the right, within such time as by rule the commission shall prescribe, to elect between bringing suit at law against such employer to recover damages for such death or accept the benefits allowed dependents of deceased employees under the act. It is also provided that if the dependents elect to take under the act they will not be entitled to sue the employer at law to recover damages. It is not questioned by appellant that the right of an election of remedies given to the dependents of anyone whose injury results in death, and for whose death the right of action is guaranteed by the constitution, contravenes or is in conflict with any constitutional right. The constitutionality of such provision, however, is set at rest by the Supreme Court of the United States in the *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553 [p. —].

It is, however, contended that the guardian attempting to make the election in this case was not authorized or empowered to make a binding election on behalf of the minors, and that the court authorizing the election was without authority to make such order.

Not only, in our judgment, is the district court given authority by the Probate Code to direct and authorize an election of remedies, as it did in this case, but if no such power existed by the provisions of the code, and the district court having jurisdiction of the persons and estates of the minors is convinced that it is for the best interests of such minors that an election be made to take the award provided for by the workmen's compensation act, the court has the authority to make such order.

The right of an heir to recover damages for the wrongful death of an adult is, after all, but a property right. It may, in a certain limited sense, be considered as a personal right, but, nevertheless, the result to be obtained by such an action is property equivalent to the loss sustained. The right of the unborn child to maintain an action for the death of the father in this case after its birth, or the right to take under the workmen's compensation act, has for its object one and only one purpose. That purpose is compensation for the death of the individual caused by industry.

We conclude, therefore, that the court was in the exercise of its rightful authority under the circumstances appearing in this record, when it named a guardian for the unborn child, and that such guardian, when authorized by an order of court, was empowered to elect to take the award that could be made for it under the workmen's compensation act.

The judgment of the district court upholding the award is affirmed.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—PROCEDURE—NOTICE—ALTERNATIVE ACTION—*Colorado v. Johnson Iron Works (Ltd.)*, *Supreme Court of Louisiana* (Nov. 3, 1919), 83 *Southern Reporter*, page 381.—George Creath was killed by an explosion while he was in the employ of the defendant company. The injury arose out of and in the course of his employment and was within the scope of the employers' liability act (act 20, p. 44, Acts of 1914), by which title the Louisiana workmen's compensation law is known. Creath's widow, Mrs. Camilia Colorado, chose to ignore the compensation act and brought an action under article 2315 of the Civil Code for damages for the death of her husband. The defendant interposed the compensation law as a defense to the widow's suit and the action was dismissed, with right to proceed under said act. The widow appealed, alleging that the compensation law did not affect actions for damages for death under article 2315 of the Civil Code and that the said compensation act was unconstitutional in so far as it applied to cases such as hers. The court upheld the constitutionality of the act, rendering the following decision:

Said act, by its plain and express terms, does make the remedy which it provides exclusive in a case like the present; it therefore does apply to this case, and does supersede article 2315 of the code. And for so doing the title is broad enough, since it reads:

"An act prescribing the liability of an employer to make compensation for injuries received by an employee in performing services," etc.

The act does no more in its body than "prescribe the liability of an employer for injuries received by an employee in performing services," etc.

As to this law being "special," within the intendment of article 48 of the constitution, forbidding the enactment of special or local laws, it is not such, since it applies to employers and employees in general. As to its depriving plaintiff of property without due process of law, it does nothing of the kind, for two reasons: First, because formerly the right to sue for the death of a human being, which is the right plaintiff is seeking to exercise, did not exist in this State, but was given by statute, and, of course, the legislature may repeal a statute enacted by itself, or supersede it by another statute; second, because the regulation of what recourse one person may have against another for personal injury is a matter entirely within legislative discretion.

Plaintiff also contends that the said act is inapplicable to this case, for the further reason that the notice required by section 12 of the act to be posted was not posted. But by the very terms of said section the sole effect of failure to post said notice is to extend for six months the delay within which notice of the injury must be given to the employer.

All the questions raised by plaintiff in this case in connection with said act have been considered and decided (and let us hope settled) in the following cases: *Boyer v. Crescent Box Co.*, 43 La. 368, 78 South. 596 [Bul. No. 258, p. 93]; *Whittington v. La. Sawmill Co.*,

142 La. 322, 76 South. 754; *Philips v. Guy Drilling Co.*, 143 La. 951, 79 South. 549; *Veasey v. Peters*, 142 La. 1012, 77 South. 948.

With the policy or justice of the employers' liability act this court has nothing to do. That is a matter for the legislature.

In her original petition plaintiff prayed that should the court hold that the case is governed by said act then that—

“an adequate and equitable relief and an equitable lump sum be adjudicated, according to said acts, adding to it an adequate and equitable sum for sufferings, mental agony, loss of consortium, and pecuniary loss.”

Except as in this prayer, nothing was alleged to be due or claimed under said employers' liability act in the petition; but, on the contrary, said act was repudiated throughout as invalid and inapplicable to the case. The learned trial judge thought the petition insufficient to justify any judgment under the act.

This ruling was correct. Plaintiff has made no specific demand upon defendant under the act, either in or out of court. Section 18 of the act would seem to contemplate that suit may be brought under the act only after the parties have failed to agree out of court upon the amount of compensation due. At any rate the defendant company is entitled to know what specific amount the plaintiff is claiming before it can be required to answer.

WORKMEN'S COMPENSATION—CONSTITUTIONALITY OF STATUTE—RECOVERY OF COMPENSATION—ACTION FOR DAMAGES—DEATH—*Grannison's Admr. v. Bates & Rogers Const. Co.*, *Court of Appeals of Kentucky* (Mar. 23, 1920), 219 *Southwestern Reporter*, page 806.—The decedent, Grannison, was employed by the Bates & Rogers Construction Co. and was killed in the course of his employment by reason of his employer's negligence. Both he and the employer had elected to accept the provisions of the workmen's compensation act and accordingly his dependent sister was granted compensation. One Humphrey was appointed Grannison's administrator, and as such brought an action for damages against the defendant employer alleging negligence on its part. The action was dismissed as being barred by the workmen's compensation act, and the administrator appealed, claiming the right to bring the action under section 241 of the Kentucky constitution, which provides that “whenver the death of a person shall result from an injury inflicted by negligence” damages may be recovered for such death. The court held that this provision had no effect where the employee has elected to accept the workmen's compensation act, and affirmed the decision dismissing the action. The opinion is in part as follows:

It will, of course, be readily admitted that, if the personal representative has a vested property right in the cause of action created by section 241 of the constitution, this property right can not be taken from him by a legislative enactment or a court decision, as

such enactment or decision, although it might be held not to violate section 241 of our constitution, would be prohibited by the Federal Constitution. It would further follow from this premise, if it was sound, that the employee himself could not by his contract take from the personal representative his vested property right.

But we find ourselves wholly unable to agree with counsel that the personal representative of an employee who comes to his death by the negligence or wrongful act of his employer has a vested property right in the cause of action created by section 241 of the constitution. The right of action given to the personal representative by the constitution depends entirely on the employee in whose power it is to determine for himself whether a cause of action shall survive to his personal representative. The employee has the right of election, and, when he elects that the loss sustained by his death shall be compensated in the manner provided in the act, his personal representative has no control over it. The right of action contemplated by the constitution never reaches him.

It was not intended by section 241 of the constitution to take from the employee his right to voluntarily contract that in the event of his death from whatever cause a stipulated sum should be paid to the persons entitled thereto. The constitutional provision only becomes operative when a right of action survives to the personal representative. It was never intended that the personal representative should have a vested property right in the cause of action that he could not be deprived of by statute supplemented by contract.

That this right of election is in the employee we determined in *Kentucky State Journal Co. v. Workmen's Compensation Board*, 162 Ky. 387, 172 S. W. 674.

It has been fully settled in the interpretation of these acts that no vested rights control the liberty of action of the contracting parties or prevent either from exercising the privilege to forego causes of action and likewise of defense that existed before these acts. In fact, many courts have gone so far as to uphold compulsory compensation acts.

It is also, as we have said, insisted that the act should be confined to accidental injury and death as distinguished from death caused by negligence or wrongful act; in other words, the argument is that the act was not intended to embrace cases in which the employee came to his death by negligence or wrongful act. There is, however, no room for such a distinction found in the act. It applies when its provisions are accepted in every case of injury or death that occurs within the scope of the act, whether it be brought about by accident or negligence. To hold that the act does not cover injuries caused by negligence that resulted in death would be taking from the act a very material part of it and would work the destruction of its harmonious purpose.

WORKMEN'S COMPENSATION—DEATH—BENEFITS FOR PRIOR DISABILITY—SEPARATE AWARDS—*Jackson v. Berlin Const. Co.*, *Supreme Court of Errors of Connecticut* (Dec. 17, 1918), 105 *Atlantic Reporter*, page 326.—*Jackson*, an employee of the defendant company, received an injury on March 26, 1914, consisting of a fracture of

his right leg, which arose out of and in the course of his employment. A wound was produced by this injury; it did not heal and it became necessary to amputate the leg. As a result of these injuries he died on March 18, 1916. Jackson had made an agreement with the company, which was duly approved by the compensation commissioner, under which he received weekly payments, together with the medical, surgical, and hospital services, in all amounting to \$1,010. The dependent widow after bringing action was awarded by the commissioner a sum which when paid would equal \$3,220 and which included funeral expenses. The company, on appeal to the court, succeeded in having the \$1,010 paid to the deceased credited against this award. The widow appealed from this judgment. In reversing the judgment, Judge Wheeler spoke, in part, as follows:

The legality of such a credit depends upon whether under our act the compensation paid to this employee was an indivisible part of the compensation awarded after death to the dependent. If so, the statute must be so construed as to give this credit. But if the compensation is separable and that paid to the employee is independent of that paid to the dependent, a construction compelling this credit could not be made unless the language of the statute were imperative. The General Statutes, sections 5351, 5352, provide that compensation for either partial or total incapacity "shall be paid to the injured employee." It is to be paid to him because the statute intends to provide support for him during his period of incapacity. Whatever is paid him belongs to him. Whatever of compensation accrues in his lifetime and is unpaid becomes upon his decease an asset of his estate.

The voluntary agreement was made under General Statute, section 5361, between the employer and employee. The dependent had no privity with this contract, and no right to its payment in the lifetime of the employee or to any which remained unpaid at his decease.

The compensation to the employee is distinct from that to the dependent. The allowance of payments made to the employee can not be made against the compensation to the dependent, and vice versa.

The trial court assumes in its reasoning that the payments to the employee were payments to the dependent. This is quite contrary to the fact and law. The payments to the employee belonged to him. The court failed to note that the act provides two distinct forms of compensation, the one for incapacity, the other for death; the one payable to and belonging to the employee, the other payable to and belonging to the dependent.

There is error, the judgment is set aside, and the cause remanded, with direction to the superior court to enter judgment dismissing the appeal from the commissioner.

WORKMEN'S COMPENSATION—DEATH WITHOUT DEPENDENTS—
PAYMENT TO STATE—*Stempfler v. J. Rheinfrank & Co. et al.*, Supreme Court of New York, Appellate Division, Third Department

(Dec. 29, 1919), 179 *New York Supplement*, page 659.—Stempfler, while in the employ of the J. Rheinfrank Co., was injured by an accident, for which he received compensation under the workmen's compensation act up to the time of his death. He left no dependents. The industrial commission awarded the State treasurer \$100 in accordance with the provisions of the law. The company and its insurer appealed, claiming that because they paid compensation to the employee before his death the case is not one coming within the provisions allowing the State treasurer an award. The court affirmed the award, rendering the following decision:

It is provided in subdivision 7 of section 15 of the workmen's compensation law (Consol. Laws, c. 67):

"The insurance carrier shall pay to the State treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of \$100."

The deceased, for whose death an award under this provision was made, left him surviving no widow, child, or dependent relative, and therefore no person entitled to compensation. The fact that the deceased himself received compensation for a brief period for disabilities resulting from his injuries has no significance. An award is payable to the State treasurer in a "case of injury causing death," and although the person dying temporarily receives compensation for disabilities during life he is nevertheless not, within the meaning of the provision, a "person entitled to compensation" in a "case of injury causing death." for the very obvious reason that when the payment is or can be made there has arisen no such case.

The award should be affirmed. All concur.

WORKMEN'S COMPENSATION—DEFENDANTS—"CHILD"—*Hasselman et al. v. Travelers Ins. Co. et al.*, *Supreme Court of Colorado* (Nov. 3, 1919), 185 *Pacific Reporter*, page 343.—Richard P. Hasselman was killed by an accident arising out of and in the course of his employment with the H. Koppers Co. His sole dependent was a minor sister, 17½ years of age, to whom the industrial commission allowed an award of \$2,500, payable \$34.72 per month, beginning March 31, 1917. This method of paying the compensation would make it extend over a period of about six years. The sister reached the age of 18 on September 10, 1917. The law provides that benefits payable to a child shall cease at 18. The employer's insurer admitted liability for compensation only for the period the dependent sister remained a minor, but the commission held that it was liable for the full award. The insurance company brought action in the district court to have the award cease as of September 10, 1917, and was granted judgment. The sister and the commission both appealed, and the supreme court reversed the district court and affirmed the award of the commission. It was the contention of the insurance

company that the compensation was payable only to a child or children under 18 years of age and that it could not be construed to mean a "minor dependent." After reviewing the various provisions of the workmen's compensation law relating in any way to children the court proceeded as follows:

When the above provisions are taken and considered together, it is obvious that the word "child" in each instance refers to and specifies the relationship of parent and child, or lineal descendant, and can not upon any theory refer to a person who, although a minor, stands in some other dependent relationship to a deceased employee.

The act contains nothing which either directly or by necessary, or even reasonable, implication, indicates an intent upon the part of the legislature to limit compensation in general to minor dependents only. To hold that the dependent in the case at bar is not entitled to the compensation which was awarded her would in effect thus limit the application of the act whenever it involved a minor dependent. The term "child" as used in the act can not be construed to mean "minor dependent." Such a construction would deprive widows, and in fact all designated dependents, if minors, of compensation after they came of age. There is no dispute but that if the claimant had been of full age at the time of the accident she would have been entitled to the full amount awarded, payable as directed by the commission.

WORKMEN'S COMPENSATION—DEPENDENTS—DUAL COMPENSATION—
Decker v. Mohawk Mining Co., Supreme Court of Pennsylvania (Jan. 5, 1920), 109 Atlantic Reporter, page 275.—Mary Decker's father was killed in an industrial accident, and the compensation board allowed her compensation under the act. Her mother remarried, and subsequently her stepfather was killed while in the employ of the Mohawk Mining Co. and she was again awarded compensation. The employer appealed, declaring that the legislature had no power under the constitution to permit double compensation under the compensation act. The court affirmed the decision, dismissing the employer's appeal, saying in part:

In section 307 of the workmen's compensation act (Acts 1915, p. 736):

"The terms 'child' and 'children' shall include stepchildren and adopted children, and children to whom (the employee) stood in loco parentis, if members of the decedent's household at the time of his death."

The referee finds that decedent not only stood in loco parentis to these children, who were members of his household at the time of his death, but that they were also dependent upon him. This conclusion would seem to fix their right to compensation through the stepfather. We find nothing in the act that prohibits this dual compensation. Moreover, it would seem to be expressly permitted. Section 204 reads:

That "the receipt of benefits from any association, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void."

If it is inequitable for children who are receiving compensation as a result of the death of their natural father to receive additional compensation on the death of their stepfather, but we do not so decide, an appeal should be made to the legislature, not the courts. Conditions may have so changed as to cause the prior compensation to be wholly inadequate, or the second husband's wages might raise the amount of their compensation, and, if inequality among dependents exists, yet the first paying company surely should not bear the entire burden. The appellant can not complain, as it is merely complying with its undertaking, directed by the act of assembly.

WORKMEN'S COMPENSATION—DEPENDENTS—ILLEGITIMATE CHILDREN—*Murrel v. Industrial Commission et al., Supreme Court of Illinois (Feb. 18, 1920), 126 Northeastern Reporter, page 189.*—John Hering was killed as the result of an accident. The industrial commission made an award of compensation to Alice Hering as his widow and five children under 18 years of age as his children. It was later discovered that John and Alice Hering had never been married and that the four older children were not John Hering's children, while the youngest, John, jr., was his child by Alice Hering. The circuit court set aside the award and the administrator of Hering's estate appealed. In affirming the decision setting aside the award the court held that the workmen's compensation law only applied to legitimate children. The decision is in part as follows:

Other questions are presented, but our decision is based upon the proposition that illegitimate children of a man are not included within the protection of the workmen's compensation act. The act as amended in 1915 (Laws 1915, p. 400) provided (sec. 7) for the payment of compensation for an injury resulting in death:

"(a) If the employee leaves any widow, child, or children whom he was under legal obligation to support * * * (b) If no amount is payable under paragraph (a) of this section and the employee leaves any widow, child, parent, grandparent, or other lineal heir, to whose support he had contributed within four years," etc.

The words of a statute will be construed in their ordinary sense and with the meaning commonly attributed to them under such construction unless such construction will defeat the manifest intention of the legislature. When the words have a well-settled meaning through judicial interpretation they must be understood, when used in a statute, to have that meaning unless a different meaning is unmistakably indicated. It is a rule of construction that *prima facie* the word "child" or "children," when used in a statute, will, or deed, means legitimate child or children, and will not be extended by implication to embrace illegitimate children unless such construction

is necessary to carry into effect the manifest purpose of the legislature, the testator, or the grantor. (*Blacklaws v. Milne*, 82 Ill. 505.)

The workmen's compensation act mentions only children, by which is ordinarily meant legitimate children, and there is no word in the act which indicates that the legislature used the word in any other than its ordinary sense. Indeed in paragraph (b) the words "or other lineal heir," used in connection with the words "any widow, child, parent, grandparent," seem to imply that the child, parent, grandparent mentioned must be a lineal heir—that is, that the relation must be legitimate.

Some cases in other jurisdictions have been referred to in which illegitimate children have been held entitled to the benefit of workmen's compensation acts, but the decisions have been made upon a construction of the particular statute involved and have usually been based up a question of dependency or of support as a member of the family. The right to compensation under the statute of 1915 does not rest upon dependency or support as a member of the family, but upon the existence of the relation specified in the statute and the legal obligation to support or actual contribution. The right is statutory and depends upon conformity with the terms fixed by the legislature. The policy of the State toward children born outside of the marriage relation has been very considerably modified from that of the common law by statute. The extent to which such modification should go is a question for the determination of the legislative department of the State and not of the courts.

The judgment is affirmed.

WORKMEN'S COMPENSATION — DEPENDENTS — ILLEGITIMATE CHILDREN—*Piccinim v. Connecticut Light & Power Co., Supreme Court of Errors of Connecticut* (Apr. 16, 1919), 106 *Atlantic Reporter*, page 330.—One Piedmonte was killed while in the employ of the defendant company. In 1909 Piedmonte agreed to marry Clotilde Piccinim but never fulfilled the agreement. He did, however, live with her from this time until his death. During this period three children were born to them, and now she and the three children are asking for compensation for his death. Award was granted to the children but not to the mother. Deceased had up to the time of his death cared for and supported the plaintiff and her three children as if they had been lawfully married. The court affirming the award in favor of the children rendered a decision from which the following is quoted:

Our act as enacted in 1913 defines dependents as meaning and including "members of the injured employee's family or next of kin who are wholly or partly dependent upon the earnings of the employee at the time of the injury."

The word "family" is one of elastic meaning, and is used in a great variety of significations.

But whatever be the accepted meaning of the word as used in the statutory definition under review, the three children claimants will

not be excluded from the family group to which the deceased belonged and over which he presided, unless that meaning is one which either directly or indirectly raises a bar of exclusion for them out of their illegitimacy. The question before us, therefore, comes down to this: Does their illegitimacy ipso facto forbid that they be regarded as members of the deceased's family for the purpose of receiving compensation?

It is, of course, true that one may not successfully assert a claim to membership in a family group and thereby secure benefits provided by the law whose presence in that group is a violation of the law. That is the position in which the mother of these children found herself, and the commissioner has for that reason properly refused to recognize her as belonging to the deceased's family and denied her claim to share in an award of compensation.

The children's position in that household was a very different one. They were not only innocent of their parents' wrongdoing, but their father, in caring for them, was acting in obedience to the mandate of the law. It was alike his legal and moral duty to maintain them, and it was quite within his legal right to do so in the most natural and convenient way by taking them into his household. That he kept his unlawful consort there also is a matter for which they were not responsible. They certainly should not be punished for his unlawful act in so doing or hers in remaining.

WORKMEN'S COMPENSATION—DEPENDENTS—PARTIAL DEPENDENCY—*Freeman's case*, *Supreme Judicial Court of Massachusetts* (June 25, 1919), 123 *Northeastern Reporter*, page 845.—Clarence E. Freeman, a boy of 16 years of age, went to Boston and entered the employ of the Automatic Time Stamp Co. While working for this company and before his first pay day he received injuries arising out of and in the course of his employment which resulted in his death. When he left his home he had promised his mother, who was partially dependent upon him, to send her all his wages that remained after he paid his board and bought necessary clothing. The boy's father was living, but was unable to support his family of a wife and five children. The industrial accident board allowed the mother an award, and the employer and its insurer appealed. In affirming the award the court said in part:

The question of dependency upon the earnings of a deceased employee under the workmen's compensation act is to be "determined in accordance with the fact, as the fact may be at the time of the injury. (Part 2, pp. 6 and 7; part 5, p. 2; *Bott's case*, 230 Mass. 152. 119 N. E. 755.) The fact was that at the time of his injury the deceased was at work for wages, which it was his declared purpose as well as his filial duty to send home. The circumstance that, the mother did not know that the son was working and that his intent was to send her the proceeds of that particular employment as fast as earned is not by itself decisive. A simple expression of purpose to contribute to support, unaccompanied by any actual contribution

after reasonable opportunity, would not constitute dependency. The case at bar, however, in substance and effect discloses injury to the employee before his first pay-day and before any opportunity had arisen to make contribution to the support of the dependent out of the wages of the particular service, and substantial contributions from the earnings of earlier work. Partial dependency may be found even though the dependent might have subsisted without the aid. (McMahon's case, 229 Mass. 48, 118 N. E. 189.) The deceased was a minor; hence a duty rested upon him to turn his wages over to the parent entitled thereto, and a correlative right to receive such wages vested in the parent. (Tornroos v. Autocar Co., 220 Mass. 386, 107 N. E. 1015.) The finding of partial dependency by the mother can not be pronounced erroneous in law. (Kenney's case, 222 Mass. 401, 111 N. E. 47.)

WORKMEN'S COMPENSATION—DEPENDENTS—REMARRIAGE OF WIDOW—VESTED RIGHT—*Newton v. Rhode Island Co., Supreme Court of Rhode Island (Jan. 10, 1919), 105 Atlantic Reporter, page 363.*—James E. Newton was killed while in the employ of the Rhode Island Co. as a result of an accident arising out of and in the course of his employment, and in accordance with the workmen's compensation act of the State of Rhode Island his widow was awarded compensation in the amount of \$7.64 per week for 300 weeks from May 22, 1915. On the 22d of August, 1916, Mrs. Newton was legally married to Nathaniel Major, jr. The Rhode Island Co. now seeks to have the award to the widow set aside on the ground that she is no longer dependent on the compensation awarded her for the loss of her right of support by her former husband and that her present husband being legally bound to provide for her support, she could no longer be called a dependent. The case was certified by the lower court to the supreme court for decision, the first and principal question being: "First, did the obligation of the respondent, the Rhode Island Co., to pay compensation to the petitioner cease by reason of the petitioner's second marriage?" In answer to this the court said:

The rights of the parties in the premises are wholly dependent upon the provisions of the workmen's compensation act, chapter 831, Public Laws, approved April 29, 1912, and the amendments and additions thereto. Unless said act expressly or by necessary implication authorizes the superior court to modify its decree upon the second marriage of the petitioner and because of such second marriage, the question must be answered adversely to respondents. The provisions of the act justify the respondent's contention that in passing upon the petitioner's claim for compensation her dependency was the point of supreme importance. By "dependency," however, the statute clearly intends a reliance for support upon the earnings of the workman at the time of the injury which results in his death, and not at any time thereafterwards. Manifestly no one can be regarded as a person dependent upon the earnings of a deceased workman after his death. It is therefore to the time of the injury alone

that the superior court was to look in determining who, if any, of the members of James E. Newton's family or next of kin, should be regarded as his dependent or dependents according to the terms of the statute. The superior court found and decreed that the petitioner was at the time of the injury wholly dependent upon the earnings of said Newton for her support. No appeal was taken from this decree; and the standing of the petitioner became fixed as the dependent of James E. Newton, and the person entitled to compensation from the respondent in the amount and for the period fixed by statute. It seems clear that during the lifetime of the petitioner, within the period named in the decree, her status in that regard, depending upon a finally adjudicated fact, can not be changed by extraneous happenings.

The court permitted the award to stand as originally decreed.

WORKMEN'S COMPENSATION — DEPENDENTS — REMARRIAGE OF WIDOW—VESTED RIGHT—*Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission, Supreme Court of Illinois (Feb. 20, 1919), 122 Northeastern Reporter, page 366.*—One Frank Lewis, who had been in the employ of the metal works company, was killed as the result of an accidental injury, and upon bringing proper proceedings his widow recovered compensation. The widow later married again, and the metal works company refused to continue to pay the compensation on the ground that as respects the widow and minor children of a deceased employee under the workmen's compensation act, the compensation is based on the theory of support for dependents and on that theory alone, and when the widow no longer is dependent upon the compensation she is no longer entitled to it. The commission entered a petition for a judgment to enforce the award. Judgment was awarded the commission in behalf of the administrator of deceased employee, and the metal works company brought error. In sustaining the judgment on the award the court said in part:

The workmen's compensation act contains no provision for the extinguishment of compensation where the widow of the deceased employee remarries, and we can see no reason, on principle, for reading such a provision into the act. We do not adopt the view of counsel for plaintiff in error that the basis of the act is merely that of providing support through "a period of adjustment," but, as its title indicates, the act is based on the idea of compensation for death or injury arising out of and in course of the employment. The act is also based on the broad economic theory that such death or injury is an incident of industrial activity and production, and that compensation therefor is properly chargeable as a part of the cost of such activity and production.

The legislature has power to place limitations upon the right of beneficiaries, but courts have not power to put a limitation upon

a right legally given by the legislature, unless by a fair construction of the act it can be said that such limitation was in furtherance of legislative intent. Such a limitation as is contended for by plaintiff in error can not be placed on this act, without reading into the act that which is not to be found either in its language or spirit. The right to compensation being a vested right of the beneficiary, the liability of the employer, on the vesting of that right, becomes fixed, and in the absence of an act of the legislature under which such right becomes divested, we are unable to see wherein the conduct of the beneficiary can be said to affect such liability on the part of the employer.

WORKMEN'S COMPENSATION—DEPENDENTS—RIGHTS OF CHILD ON TERMINATION OF PAYMENTS TO WIDOW—*Catlin v. William Pickett & Co., Supreme Court of Pennsylvania (Oct. 7, 1918), 105 Atlantic Reporter, page 503.*—Charles Catlin was killed while in the employ of the defendant company and left surviving him a widow and a minor child. The law limits payments to the widow to 300 weeks, and a dispute arose as to whether the child could be given an award to commence after the expiration of payment of compensation to the widow. The commission made such an award, which the trial court refused to disturb. The supreme court affirmed the decision of the court below, rendering the following decision:

The question which is squarely raised on the record is this: If both a widow and a dependent minor child survive a workman killed in the course of his employment, under the workmen's compensation act can an award be made in favor of such dependent minor child, to begin after the expiration of the 300 weeks during which the widow is to receive compensation and to continue until the child reaches 16 years of age? We think that such an award is required under section 307 of said act.

That section provides for compensation to be paid to a decedent's children, including therein those "to whom he stood in loco parentis," "if there be no widow or widower entitled to compensation," and, subject to certain contingencies, not necessary to be considered here, further provides that payments to children shall continue until each reaches 16 years of age, and as to all others shall continue for 300 weeks. This section then proceeds:

"Should any dependent of a deceased employee die, or should the widow or widower remarry, or should the widower become capable of self-support, the right of such dependent, or of such widow or widower, to compensation under this section shall cease. If the compensation payable to any person under this section shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased."

The contention of the appellant is that the above-quoted words "for any cause" are to be limited to the causes stated in the preceding sentences. We do not so construe them. An additional word or words

would have to be interpolated in order to reach that conclusion, and we are not at liberty to add them unless it is clearly necessary so to do in order to effectuate the legislative intent. No such necessity exists here. On the contrary, we are convinced that the addition of limiting words would defeat that intent. Compensation to decedent's children until they reach 16 years of age is expressly given "if there be no widow or widower entitled to compensation." At the expiration of 300 weeks the compensation to the widow or widower "ceases," and because of that "cause" the compensation to children still under 16 years of age arises, with the same effect as if they had "been the only persons entitled to compensation at the time of the death of the deceased."

The judgment is affirmed.

WORKMEN'S COMPENSATION—DEPENDENTS—WIFE NOT LAWFULLY WEDDED—*Temescal Rock Co. et al. v. Industrial Accident Commission et al.*, Supreme Court of California (June 24, 1919), 182 Pacific Reporter, page 447.—This is a proceeding by the Temescal Rock Co., employer, and others against the commission to have annulled an award granted under the workmen's compensation act to Dolores Lopez. One Silviano Lopez was killed by an accident arising out of and in the course of his employment with the Temescal Rock Co. Silviano and Dolores were both ignorant of the marriage laws, and when they had received a marriage license they both thought they had become man and wife and proceeded to live together as such. The commission allowed an award in favor of Dolores and the employer appealed on the ground that she was not the deceased employee's lawfully wedded wife. In affirming the award the court quoted the following subsection of section 14 of the workmen's compensation act of 1917 (Stats. 1917, p. 844):

"(b) In all other cases, questions of entire or partial dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

Continuing, the court rendered in part the following opinion:

Dolores Rodriguez does not come within the provisions of subdivision 1 of subsection (a). That part of the subsection includes only those who stand in the relation of husband and wife. Its language necessarily implies that the relation must be lawful, and therefore it excludes persons who, though not lawfully married, live together believing themselves to be husband and wife.

Subsection (b), however, clearly empowers the commission to inquire into the actual conditions of dependency and to ascertain whether or not the applicant was in fact dependent upon the decedent for support at the time of the injury, and finding such dependency complete or partial, thereupon to award compensation accordingly. Standing alone, this clause would authorize compensa-

tion to any person, regardless of relationship or place of abode. But it is expressly qualified and limited in these particulars by the provisions of subsection (c). The latter attaches two conditions to the powers given by subsection (b). The first one is that the person claiming to be a dependent must be "in good faith a member of the family or household of such employee." The facts found bring Dolores Rodriguez within these conditions. Lopez had a dwelling house and a household, consisting of himself and said Dolores. She was a member of that household. Both the findings and evidence show that she was living there and was such member in the utmost good faith, believing that she was the lawful wife of Lopez. The conditions are fully met by the facts.

WORKMEN'S COMPENSATION—DISABILITY—IMPAIRED FUNCTION—DEGREE—*Globe Indemnity Co. et al. v. Industrial Commission of Colorado et al., Supreme Court of Colorado (Jan. 5, 1920), 186 Pacific Reporter, page 522.*—This is an action to review an award of the Industrial Commission of Colorado in favor of one Matt Kamby, a miner, who was injured while in the employ of the Colorado Mining & Development Co. The Globe Indemnity Co. is the employer's insurer under the workmen's compensation law. Kamby was injured by a falling timber which broke his left leg about 2 inches above the knee. The result of this injury was so to impair the function of the leg as to render Kamby incapable of ever again engaging in the work of a miner, in which occupation he had been engaged for nearly all of 28 years. He was not a man of very high mentality. Three doctors testified as to the degree of Kamby's disability. Dr. Buchtel stated that Kamby would be disabled about 10 months, and thereafter the degree of disability would be 5 per cent. Dr. Stuver stated that "considering this man's occupation I believe that his permanent partial disability is not less than from 15 to 20 per cent." Dr. Hegner was of the opinion that Kamby would never be able to resume his occupation as a miner, and that his disability amounted to 70 per cent, which he believed might in time become greater, inasmuch as Kamby's usefulness was limited to his occupation as a miner. The award was granted in favor of Kamby on the basis of 70 per cent disability, and the employer and its insurance carrier appealed. The opinion of the court is in part as follows:

It appears that the rule contended for by plaintiffs in error for determining the "impairment of earning capacity of claimants," and which we will designate as "Rule No. 1," is, "The degree of disability is to be determined by the claimant's general impairment of earning capacity without respect to any particular kind of labor." to support which the following, among other authorities, are cited: *Grammici v. Zinn*, 219 N. Y. 322, 114 N. E. 397; *Goscarino et al. v. C. & D., Inc.*, 220 N. Y. 323, 115 N. E. 710; *Modra v. Little*, 223 N. Y. 452, 119 N. E. 853. Whereas the rule contended for by defendants

in error, and which we will designate as "Rule No. 2," is, "The degree of disability is to be determined by the claimant's impairment of earning capacity as it relates to the kind of labor at which he was employed when injured," to support which the following, among other authorities, are cited: *Duprey v. Md. Cas. Co.*, 219 Mass. 189, 106 N. E. 686; *Gillen v. O. A. & G. Corp.*, 215 Mass. 96, 102 N. E. 346.

We are of the opinion that the widest possible discretion is vested in the commission to determine whether, under a given set of circumstances and a particular state of the evidence, the first or second rule, or a combination of both, should be applied. Age, education, training, general physical and mental capacity, and adaptability may, and often should, be taken into consideration in arriving at a just conclusion as to the percentage of impairment of earning capacity.

The claimant in the instant case testified before the commission. They were thus enabled to make an application of these tests which is impossible to us. It will be observed that Dr. Hegner in his testimony gave due weight to these considerations, and that Dr. Stuver did not claim to do more than fix a minimum per cent of impairment of earning capacity. There is sufficient in the record as it comes before us to demonstrate that the commission was justified in finding, and may have found that, as to claimant's ability to change his occupation or perform general physical labor, he was a much older man than his years would indicate; that he was a person of low mentality and scant adaptability; that a 70 per cent impairment of his earning capacity as a miner, which might have been nothing more than a 5 per cent impairment of the general earning capacity of many men, was in fact, by reason of his special limitations, a 70 per cent impairment of his general earning capacity. It thus appears that the alleged error in the instant case goes solely to a finding of fact made by the commission upon conflicting evidence. That this court will not disturb such a finding so made is too well settled to admit of further discussion.

The judgment is therefore affirmed.

WORKMEN'S COMPENSATION — DISABILITY — INJURY TO FINGERS — LOSS OF USE OF HAND—*U'pdiike Grain Co. v. Swanson*, *Supreme Court of Nebraska* (Nov. 15, 1919), 174 *Northwestern Reporter*, page 862.—Albert Swanson was employed by the grain company as a carpenter and millwright. While engaged at his duties a heavy plank fell upon his hand, badly cutting and crushing it, so that he was totally disabled from working at his trade. Upon suit for compensation the court found that Swanson's third, fourth, and fifth fingers of his left hand were injured and awarded him compensation at the rate of \$12 per week for 30 weeks, basing the award on the schedule relating to injuries to fingers. Two physicians testified that a fair percentage of loss of the use of the hand was 50 per cent. Swanson was dissatisfied with the award and appealed, claiming that he should have compensation for 50 per cent of the loss of the use of

his hand. The court reversed the award and advised the entering of an award in accordance with Swanson's contention. The opinion in part is as follows:

We think the court erred in holding that the injuries were confined to the fingers alone. The evidence discloses that in its present condition Swanson's hand presents a case "involving permanent partial loss of the use or function" of that member and comes clearly within the provisions of section 3662, Rev. Stat. 1913, as amended, Laws 1917, ch. 85, sec 7.

This section provides two-thirds of the wages for 150 weeks for loss of the hand, and proportionate amounts for partial loss or loss of use.

Respecting the present condition of Swanson's hand, and that is the time to which the inquiry should be directed, the evidence is clear and seems to show that under the act, on the ground of "permanent partial loss," at the present time he is entitled to \$12 a week for 75 weeks from the date of the injury.

WORKMEN'S COMPENSATION—DISABILITY—"LOSS" OF FINGERS—LOSS OF USE—*In re Merchant's case*, Supreme Judicial Court of Maine (Apr. 8, 1919), 106 Atlantic Reporter, page 117.—Clarence N. Merchant was by occupation a painter, and while in the employ of the Maine & New Hampshire Granite Corporation he met with an accident which inflicted an injury upon him consisting of a laceration of the back of the left hand, and resulting in the loss of the use of two fingers but not in their amputation. Compensation was refused, and on appeal the decision was affirmed, the court saying in part:

It is agreed that the injury arose out of and in the course of the employment, and that the earning capacity of the claimant, who is a painter, has not been diminished by the accident.

The real and only issue is whether the claimant has "lost" these two fingers within the contemplation of R. S. ch. 50, sec. 16. and should receive the compensation specified therein, to wit:

"For the loss of the third finger, one-half the average weekly wages during eighteen weeks. For the loss of the fourth finger, * * * one-half the average weekly wages during fifteen weeks"—or whether he has suffered a partial disability and should be compensated as provided in section 15; the basis of compensation being the difference in his earning capacity before and after the accident.

The court, after reviewing the context of the statute, continued:

Throughout these sections when loss of use without removal or severance is contemplated, it is so stated in unambiguous words, and when "loss" is used it means loss in the ordinary acceptance of the term; that is, physical loss of a member.

It may be that in fixing an arbitrary compensation for the loss of these various parts the legislature purposely refrained from extending these provisions to loss of use, in all but the two excepted instances before referred to (loss of sight in both eyes, and paralysis due to injury to the spine) for the reason that a use which might be deemed loss at the beginning might be regained in whole or in part long before the expiration of the arbitrarily fixed period, while the loss by severance is irreparable. Some uncertainty might exist with regard to the one, none in regard to the other.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF HAND—LOSS OF USE OF ARM—*Pater v. Superior Steel Co., Supreme Court of Pennsylvania (Jan. 4, 1919), 106 Atlantic Reporter, page 202.*—The right arm of Elmer Pater, an employee of the Superior Steel Co., was caught in one of its rolls and badly crushed. Amputation followed, about an inch or three-fourths of an inch below the elbow, and the referee found that as a result Pater had suffered the loss of use of the right arm for all practical purposes and allowed an award for 215 weeks' compensation. Defendant contests this award, claiming that as the amputation was below the elbow only the loss of a hand resulted and that the compensation should be only for 175 weeks. The award of the referee was affirmed by the compensation board and by the court below. In affirming the award this court in rendering its decision said in part:

The act is remedial and should be given a liberal construction. But aside from this, under the fact found by the referee, the express words of the statute called for the award made to the claimant. He had permanently lost the use of his arm. While the act declares that amputation at any point between the elbow and wrist shall, ipso facto, be considered the equivalent of the loss of the hand, it further provides in the same clause that permanent loss of the use of an arm, with or without amputation, resulting from injuries sustained by a workman, shall be the equivalent of the actual loss of the arm. If in the present case there had been no amputation but the arm had been so crushed as to hang permanently useless at the side of the claimant, could his right to compensation for 215 weeks be questioned? The finding of the referee is that as a result of the injuries which he sustained in the course of his employment he has permanently lost the use of his arm, and the amputation which necessarily followed is not a determining factor in fixing the basis upon which compensation is to be allowed. This was the correct view of the learned court below.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF PART OF PHALANGE—*Edward E. McMorran & Co. v. Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 284.*—Alfred Habel was employed by the Edward E.

McMorran company, and during the course of his employment he sustained an injury to the index finger of his right hand. The injury arose out of and in the course of his employment and resulted in the loss of one-sixteenth of an inch of the first phalange of the right index finger. The injury after it had healed did not disable him in any way from the use of his finger or hand. The industrial commission allowed him an award under the schedule in the workmen's compensation act for permanent partial disability as for the loss of the entire phalange. The case was certified to the supreme court by the circuit court which had affirmed the award. In reversing the decision of the circuit court and modifying the award the court stated the facts, then quoted from a case decided by the New York Court of Appeals (*In re Petrie*, 215 N. Y. 335, 109 N. E. 549), as follows:

"We think we should hold that the provisions of the statute * * * become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost."

Continuing, the court said:

This, we believe, is a reasonable construction of such provision. The evidence shows, without contradiction, that the applicant lost but one-sixteenth of an inch off the first phalange of the index finger; that the injury did not interfere at all with the use of the distal joint; that the tip of the finger, while susceptible to cold and heat, did not in any way interfere with the use of the entire finger.

While we are of the opinion that a liberal interpretation should be given to this class of cases, yet such interpretation should not go to the extent of becoming absurd. It can not be reasonably said that the loss of one-sixteenth of an inch of the first joint of a finger is the loss of the first phalange or that the legislature so intended.

We are of opinion that the circuit court erred in quashing the writ of certiorari issued in this cause and that the industrial commission erred in making an award for $17\frac{1}{2}$ weeks at \$6 per week, for permanent partial disability, as provided in paragraph (e) of section 8 of the workmen's compensation act. The award of \$6 a week for a period of $6\frac{1}{2}$ weeks for total temporary incapacity is a proper award.

The case was therefore reversed and remanded, with directions to enter a finding in accordance with the views set forth above.

WORKMEN'S COMPENSATION—DISABILITY—TEMPORARY PARTIAL DISABILITY—REFUSING EMPLOYMENT—*Frank v. Deemer Steel Casting Co.*, Superior Court of Delaware (June 4, 1920), 110 Atlantic Reporter, page 561.—The plaintiff, Frank, was injured while in the employ of the defendant and was awarded compensation at the rate of \$10.50 per week based on a weekly wage of \$21, payments to continue dur-

ing the term of temporary total disability. He later petitioned the industrial accident board to commute his compensation into a lump sum. This the board did, but upon the appeal of the defendant to the superior court of New Castle, the decision of the board was reversed on the ground that the board had incorrectly classified Frank's injuries (108 Atl. 283). The defendant company then petitioned the board to reduce Frank's compensation, alleging that he was able to work and earn at least 25 cents per hour for a 52½-hour week and that his wage loss should be reduced accordingly. The company offered to reemploy Frank on the above terms but he refused. The board made an order reducing the amount of the award and Frank appealed. The superior court in upholding the decision of the board rendered in part the following decision:

The court believe it is not necessary to determine the general earning power of the injured employee in cases where work is offered suitable to his capacity by the employer, for the reason that under section 3193nn, Code 1915, section 133 of the Delaware workmen's compensation law of 1917, as amended, it is provided:

"If an injured employee refuses employment suitable to his capacity, procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the industrial accident board such refusal was justifiable. * * *"

We think that the industrial accident board was justified by the evidence and had the power and authority under section 133 to order Mike Frank, the claimant, to go to work for the Deemer Steel Casting Co., at the employment procured which was suitable to his capacity for work, and under section 103, subsection "b," to make an order reducing his compensation from \$10.50 per week to \$3.94 per week, until otherwise ordered by said board or terminated by the Delaware workmen's compensation law of 1917, as amended.

For the reasons stated, the award and order of the said board is in all things affirmed.

WORKMEN'S COMPENSATION—DISABILITY—"TOTAL LOSS OF ONE EYE"—LOSS OF POWER OF ACCOMMODATION—*Juergens Bros. Co. v. Industrial Commission et al., Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page 337.*—The claimant, Kaage, was employed by the Juergens Bros. Co. when he sustained an injury to his eye from an accident arising out of and in course of his employment. Various complications set in, resulting in an operation which necessitated the removal of the lens of the eye. The sight of the injured eye was reduced to such an extent that only with special lenses could it be used, and it could not in any case be used coordinately with the remaining good eye. Even when used alone and with special lenses the sight of the injured eye was greatly impaired. Kaage was awarded compensation at the rate of \$10.50 per week for

100 weeks, according to a special schedule contained in the workmen's compensation act, which allowed 100 weeks' compensation for the "total loss of one eye." The employer appealed, asserting that as Kaage had not suffered the total loss of vision in his injured eye, and that if he lost his remaining good eye he could still use his injured eye, he could not be allowed compensation for the total loss of one eye. The court refused to take this view of the case and affirmed the award, saying in part:

Paragraph "e" of section 8 of the workmen's compensation act, as amended in 1915 (Laws 1915, p. 403), provides:

"In addition to compensation during the period of temporary total incapacity for work resulting from such injury, * * * for the loss of the sight of an eye, fifty per centum of the average weekly wage during 100 weeks."

Plaintiff in error contends that should Kaage lose the sight of his good eye he could by the use of lenses gain the use of the injured eye, and therefore he has not lost the sight of the injured member. The question before this court is whether or not this man has for all practical uses and purposes lost his eye. The application of laws of this character should not be made to depend upon finespun theories based upon scientific technicalities, but such laws should be given a practical construction and application. For all practical purposes, when a person has lost the sight of an eye, he has lost the eye, and to say that the statute providing compensation for the loss of the sight of an eye does not apply here because of the remote possibility of Kaage losing his good eye, whereby he can through artificial means gain a certain amount of use of the injured member, is to place a construction on a remedial act which deprives it of all practical effect. Such could not have been the intention of the legislature in passing this act.

WORKMEN'S COMPENSATION—DISABILITY—WAITING PERIOD—LUMP-SUM SETTLEMENTS—*Raffaghelle v. Russell*, *Supreme Court of Kansas* (Dec. 7, 1918), *176 Pacific Reporter*, page 640.—Paul Raffaghelle was employed in the coal mine of the defendant Russell when a large rock fell upon a workman with whom he was working. In attempting to lift the rock from the injured man he strained himself, sustaining a femoral rupture. He was not totally disabled and continued to work, although he suffered great pain and was unable to do the heavier work of his occupation. He recovered compensation in the lower court and the employer appealed. In affirming the award for compensation the court said in part:

• Defendant contends that there was no evidence to sustain the finding of diminished capacity, and cites part of section 5896 of the General Statutes of 1915, which before the amendment of 1917 (Laws 1917, ch. 226), provided:

"That (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period

of at least two weeks from earning full wages at the work at which he is employed."

The statute quoted does not mean that, unless a workman's injuries totally disable him from laboring for the first two weeks succeeding his mishap, he can not recover. It means that, unless the injury is sufficiently serious to disable him for two weeks, the injury is considered by the statute to be too trivial for its concern. The statute would discourage malingering and the harassing of employers with petty claims of little or no merit. But it would never do to say that the courageous workman who sticks to his task notwithstanding his pain and injury is to be penalized for so doing. Neither would it do to say that an injured workman who in pain and distress and with the gratuitous help of his fellow workmen can still earn as much as he was wont to do before his strength and vigor were impaired is not entitled to compensation. A workman who is injured is not compelled to lay off then and there for two weeks to protect his rights under the act. The soldier who is wounded, but still "carries on," is looked upon as a hero; the injured workman who likewise attempts to "carry on" will lose nothing by so doing when his rights become a matter of judicial determination.

The court discerns no trouble as to the sufficiency of the evidence of diminished earning capacity. The plaintiff was so much distressed that he had to go to another State, to a mine where the coal vein was eight feet thick and where his "buddies" (friendly fellow workmen) would help him with heavy lifting. The court attaches no controlling significance to the fact that his semimonthly pay checks were sometimes as large or larger after his injury than they were before he was hurt. The evidence showed that in the days of his full vigor he occasionally took a lay-off to enjoy himself; since his injury he is occasionally compelled to take a lay-off because of pain which now attends his arduous vocation. These were merely circumstances to be considered with all the other facts, pro and con, in determining whether plaintiff's claim was genuine or spurious.

The trial court had allowed a request for a commutation to a lump sum, and the contention was made that it had erred therein, abusing its discretion. The supreme court recognized the possibility of a recovery within the period of eight years during which payments might continue, if the workman should undergo an operation, but this did not prove that the court had abused its discretion. Citing a provision of the Kansas statute authorizing lump-sum awards in cases where the employee is compelled to sue to recover benefits under the act, the court said:

Since the statute gave the injured workman a right to a lump-sum judgment, and merely added a grant of discretionary power to the court to modify that right, a failure to exercise a discretionary power which the trial court might or might not care to use does not ordinarily amount to abuse of discretion.

The judgment is affirmed.

WORKMEN'S COMPENSATION—DISFIGUREMENT—CONSTITUTIONALITY OF STATUTE—*Sweeting v. American Knife Co. et al., Court of Appeals of New York (Apr. 8, 1919), 123 Northeastern Reporter, page 82.*—The plaintiff, Sweeting, was employed in the grinding department of the American Knife Co. The explosion of an emery wheel destroyed the bridge of his nose, giving him what is commonly known as a flat nose, with deep scars upon his face. The commission made an award of \$2,500 for serious facial disfigurement according to the provisions of subdivision 3 of section 15 of the workmen's compensation law (Consol. Laws, ch. 67, as amended in 1916), allowing a maximum award of \$3,500 as compensation for disfigurement. The employer and insurance carrier insisted that this provision was unconstitutional and void because, as they argue, such injuries have no relation to the loss of the employee's earning power. The lower court affirmed the award of the commission and on appeal the award was again affirmed, the court of appeals saying in part:

The award would stand, therefore, though the facial disfigurement were unrelated to loss of earnings. But in truth it is related, and so the legislature must have found. One can not defeat a statute by a presumption that in its enactment the truths of life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others. There may, of course, be individual instances of disfigurement without impairment of earning power. That is true also where there has been the loss of a finger or a foot or an eye. Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.

This case was carried to the Supreme Court of the United States on appeal and there affirmed, in conjunction with other cases under the same statute. (See next case below.)

WORKMEN'S COMPENSATION—DISFIGUREMENT—CONSTITUTIONALITY OF STATUTE—LOSS OF EARNING CAPACITY—DUE PROCESS OF LAW—*New York Cent. R. Co. v. Bianc, American Knife Co. et al. v. Sweeting, Clark Knitting Co. (Inc.) et al. v. Vaughn, United States Supreme Court (Nov. 10, 1919), 40 Supreme Court Reporter, page 44.*—This decision is the result of appeals by three employers and an insurance carrier from orders issued by the appellate division of the Supreme Court of New York, and affirmed by the New York Court of Ap-

peals, affirming awards by the State industrial commission of compensation to the injured employees for facial or head disfigurement. It is contended that the provision of the compensation statute allowing awards for disfigurement, added by an amendment of 1916, is unconstitutional as an unreasonable exercise of the police power of the State, and that it deprives the employers of their property without due process of law because it allows compensation where no loss of earning capacity has been suffered. Mr. Justice Pitney delivered the opinion of the United States Supreme Court upholding the constitutionality of the provision.

He first called attention to the fact that the compensation law had been held constitutional by the court prior to the amendment. (*New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 [see Bul. No. 224, p. 232].) Continuing, Mr. Justice Pitney said:

The sole contention here is that the amendment of 1916 deprives the respective plaintiffs in error of property without due process of law, in contravention of the fourteenth amendment.

The argument is that an award for disfigurement, made wholly independent of claimant's inability to work, is not based upon impairment of earning power; that only such impairment can justify imposing upon an employer without fault compulsory payment by way of compensation to an injured workman; and hence that the "disfigurement clause" is not a reasonable exercise of the police power, but is arbitrary and oppressive.

Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work.

Under ordinary conditions of life a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing or at least less pleasing to employer, to fellow employees, and to patrons or customers. (See *Ball v. Wm. Hunt & Sons (Ltd.)*, 1912, App. Cas. 496.)

But we can not concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement, although it does not impair the claimant's earning capacity. (*Matter of Erickson v. Preuss*, 223 N. Y. 365, 368; 119 N. E. 555 [Bul. No. 258, p. 167]; and see opinion of Judge Cardozo in the present case, 226 N. Y. 199, 200; 123 N. E. 82 [above].) In view of this, and there being no specific finding of such impairment in these cases, it is proper

to say that in our opinion the "due process of law" clause of the fourteenth amendment does not require the States to base compulsory compensation solely upon loss of earning power.

The New York law as at first enacted, the Washington, and the Arizona laws presented for our consideration three different methods adopted for the purpose of imposing upon the industry the burden of making some compensation for the human wastage attributable to the hazards of the work. We were unable to find that any of these ran counter to the "due process" clause. Nor does that provision debar a State from adopting other methods or a composite of different methods provided the result be not inconsistent with fundamental rights.

And we see no constitutional reason why a State may not in ascertaining the amount of such compensation in particular cases take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.

For the reasons thus outlined it was not unreasonable, arbitrary, or contrary to fundamental right to embody in the New York workmen's compensation law a provision for a special allowance of compensation for a serious disfigurement of the face or head. Nor is there any ground for declaring that the allowance prescribed by the 1916 amendment exceeds the constitutional limitations upon the State power.

Judgments affirmed.

WORKMEN'S COMPENSATION—ELECTION—MINORS—*Chicago, R. I. & P. Ry Co. v. Fuller et al., Supreme Court of Kansas (Dec. 6, 1919), 186 Pacific Reporter, page 127.*—Fuller, a minor of 20 years, was injured in November, 1917, while in the employ of the railway company. The compensation law of Kansas by amendments made in 1917 automatically brought all employers and employees under the act, and those not desiring to be governed by the law were required to make a written election to that effect. The railway company submitted the question of Fuller's compensation for his injuries to an arbitrator, who made an award under the workmen's compensation act (Laws 1917, ch. 226) which was affirmed by the district court. Fuller appealed from the award, declaring that because he was a minor he was not subject to the provisions of the act. The court failed to take this view and affirmed the award, saying in part:

The appellants also contend that because Fuller was a minor when the accident occurred he was not bound by the provisions of the law making the statute applicable to employees who filed no notice of an election to the contrary. (Gen. Stat. 1915, sec. 5939; Laws 1917, ch. 226, sec. 24.) The argument is that the matter is contractual, and that a minor is not bound by his contracts. The compensation act by various references to minor workmen fairly shows an intention to bring them within its provisions. It is competent for the legislature to place upon minors the obligation of an affirmative election not to come within the compensation act in order not to be subject to its

provisions (*Young v. Sterling Leather Works*, 91 N. J. Laws, 289, 102 Atl. 395), and this it appears to have done. If the result sought to be attained is inconsistent with the general law with respect to the extent to which a minor is bound by his contracts, then the more recent act controls, the prior law being repealed by implication to the extent of the conflict. Provision is made in the statute for any right, privilege, or election accruing to an "injured workman" being exercised in his behalf by his guardian (Gen. Stat. 1915, sec. 5904), but the language obviously has no relation to the choice between coming within the law or rejecting its provisions before injury. The attention of the legislature having been directed to the matter of guardianship and no provision having been made for the action of a guardian in the matter of electing whether to come within the law or not, the inference seems just that the intention was for the minor to be left to make his own choice, or to change the choice which the State may be deemed to have made for him in the first instance.

The judgment is affirmed.

WORKMEN'S COMPENSATION—ELECTION—PRESUMPTION—*Storrs v. Industrial Commission, Supreme Court of Illinois* (Dec. 18, 1918), 121 *Northeastern Reporter*, page 267.—Jacob Dier was regularly employed by the foreman of the plaintiff, Storrs, who was engaged in no other business than the managing, maintaining, and keeping in repair of some 12 or 15 buildings. Dier was a painter, and in the course of his employment he received an injury to one eye which destroyed the sight. The law of Illinois was at the time elective; and Storrs had made no election. He therefore claims that he was not subject to the workmen's compensation act. The court, in affirming the judgment of the lower court that he was, spoke, in part, as follows:

Every employer enumerated in subdivision 1 of paragraph (b) of section 3 (sec. 128) is conclusively presumed to be subject to the act unless he elects to the contrary. Plaintiff in error (Storrs) made no election. Among the occupations, enterprises, or businesses enumerated in paragraph (b) are "the building, maintaining, removing, repairing, or demolishing of any structure, except," etc. If plaintiff in error was subject to the act, it was because he was engaged in the occupation or business of maintaining buildings. He looked after renting the property and collecting the rent, and for the purpose of keeping it in good condition he had a regularly employed foreman and also employed such other help as was needed. He engaged in no work of any kind for others and was not a contractor or builder. All he did was to look after and care for his property and that of his children. Lexicographers define "maintain": "To hold or keep in any particular state or condition; in a state of efficiency or validity; to keep up." It would seem clear that plaintiff in error was engaged in the business or occupation of maintaining buildings within the usual and ordinary meaning of that term. If he had not been the owner, but had contracted to look after, maintain, and keep

in repair the buildings for other owners, from whom he received compensation for his services, it could not reasonably be disputed that his business or occupation would come within the act. The fact that he was the owner and received his compensation from rents of the properties we can not believe to relieve him from liability under the provisions of the workmen's compensation act.

We are of the opinion the contention that the plaintiff in error was not engaged in an occupation subject to the act can not be sustained.

WORKMEN'S COMPENSATION—EMPLOYEE—COURSE OF EMPLOYMENT—*Farrington v. United States Railroad Administration et al., Court of Appeals of New York (Mar. 9, 1920), 127 Northeastern Reporter, page 272.*—John Farrington and another laborer were engaged in unloading some screenings for their employer from a Long Island Railroad freight car standing on the tracks of the railroad company. The two men had completed their days' work and had boarded a motor truck of their employer to return to their homes when the station agent of the Long Island Railroad, who together with a helper was endeavoring to shut the door of a box car, called to them to help him close the door. This the men did, but in so doing the tip of Farrington's finger was clipped off. An infection set in and he later died of tetanus. The lower courts affirmed an award by the industrial commission and the defendant appealed. The decision and award were reversed by the court of appeals on the ground that Farrington was not an employee of the railroad company and therefore the accident did not occur in the "course of employment" by the railroad company, so as to render it liable under the workmen's compensation act.

In taking this action, the court of appeals adopted the dissenting opinion of Judge Henry T. Kellogg in the trial in the supreme court, appellate division (179 N. Y. Supp., 920), which reads in part:

The agent [of the railroad company] testified that he had no authority to employ labor, and particularly to employ the two men whose help he asked. These men had finished their work and were about to go home on their employer's truck, when they were called upon to do a friendly act requiring the exertion of their strength but for a moment of time. To call their acts those of a new employment, rather than acts of kindness gratuitously performed, is to supply a mercenary motive, where the proven facts indicated that none existed.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT—WELL REPAIRER—*Otmer v. Perry, Supreme Court of New Jersey (Dec. 15, 1919), 108 Atlantic Reporter, page 369.*—Frank J. Perry was employed by Matilda Otmer to repair a well. He was paid \$8 per day and was free to make the repairs

in whatever way he deemed best. He worked on the pump for 3 days and then was discharged and another hired, but after some days the second man was also discharged and Perry was reemployed to finish the work at the old rate of \$1 per hour. There was only two hours' work, and in part payment Perry was to receive the old pump. While he was completing the work a pipe which had been insecurely joined slipped and injured his index finger, disabling him for 10 weeks. He brought proceedings under the workmen's compensation act and was allowed an award for 6 weeks. The employer appealed and the decision was reversed on the ground that Perry was an independent contractor and not an employee under the workmen's compensation act. The opinion of the court is in part as follows:

The work which the petitioner contracted to perform in this instance was of a distinct and specific character, in the execution of which he was unhampered and uncontrolled by the views and orders of an immediate superior; and when the work was executed the relationship of the parties arising out of the contract was at an end. In that fact inheres the distinction which differentiates the work or employment of the ordinary servant from that of an independent contractor.

The legal status existing between these parties under their contract was manifestly one in which the defendant contracted for a certain specific result, and left the *modus operandi* entirely to the petitioner. The defendant obviously was interested only in the specific result of reparation, and not in the means of its execution, and that feature of the contract was entirely left to the judgment and discretion of the petitioner.

The rule applicable to the situation is therefore that to which I have adverted, and not the familiar doctrine arising from the relationship of master and servant, arising out of the "*servitium*" of the civil and common law, as expounded in 1 Blackstone, 423. Emphasis is given to this distinction by the provisions of the act upon which this application is based, which provides that the word "employer" is declared to be synonymous with "master," and "employee" with "servant." Section 3, Laws 1911, ch. 95.

The judgment awarding compensation was therefore reversed.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—FINDINGS OF INDUSTRIAL BOARD—*Muncie Foundry & Machine Co. v. Thompson, Appellate Court of Indiana, Division No. 1 (May 9, 1919), 123 Northeastern Reporter, page 196.*—Thompson was employed by the machine company to unload coke from freight cars into bins provided for that purpose. He was paid 40 cents for each ton he unloaded. While at work a conveyor became stuck and his hand was injured while attempting to dislodge some lumps of coal. The industrial board allowed him an award for the injuries he sus-

tained. The company appealed, alleging that Thompson, inasmuch as he was being paid by the ton, was an independent contractor and not an employee and that the findings of the commission were not sufficient. The court held that Thompson was not an independent contractor, but also held that the findings of the commission were insufficient, saying in part:

It is frequently said in cases that—

“To draw the distinction between independent contractors and servants is often difficult, and the rules which courts have undertaken to lay down on this subject are not always simple of application.”

What contract, as an independent contractor, did the appellee have with the appellant? How many cars must he unload at 40 cents per ton, before his contract would be complete? Or during what period of time was he, under his contract, to unload cars for the appellant? As to each of these questions there is no answer found in this record favorable to the appellant.

Contracts are entered into for the purpose of acquiring rights, on the one hand, and imposing obligations on the other. The appellee could cease to labor for the appellant at any time he chose, and the appellant had the right to discharge him at any time it chose. Appellee's pay instead of being measured by the hour, day, week, or month, was, by this contract, to be measured by the ton of coke unloaded; but he was none the less a laborer, in the employ of the appellant, doing appellant's work at the time he received the injury in question.

In cases of this character there are five facts which must be found as a legal basis for an award of compensation, viz.:

- (1) That claimant was an employee.
- (2) That he received an injury by accident.
- (3) That the accident arose out of and in the course of the employment.
- (4) The character and extent of such injury.
- (5) Claimant's average weekly wage.

For the failure of the board to find facts necessary to sustain its award, this cause is reversed and remanded to said industrial board, with directions to restate its findings of fact, and for further proceedings not in conflict herewith.

WORKMEN'S COMPENSATION — “EMPLOYEE” — SHOT FIRER IN MINE—*Bidwell Coal Co. v. Davidson*, Supreme Court of Iowa (Nov. 15, 1919), 174 *Northwestern Reporter*, page 592.—The law of Iowa requires mines to employ shot examiners, and it is admitted that they are mine employees. The miners of the Bidwell Coal Co.'s mine considered it desirable that only one person be permitted to fire the dynamite shots used in blasting down solid coal. The miners worked for the mine under an agreement whereby they were to receive a certain sum per ton for each ton of coal mined. They were permitted to select the person who was to act as shot firer, and they were also permitted to discharge him. The company deducted a certain sum from

the amount to be paid the miners on each ton mined for the purpose of paying the shot firer, because it is part of a miner's duty to fire his own shots. The miners usually appointed the shot examiner to act as shot firer and had appointed one Medford to act in this capacity. Medford left and, with the knowledge and consent of both the company and the miners Davidson took his place as shot examiner and shot firer. While engaged in firing a shot Davidson was killed. The compensation commission refused to grant his widow an award on the ground that Davidson was not an employee of the company. On appeal the district court held that Davidson was in fact an employee of the company, and that compensation should be awarded. The company appealed to the supreme court, which affirmed the judgment of the district court allowing an award. The opinion is in part as follows:

Under the stipulation but one question remains open for consideration: Was Ben Davidson an employee of the plaintiff company at the time he received his injuries?

It is true, as a general proposition, and we think the record shows it was so understood in conferences between the miners and the company, that the management of the mine and the direction of the mine are vested exclusively in the operators of the mine, and that the miners have no right to abridge this right. The selection of a shot firer was given by the company to the miners in the mine, and it is said that whenever a majority of the miners in any mine decide to do so, they may select the shot firers for the mine. That is, the company, having authority to select its own employees, delegated to the miners the right to select certain persons to do certain work in the mine. The work to be done in the mine was for the use and benefit of the mine owners. The power to select the workmen rests originally and primarily in the owners. They may delegate that right to select to another. The selection made under this delegated power is the selection of the mine operators themselves.

This thing is clear: This man was working in the mine, doing work for the company in the mine, with the knowledge and consent of the company, and for the purpose of more effectually carrying on the work in which the operators were engaged. He was engaged at the time he was injured in performing an indispensable part of the mining operations carried on in the mine. He was doing a part of the business of mining for which miners were directly employed. The appellant knew that he was doing this work for them. If he had been employed directly by the company as shot firer, the liability of the company would be apparent under the workmen's compensation act. The fact that they had delegated to the miners the right to select him to do this particular work, indispensable to a proper carrying on of the work, does not change the relationship.

WORKMEN'S COMPENSATION—EMPLOYEE—VOLUNTEERS—*George S. Mephram & Co. v. Industrial Commission, Supreme Court of Illinois (Oct. 27, 1919), 124 Northeastern Reporter, page 540.*—Stephens was

employed by George S. Mephram & Co. to operate two paint mixers known as chasers. On the other side of the room in which Stephens was employed were two other chasers operated by Roberts. A heavy belt which turned the shaft that transmitted power to Roberts's chasers broke and had to be repaired by the millwright. The broken belt in no way affected Stephens's chasers. The foreman called Roberts and one Tipton to help put the belt back on the pulley. While they were doing this Stephens, who was passing, offered to do it for them, and before the foreman could prevent him he took a rod and attempted to push the belt on the pulley, but the belt pushed the rod against the pulley in which it became caught and whirled Stephens around and threw him to the floor. When picked up he was dead. His widow brought proceedings for compensation and was allowed an award, but on appeal the award was quashed. The widow appealed from the decision quashing the award, but that decision was affirmed by the supreme court. The opinion is in part as follows:

In the instant case deceased was neither required nor expected to assist in adjusting this belt. The foreman had called two men to help, and it is apparent no more were needed. It was merely a question of time until the belt would have been adjusted. There was no emergency. The condition of that belt did not affect the part of the work which deceased was employed to do. Deceased here volunteered his services, and before his foreman could command him not to perform the service he had placed himself in such a position that he could not save himself from injury. A "volunteer" is one who introduces himself into matters which do not concern him and does or undertakes to do something which he is not bound to do, which he has not been in the habit of doing with his employer's knowledge or consent, or which is not in pursuance of any interest of the master and which is undertaken in the absence of any peril requiring him to act as on an emergency.

As it appears from the testimony of the fellow employees of deceased that deceased was volunteering his services and was of his own volition intermeddling with something entirely outside the work for which he was employed, the judgment of the circuit court must be and is affirmed.

Judgment affirmed.

WORKMEN'S COMPENSATION—EMPLOYEE—WATCHMAN QUALIFIED AS DEPUTY SHERIFF—*Engels Copper Mining Co. v. Industrial Accident Commission et al.*, Supreme Court of California (Nov. 4, 1919), 185 *Pacific Reporter*, page 182.—The mining company had in its employ one Franklin H. Smith, who was a general utility man, fire marshal, and watchman. In order that he might perform his duties with the authority of law he was deputized as a sheriff. He had never served the sheriff in a criminal matter but had acted in several civil cases.

One evening a Mexican brought some whisky into one of the shacks and a drunken orgy ensued, in the course of which one of the occupants threatened gun play. Smith was called upon to quell the disturbance, and when he went to the shack he was shot and killed. His widow was awarded compensation, and the company brought certiorari to review the award, claiming that because Smith was a deputy sheriff his wife could not recover under the workmen's compensation law. The court affirmed the award. Its opinion, in part, is as follows:

Respondent relies upon section 8 (a) of the statute (St. 1917, p. 835), which defines the term "employee," and includes "all elected and appointed paid public officers," but excludes "any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of the appointee, but receives no compensation from the county or municipal corporation or the citizens thereof for the services of such duty." The section, however, provides:

"That such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment."

The question presented in the instant case involves the construction to be placed upon the words of the proviso above quoted. Petitioner contends that the "employment" referred to in the proviso has no relation to the performance of official acts, and that a deputized person can be an employee only when performing some act in no wise connected with his official duties. With this construction we can not agree. It would not, we think, require an express statutory reservation to secure to a deputy sheriff the right to compensation for an injury received in the course of working at a mechanical art or trade. The clause in question should not be regarded as intended to effect this purpose, and thereby be interpreted as a purely supererogatory enactment, if it may fairly be construed in such a manner as to give it a rational purpose. In our opinion the statute is to be construed in the light of the common practice of property owners to choose as watchman or special officers men who are deputized officers of the law and to secure the deputization of such watchman or special officers engaged by them as are not already deputies. It is obviously to this class of deputies that the excluding clause of the statute refers in sharp contrast to the provisions of the including clause. It is in the light of the meaning of the excluding clause that the proviso in question must be read. So read, its clear effect is to provide that, where a deputy performs acts which, while official in their nature, are advantageous to the employer and directed by him, not incidentally merely, but as part of the duties prescribed and contemplated in the contract of employment, then such deputy is acting in the course of his private employment within the meaning of the provisions of the workmen's compensation act.

Upon this view of the statute, petitioner can not escape liability to compensate the widow for the death of Franklin H. Smith on the

plea that in performing the duties incident to his employment he was also fulfilling a duty to the county.

The award is affirmed.

WORKMEN'S COMPENSATION—EMPLOYEE—WORKING DIRECTOR OF COMPANY—*Miller's Mutual Casualty Co. v. Hoover et al.*, Court of Civil Appeals of Texas (Nov. 8, 1919), 216 *Southwestern Reporter*, page 475.—This action was brought by the widow and surviving children of Guy Frank Hoover against the insurer of the G. B. R. Smith Milling Co. for compensation under the workmen's compensation act for the death of the husband and father of the plaintiffs. Guy Frank Hoover was general manager and head miller of the milling company. He was also a director in the corporation. He did not have authority to hire and discharge the employees of the company although occasionally he was permitted to do so, that function being exercised by the president, G. B. R. Smith, who took active part in the management of the business. Hoover was killed while in the performance of his duties as head miller, and upon proceedings being brought therefor the plaintiffs were awarded compensation. The insurer appealed, contending that because Hoover was a director in the corporation he could not at the same time be an employee and therefore recovery was barred under the act by the provisions as amended that "the president, vice presidents, secretary, or other officers * * * and the directors" of corporations which accept the act "shall not be deemed or held to be an employee within the meaning of that term as defined" in the act (article 5246-83, vol. 2. Vernon's 1918 Supp. Civ. & Crim. Stats.). The court affirmed the award, replying to this contention as follows:

We are unable to agree with the contention. The provisions of the quoted article, which exclude officials of the corporation from participating in the benefits of the act, we are convinced refer to them as such; that is to say, while they are engaged in the performance of the duties conferred on them by the directors or the by-laws of the corporation. The article purports to deal with them in that respect only. It neither directly nor inferentially denies the right of such officials to have other and different relations with the corporation. Conceivably, and not unnaturally, officers and directors of corporations might be employed in the performance of duties of a character wholly distinct from and unrelated to those ordinarily exercised as such officials. The act as a whole neither denies them the right to serve in the capacity of an ordinary servant or employee, nor denies the corporation the right to engage their services in that particular. If, as matter of fact, they are so otherwise employed, and that the employment is such as to bring them within the definition of "employee" contained in the act, and while so engaged they are injured, they are, in our opinion, entitled to the benefits of the act. What employees or servants are included in the definition, or

what particular test is to be applied to determine that issue, will depend largely upon the facts of each case.

In the present case it is not claimed that Hoover was engaged in the performance of his duties as director when injured. It is, in effect, conceded that his services were such as to raise the ordinary relations of master and servant, as it is also conceded that he was in the employ of the milling company under a contract of hire. Such being the facts, and having reached the conclusion that the article excluding corporate officials from the provisions of the act applies to them only as such, it becomes our duty to affirm the judgment of the trial court.

WORKMEN'S COMPENSATION—EMPLOYER — "BUSINESS" — OWNING AND RENTING HOUSES—*Lauzier v. Industrial Accident Commission of California et al., District Court of Appeal of California, Second District (Oct. 22, 1919), 185 Pacific Reporter, page 870.*—Clotilde Lauzier was a housekeeper for her son-in-law and daughter, who gave her "board and upkeep" in exchange for her services. She owned four small frame dwellings, the income from which was very meager. The houses were in the care of an agent, who collected the rent and looked after the property. The roof of one of the houses needed repairing, and the agent employed a carpenter to do the work, which consumed one hour and cost 30 cents. While descending from the roof of the house the carpenter fell and sustained injuries, for which the commission awarded him compensation under the act. Mrs. Lauzier claimed that she was not liable under the workmen's compensation act as amended (Stats. 1917, p. 831), and appealed. The award was annulled. The opinion of the court is in part as follows:

It is argued, however, by respondent, in justification of the award made that the amendment to the act made in 1917 worked an extension of the ordinary definition to be applied to the terms "trade or business," and made appropriate the inclusion of conditions which the facts of this case disclose. Particular emphasis is placed upon the amendatory phrases that the words, "trade, business, profession, or occupation of the employer," "shall be taken to include any undertaking actually engaged in by him with some degree of regularity." As we interpret that amendment, it is designed to have a clarifying effect only upon the original terms of the enactment. The use of the word "undertaking" we think of itself does not make less applicable the ordinary definition of the word "business," and we believe that that phrase should be read as though the word "business" immediately preceded the word "undertaking." Such seems to us to be the evident and plain meaning. It was no doubt the intention by the amendment to make it clear that the act should cover a business undertaking, whether the same was continually carried on or only engaged in at intervals. We do not intend to intimate it as our opinion that because the principal business of the petitioner was that of housekeeper she might not, still within the meaning of the compensation act, be engaged in other business enterprises. We hold

simply that the mere owning and renting of a house or houses by an individual for purposes of investment, conceding that such owner has no particular or principal business, does not come within the purview of the act.

The findings and award of the respondent commission are annulled. .

WORKMEN'S COMPENSATION—EMPLOYER—EMPLOYEE OF CITY CONTRACTOR—*City of Milwaukee v. Fera et al.*, *Supreme Court of Wisconsin* (Dec. 2, 1919), *174 Northwestern Reporter*, page 926.—The city of Milwaukee contracted with one Boadi for the removal of garbage from the city to the city's incinerator. Boadi was not under the workmen's compensation law. Fera worked for Boadi as a teamster and it was his duty to haul garbage to the incinerator. While he was leaving the incinerator with his team and wagon and the city's garbage box, on his way to the barn to put the equipment away, the horses ran away and the wagon was turned over, throwing Fera to the ground and seriously injuring him. Fera was awarded compensation by the industrial commission against the city of Milwaukee. The city appealed, claiming that Fera was not in its employ within the meaning of the compensation act, but the decision was affirmed and the award upheld. The opinion of the court, as expressed by Chief Justice Winslow, is as follows:

In order to be entitled to compensation under the workmen's compensation act, the claimant must have been, at the time of the accident, (1) an employee of the party of whom compensation is claimed, and (2) performing some service growing out of and incidental to his employment. (Stats., sec. 2394-3.) It seems clear to us that the claimant here answered both requirements.

It must be conceded not only that the claimant was in the employ of Boadi at the time of the accident but that he was then engaged in his regular work as such employee. Boadi was not subject to the provisions of the compensation act, and that act provides (Stats., sec. 2394-3) that an employer subject to the provisions of the act shall be liable for compensation to an employee of a contractor or subcontractor under him who is not subject to the act in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

The city of Milwaukee is subject to the provisions of the act, and this provision plainly made the claimant here the employee of the city while carrying out Boadi's contract with the city to the same extent that he was an employee of Boadi so far as the purposes of the compensation act are concerned. So there can be no doubt of the existence of the relation of employer and employee within the meaning of the compensation act at the time of the accident. That the claimant was then performing service growing out of and incidental to his employment seems equally beyond doubt. He was taking the garbage collection equipment, part of which belonged to the city, to its usual place of storage and care so that it should be ready for the work of the following day.

WORKMEN'S COMPENSATION—EMPLOYERS' LIABILITY—FEDERAL STATUTE—CONCURRENT EMPLOYMENTS—LIABILITIES OF JOINT EMPLOYERS—*San Francisco-Oakland Terminal Ry. v. Industrial Accident Commission, Supreme Court of California (Mar. 4, 1919), 179 Pacific Reporter, page 386.*—One Robinson was employed as a watchman by the Southern Pacific Co. and the plaintiff under an agreement between the two companies whereby the Southern Pacific Co. was to employ, direct, supervise, and carry him on its pay roll, but the plaintiff was to pay half of his salary. This arrangement arose out of the fact that the Southern Pacific Co. and the plaintiff maintained and operated parallel railway lines and only one watchman was necessary for both. The Southern Pacific Co. did both an interstate and an intrastate business, while the plaintiff did only an intrastate business. While performing his duties upon the simultaneous approach of trains over each of the lines Robinson was killed, and it was held by the commission that the injury arose out of and in the course of his employment. Robinson's widow executed a release as to the Southern Pacific Co., and proceeded for compensation against the plaintiff and was allowed an award from which the plaintiff appealed on the grounds that Robinson was not its employee and that as he was performing duties of an interstate nature for the Southern Pacific Co., the State commission was excluded from jurisdiction under the Federal employers' liability act. In affirming the award the court said in part:

We are also of the opinion that, upon the facts we have stated, the commission correctly held that the deceased was in the employ of both companies, and that therefore the relation of employer and employee existed between deceased and petitioner. This appears to us to necessarily be the result of the arrangement between the companies and their course of conduct thereunder. The deceased was engaged to perform his service for both companies, and was in reality paid his wages by the two companies, each paying one-half. That he was selected for this service by the Southern Pacific Co., was placed upon its pay roll as its employee, was under its supervision, direction, and control, and was given his wages by it, was simply the result of the arrangement between the two companies as to the method by which the thing contemplated should be done. In all this, including the contract of employment, the Southern Pacific Co. was acting on behalf of the petitioner as well as itself, and in no respect an independent contractor. We can not see, looking at the substance of the transaction, why petitioner and deceased did not fully measure up to the definitions of employer and employee contained in our "workmen's compensation, insurance, and safety act."

With regard to the petitioner's claim that the case came under the exclusive jurisdiction of the Federal employers' liability act because

deceased was, when he was killed, doing interstate work as well as intrastate work, the court said in part:

The claim further loses sight of the fact that the jurisdiction of the State commission is excluded by the Federal employers' liability law only as to such matters as are covered by the act, and necessarily the Federal act can not be held to affect the rights under the State law of an employee of a common carrier by railroad in no way engaged in interstate commerce, or the rights of his dependents in event of his death, to obtain compensation under such State law on account of injuries or death occurring in the course of his employment by such carrier and arising out of such employment.

It is suggested, though not argued by petitioner in his briefs, that a release given by the claimant to the Southern Pacific Co. had the effect of releasing petitioner. It appears that, prior to the commencement of this proceeding before the commission, the claimant, in consideration of \$250 paid her by such company, executed a written release of the company from all claims and causes of action on account of the death of her husband. This amount was credited by the commission to petitioner in its final award, thereby reducing the full compensation of \$1,539 by \$250. The release did not "provide for the payment of full compensation in accordance with the provisions" of the act, and it was never "approved by the commission." In so far as any claim under the workmen's compensation, insurance, and safety act is concerned, it was therefore invalid (sec. 27), and it is material only in considering any claim that may be asserted against the Southern Pacific Co. under the Federal employers' liability law.

The award is affirmed.

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF REMEDY—BENEFITS TO FIREMAN UNDER CITY CHARTER—*Markley v. City of St. Paul*, Supreme Court of Minnesota (May 9, 1919), 172 Northwestern Reporter, page 215.—Markley was in the employ of the city of St. Paul as a fireman when he was injured. His injuries were sustained in the course of his employment, and he demanded, and upon refusal he sued for, six months' full salary while he was disabled. According to the provisions of the city charter of May, 1912, as set forth in section 52, he was entitled to this salary; but the city claims that, as it and the fireman are both subject to the provisions of the workmen's compensation act, Markley can not have the benefit allowed in the charter. Defendant demurred to the complaint, the demurrer being overruled and, upon its refusal to plead further, judgment was entered for plaintiff. In affirming this judgment the court said in part:

That a member of a fire department is an employee within the meaning of the workmen's compensation act was settled in *State ex rel. City of Duluth v. District Court* (134 Minn. 28, 158 N. W. 791 [Bul. No. 224, p. 344]). We are of the opinion that section

52 of the charter remains in force, notwithstanding the compensation act passed subsequently thereto.

Our constitution, amended in 1898, authorizes cities to frame their own charters, which must be consistent with and subject to the laws of the State. (Sec. 36, art. 4.) The statute enacted to make the foregoing constitutional amendment operative, and under which the charter in question was amended, is section 1345, G. S. 1913. [Section quoted.]

The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs.

The theory of the compensation act includes the idea that the wage earner ought not to be required to bear the whole result of a personal injury arising out of and in the course of his employment, and that the community ought to share in the loss. The carrying of this theory into practical effect, the subject of which is one of public policy, must necessarily be committed to the legislature for governmental control. But such provision will not prevent a city operating under a home-rule charter from providing additional compensation to a fireman injured in the course of his employment. Nor is a charter so providing inconsistent with the object of the compensation act. It follows that section 52 of the charter in question was not repealed, but remains in force. If the city wishes to avoid the provisions of the same, it must do so by a repeal of the section in question by proper authority.

Affirmed.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—COMITY—*Union Bridge & Construction Co. v. Industrial Commission, Supreme Court of Illinois (Feb. 20, 1919), 122 Northeastern Reporter, page 609.*—Eloy Williams was in the employ of the plaintiff company as a laborer or "sand hog." He was engaged in excavating sand and mud for the purpose of sinking a caisson in the river. The caisson was attached to the river bottom on the Kentucky side of the Ohio River. When passing over a plank from the caisson to a barge where the workmen were permitted to rest and get coffee Williams slipped and fell into the river and was drowned. His mother applied for compensation and her application was rejected by the arbitrator. The commission reversed the arbitrator and allowed an award, and on appeal the circuit court affirmed the award. In reversing the circuit court and refusing to allow the award to stand the supreme court said in part:

It is assigned for error that the circuit court erred in holding the workmen's compensation act to apply to injuries occurring outside of the State. No law of this State has any effect as law by its own force beyond the territorial limits of the State, and if it is enforced in any other jurisdiction it is by the rule of comity; but a law effective in this State as such may create rights and liabilities arising from acts occurring outside of the State.

The compensation act has been held, on account of its elective features, to create a contract obligation, but the obligation so created

is that the employer will provide and pay compensation according to the provisions of the act, and he does not agree to provide and pay compensation for injuries not included within the act. There have been decisions in other States that compensation is to be awarded for injuries occurring beyond the territorial limits of the State, but they have been based upon provisions of the acts showing such a legislative intention.

The decision was within the rule that the act being elective in nature every provision of the act became a part of the contract, and the employer became bound to pay according to the terms of the act. The workmen's compensation act of this State is remedial in its nature, and should be liberally construed to carry out its beneficent object; but there is no provision of the act which can be construed to authorize compensation for an injury occurring outside of the State.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—CONSTITUTIONALITY OF STATUTE—DISCRIMINATORY PROVISIONS—*Quong Ham Wah Co. v. Industrial Accident Commission et al.*, *Supreme Court of California* (Oct. 5, 1920), 192 *Pac. Reporter*, page 1021.—Owe Ming, while working for the Quong Ham Wah Co. under a California contract, but outside the State, was injured, and upon submitting his case to the industrial accident commission of California was granted an award of compensation. The Quong Ham Wah Co. appealed and the decision granting the award was reversed on the ground that the section of the law depended upon was unconstitutional. A rehearing was granted, however, and the earlier decision was reversed and the award permitted to stand. The point in dispute involved the question of the extraterritorial effect of the statute and the constitutionality of section 58 of the workmen's compensation act, which reads as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." (Stats. 1917, p. 870.)

Judge Lennon in rendering the decision of the majority of the court, said in part:

In the instant case, the compensation act does not give the commission jurisdiction over controversies arising out of injuries sustained abroad by workmen who are not residents of California. It is clear, therefore, that a nonresident would have no standing before the commission or before any court to make a claim under the act; and, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensa-

tion nor the constitutional question involved. Since, therefore, no member of the class discriminated against can ever raise the constitutional question, the petitioner is entitled to assail the constitutionality of the statute, since a determination of that question is clearly relevant in determining its rights herein.

The theory of territorial sovereignty has been too long established as a principle of international law to admit of question at this time. Rights created by one State may be recognized and enforced by another State at its pleasure, and likewise a status attached to a person by one State may be recognized by another State, into which that person may travel, at the pleasure of the latter State; but as law the mandates of the sovereign of a given State can have no effect beyond the territorial limits to which his rule is extended. When, therefore, it is said that a statute, such as the workmen's compensation act, has an extraterritorial effect, it can not mean that the law does, or attempts to, create rights abroad; it can only mean that an act occurring beyond the geographical limits of the State is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within this State. The power of an absolute sovereign to thus sanction the enforcement, within the territory subject to the jurisdiction of that sovereign, of rights based upon acts occurring abroad, can not be questioned upon the ground of any inherent deficiency. It is therefore a power which may be exercised by this State, subject only to the restrictions of the State and Federal Constitutions.

We may assume, in accordance with the contention of respondents, that if the imposition of the obligation to compensate a servant, not domiciled within the State, for injuries sustained without the geographical limits of the State, were an attempt to create an obligation merely as an incident to a status, such legislation would conflict with well-defined principles. The effect and purpose of the act now under consideration, however, can not be held to be the regulation of a status or imposition of a tort liability. It is true that the extension of the liability imposed by the act to acts occurring beyond the territorial limits of the State can not be supported on the simple theory that the obligation so imposed is, strictly speaking, purely a contractual liability, for the proposition that a compulsory statute is a contract has been definitely repudiated by this court. (*North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 Pac. 93 [Bul. No. 246, p. 231].)

The right of the legislature to impose reasonable regulations upon contracts subject to its sovereignty is unquestioned. When, however, the legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment when entered into in this State by citizens of this State, and that that privilege shall not be incident to identical contracts of employment when entered into in this State by citizens of other States of our Union, the enactment is clearly in contravention of section 2, clause 1, article 4 of the Federal Constitution.

The Constitution provides that:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the

internal policy of the State or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a State may, in the valid exercise of its police power, limit the right of individuals to engage in certain professions or callings. Such regulations will be upheld, even though their effect is indirectly to place noncitizens at a disadvantage, but the regulation must be inherently reasonable.

Respondents make the contention that the court should uphold the right of the State to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the State as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other States.

No consideration of public policy requires that citizens of sister States be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister States as strongly as they require their extension to citizens of this State furnishes absolutely no sound reason for the exclusion of the former, and affords no reasonable basis for the discrimination.

It follows that the discrimination made in section 58 of the workmen's compensation act contravenes the provisions of the Federal Constitution.

It is contended, however, and correctly, that the provisions of the Federal Constitution do not have the effect of rendering invalid that portion of the workmen's compensation act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid, and automatically and without regard to the intent of the State legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister States. In support of this contention respondents rely upon *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. No good reason has been advanced for departing from the doctrine therein declared.

Where a State by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other States, the Federal Constitution operates, by the very force of its own language, to place citizens of other States in the same category and upon the same footing as citizens of the State, in so far as concerns the right to have and enjoy the privileges and immunities conferred by the State upon its own citizens. In other words, the Federal constitutional provision was designed for the protection of noncitizens, and therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen.

It follows that, despite the invalidity of the discrimination, the statute itself is valid, and may be made to apply uniformly to citizens of California and the citizens of the other States.

The award is affirmed.

Following this decision, the Quong Ham Wah Co. sought to have the case reviewed by the Supreme Court of the United States on a writ of error, but the court dismissed the case for want of jurisdiction (Mar. 21, 1921, 41 Sup. Ct. 373), saying in part:

It is elementary that this court is without authority to review and revise the construction affixed to a State statute as to a State matter by the court of last resort of the State.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—WHAT LAW CONTROLS—PLACE OF MAKING CONTRACT—*Thompson v. Foundation Co. et al.*, *Supreme Court of New York, Appellate Division, Third Department (June 30, 1919)*, 177 *New York Supplement*, page 58.—The defendant company is a New York corporation having its principal office in New York City, but carrying on construction work in Pennsylvania. Thompson while in New York received a letter from the defendant's boss carpenter in Pennsylvania making him a tentative offer of employment in the latter State. Thompson did not respond to the letter, but later went to Pennsylvania and there entered the employ of the defendant as a carpenter. He was injured and was awarded compensation by the Pennsylvania Workmen's Compensation Board. After receiving these benefits for nearly one year he put in a claim for compensation with the New York commission and was granted an award. From this award the defendant appealed. In reversing the award the court said in part:

The award was granted solely on the theory that the contract of employment was entered into in the State of New York, whereas the undisputed facts clearly established that the contract was made in the State of Pennsylvania. The letter which he received in New York was an incomplete and indefinite offer, the acceptance of which in New York would not have created a contract, for the offer contained no term concerning compensation, hours of labor, character of work, or any other thing by which the employer would be definitely bound, if there were an acceptance.

Moreover, there was no overt act on the part of the claimant, unequivocally indicating an acceptance of any offer, through which claimant would be bound, were the offer sufficient. He started on a journey for Jefferson, Pa., on receipt of the letter; but this may or may not have been for the purpose of accepting the indefinite offer made him. It is clear that the contract was made in Jefferson, Pa., where a written agreement was entered into between the claimant and his employer.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—INDEPENDENT CONTRACTOR—*Cinofsky v. Industrial Commission*, *Supreme Court of Illinois (Dec. 17, 1919)*, 125 *Northeastern Reporter*, page 286.—Cinofsky was engaged in the junk business and maintained a

junk yard where he had engines and boilers stripped and other metal prepared for use by foundries. Decker had worked for Cinofsky off and on for 13 years. He came to Cinofsky on October 25, 1917, and applied for work. Cinofsky told him that he was expecting some cars of scrap iron to arrive, and that as soon as the cars were placed he could go to work on them, and that meanwhile he could strip some engines, for which he would be paid \$4 per engine. Decker went to work on the engines, and while so working with a chisel and hammer a piece of steel flew off and struck him in the eye, so injuring it as to necessitate the removal of the eyeball. Decker sued for compensation under the workmen's compensation law and was granted an award, which on appeal was affirmed by the circuit court. The employer brought certiorari to review the award, claiming that the junk business is not extrahazardous, and, therefore, did not come under the law, and, further, Decker was an independent contractor and not an employee within the meaning of the law. The court affirmed the award, and said in part:

Counsel for plaintiffs in error argues that the business or enterprise in which plaintiffs in error were engaged did not bring it within the classification set forth in section 3 of the workmen's compensation act (sec. 128) as extrahazardous, and that as they had not elected to come under the act they could not be held liable thereunder unless it is shown as a matter of fact that the business was extrahazardous. (*Hahnemann Hospital v. Industrial Board*, 282 Ill. 316, 118 N. E. 767 [Bul. No. 258, p. 188].) This court held in this last case that a hospital conducted under certain character might be a hazardous business while it would not be so under others. The mere receiving or buying of junk of a certain character might not be extrahazardous, but that was not the whole of the plaintiffs in error's business. The evidence shows that they were operating a junk yard—that is, they were collecting, sorting, and preparing junk and metals for market—and that in this work they were sometimes required to use shears driven by electric motor and an acetylene torch. There can be no question that the preparation of this junk for sale was a necessary part of the business, and that the work was of such a nature as to bring it within the rule of being extrahazardous in fact; plaintiffs in error should be held within the act on that account.

Counsel for plaintiffs in error also argues that the applicant, Decker, was not an employee but an independent contractor. The evidence already set out shows that on this point it was conflicting. Decker and Ashcraft testified that they were employed and held on piecework only until certain cars were set, when they were to be paid by the day, and it is conceded that they did not furnish their own tools. It has been held that the principal test as to whether one is an employee or an independent contractor lies in the degree of control retained and exercised by the person for whom the work is being done. Little supervision was required for this particular work. If the applicant once had his instructions, it would not be difficult for him to proceed with his work of stripping the engines

without any interference from his employer. The mere fact that the employment is for one job only does not necessarily take the employment from under the act. (*American Steel Foundries v. Industrial Board*, 284 Ill. 99, 119 N. E. 902.)

The judgment of the circuit court will be affirmed.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—STENCIL CUTTER IN BUSINESS OFFICE—*Gowey v. Seattle Lighting Co.*, Supreme Court of Washington (Oct. 15, 1919), 184 Pacific Reporter, page 339.—Elizabeth C. Gowey was a clerk in the office of the defendant lighting company. She was injured in the course of her employment by having her hand crushed in the machinery of an electrically-driven multiple-head imprinter with which she was making zinc plates or stencils for the printing of gas bills. She sued for damages for personal injuries, claiming that because she was a clerk and her work was not "hazardous" she was not required to proceed under the workmen's compensation law. The trial court failed to accept this view and rendered judgment for the defendant, and Miss Gowey appealed. The court affirmed the judgment, declaring that the work she was engaged in when injured was "hazardous" within the meaning of the workmen's compensation law, and said in part:

Among the extrahazardous works enumerated in the workmen's compensation act (sec. 6604-2, Rem. Code) are "factories, mills, and workshops where machinery is used."

Was the office of the defendant a "factory" or "workshop" wherein power-driven machinery was being employed, in so far as the operation of this machine by electric power in the making of zinc plates or stencils was concerned, within the meaning of the workmen's compensation act? We think it was. It is plain that the machine was a power-driven machine, and that the operation of it in the making of zinc plates or stencils was the manufacture and change of zinc plates into the form of stencils; we also think the conclusion can not be escaped that such work was extrahazardous, regardless of the fact that it may have been carried on in the general offices of the defendant rather than in some place apart from the office. Plainly, it was not clerical work. Its character, to our mind, was not different than if it had been carried on in a manufacturing plant devoted exclusively to such work. We are equally convinced that the plaintiff was engaged in extrahazardous work when she was operating this machine, though she also had other duties of a clerical nature, even though such duties constituted the larger part of her employment.

WORKMEN'S COMPENSATION—INJURIES—ACCIDENT—POWERS OF COURTS—*E. Baggott Co. v. Industrial Commission et al.*, Supreme Court of Illinois (Dec. 17, 1919), 125 Northeastern Reporter, page

254.—Joseph Cripps was employed as a plumber by the E. Baggott Co., which was engaged in installing plumbing in a building. Cripps was working on the sixth floor and along with another man was engaged in lifting bundles of iron pipe from the ground by means of a derrick and hand windlass. He was a strong man and in good health and had never suffered any hemorrhages or trouble with his heart. The last load of pipe the two men lifted weighed about 250 or 300 pounds, but was not out of the ordinary and did not require any unusual exertion to raise. When the load had been landed Cripps suffered a hemorrhage and coughed up blood and asked the foreman to get a doctor. Later the hemorrhages recurred until, after 12 days, Cripps died. A post-mortem examination disclosed a large longitudinal tear and several smaller transverse tears in the walls of the aorta. The industrial board allowed an award under the workmen's compensation act and the employer appealed. The circuit court affirmed the award and entered judgment thereon ordering the issuance of execution. The employer again appealed and the award was again affirmed, but the order issuing execution on the judgment was reversed. The employer contended that the death of Cripps was not the result of an "accident" under the compensation act, but was due to a preexisting disease of the heart. The opinion is in part as follows:

In the instant case all the characteristics of an accident were present. The occurrence was sudden, unexpected, and undesigned by the workman. The circumstances were clearly such that the commission was justified in finding that the hemorrhage was due to blood pressure intensified by vigorous muscular exertion. Relating the hemorrhage to physical exertion, rupture of the aorta by force from within was as distinctly traumatic as if the canal had been severed by violent application of a sharp instrument from without. There was no direct evidence of extraordinary exertion suddenly displayed. When last observed before the first hemorrhage, the deceased was working in the manner habitual to his employment. The fact remains, however, that an extraordinary and unforeseen thing suddenly and unpremeditatedly occurred, and presence of all the essential attributes of accident can not be gainsaid. There was ample evidence in the record to justify the finding of the industrial commission that the deceased came to his death by accident, and the circuit court therefore properly confirmed the award. (*Peoria Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N. E. 651; *Matthiessen & Hegeler Zinc Co. v. Industrial Board*, 284 Ill. 378, 120 N. E. 249 [Bul. No. 258, p. 159]; *Western Electric Co. v. Industrial Com.*, 285 Ill. 279, 120 N. E. 774; *State v. District Court*, 137 Minn. 30, 162 N. W. 678.)

The circuit court erred in entering a judgment directing the payment of the award of the commission and ordering execution thereon. The only authority which the circuit court had on review by certiorari was to confirm the findings and award of the industrial commission or to set aside the same and enter such a decision as is justi-

fied by law or remand the cause to the commission for further proceedings. (*Baum v. Industrial Com.*, 288 Ill. 516, 123 N. E. 625; *Otis Elevator Co. v. Industrial Com.*, 288 Ill. 396, 123 N. E. 600.)

The judgment is therefore reversed, and the cause remanded to the circuit court of Cook County, with directions to enter an order confirming the decision of the industrial commission.

WORKMEN'S COMPENSATION—INJURIES—DISEASE CAUSED BY ACCIDENT—*Murdock v. New York News Bureau, Supreme Court of Pennsylvania (Feb. 10, 1919)*, 106 *Atlantic Reporter*, page 788.—Murdock was employed as a lineman by the defendant. While engaged in his work on a pole he came into contact with a highly charged electric wire which caused him to fall to the ground. In landing his knees "doubled up" and struck him violently on the chest, making breathing difficult. Three days later he returned to work, but was not able to resume his former duties, and because of the pain he suffered he was obliged to again return to his home, and 10 days after the accident he died from lobar pneumonia. Murdock's widow was awarded compensation, which on appeal was affirmed by the common pleas court. Appeal was again taken on the ground that the evidence did not show that the disease from which Murdock died was the result of the injury received at the time of the accident. In affirming the award the supreme court said on this point:

The findings of the referee clearly show the injury to the chest resulted in continuous pain from the time of the accident until the trouble was diagnosed by the physician as lobar pneumonia, and we find nothing in the record to justify the inference that, between the time of receiving the injury and the development of the disease, there were other causes from which pneumonia might have been contracted. That the physician failed to discover a fractured rib does not detract from the weight to be given the undisputed facts that a blow on the chest received was followed by continuous pain, resulting a week later in the disease which finally caused death. The nature of the injury and its resultant effects, followed so closely by the development of the disease, constitute sufficient evidence to support the conclusion of the referee and the court below, particularly as a consideration of the record indicates ample expert medical testimony upon which the referee based his conclusion that the injury to the chest was the proximate cause of the disease which terminated in the death of claimant's husband.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—ANTHRAX—ACCIDENT—*Chicago Rawhide Mfg. Co. v. Industrial Commission et al., Supreme Court of Illinois (Feb. 18, 1920)*, 126 *Northeastern Reporter*, page 616.—The Chicago Rawhide Manufacturing Co. had in its employ a foreman by the name of Tophoven.

Tophoven while getting dressed for work one morning scratched open a pimple on his neck. During that day he handled many hides in the employer's factory. The pimple became infected with anthrax bacilli and later caused Tophoven's death. His widow upon application was awarded compensation under the workmen's compensation act, and the employer brought error on the ground that the finding of an accidental injury was not warranted by the evidence. The court affirmed the award, saying in part:

It is a reasonable conclusion from the evidence that the anthrax bacillus came in contact with the abrasion on Tophoven's neck, caused by his scratching off the pimple on Saturday morning. Nobody saw the anthrax bacilli enter his system. In the nature of things the entrance of the microscopic organism was not perceptible, but the broken skin was there, the swelling followed, the characteristic malignant pustule developed, the rapid destruction of tissue occurred, the anthrax bacillus was present, and the speedy death resulted. This sequence of events is scarcely susceptible of any explanation except the acquiring of the anthrax bacillus from the hides in plaintiff in error's tannery. Indeed, no attempt is made by the plaintiff in error to account for Tophoven's inoculation with anthrax bacilli, but the plaintiff in error relies wholly upon the insufficiency of the proof against it.

These circumstances tend to show that Tophoven contracted the disease by an accident arising out of his employment.

There was evidence from which the industrial commission might find that the defendant contracted anthrax on Saturday morning at the plaintiff in error's factory by accidentally coming in contact with the anthrax bacillus in the course of his employment, and that his death was the result of such accident. In *Turvey v. Brinton* (1905) A. C. 230, and *McCauley v. Emperial Woolen Co.*, 261 Pa. 312, 104 Atl. 617, the contracting of anthrax, from which the employee died, was held to be an accidental injury.

The judgment of the circuit court will be affirmed.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—
ANTHRAX—*Eldridge v. Endicott, Johnson & Co. et al.*, *Court of Appeals of New York* (Jan. 20, 1920), 126 *Northeastern Reporter*, page 254.—Eldridge was employed as a subforeman in the defendant company's tannery and his work involved the handling of hides. In November, 1915, he was cut on the neck while being shaved by a public barber and later went to work with this open sore. The sore developed into a pimple and three days later he died of anthrax. The industrial commission allowed his widow an award of compensation under the workmen's compensation act (Consol. Laws, ch. 61) for his death, and on appeal to the appellate division, third department (189 App. Div. 53, 177 N. Y. Supp. 863), the decision was affirmed. The employer appealed to the court of appeals, which

reversed the award and remanded the case. The decision is, in part, as follows:

No evidence was given as to the nature of anthrax, whether hides such as those in question have anthrax bacteria and whether and in what manner it may be transmitted to men. The commission has presumed that, because Eldridge had a cut or pimple, worked in a tannery about hides, and died of anthrax, he must have received the injury in the course of his employment. On this appeal it is said by the respondent that the employer conceded that the deceased got the anthrax germ at his work. We do not so read the record.

We do not think this is a case where the commission were justified in taking judicial notice or in presuming that hides such as those in question usually or frequently contain anthrax germs, and that a person working about them with an open wound is likely to receive the germ and die of anthrax.

In Webster's dictionary anthrax is defined to be "an infectious, and usually fatal, bacterial disease of animals, especially cattle and sheep, and occasionally of man, to whom it may be transmitted by inoculation."

In the absence of all proof upon the subject the commission were not justified in presuming that the hides in question had anthrax, and that the germ could pass to a person working about them; in other words, the commission could not take judicial notice of the nature of these skins or their susceptibility to anthrax or to the method or likelihood of inoculation by an employee. Some evidence should have been given upon these matters to justify the assumption and finding made.

Section 21 of the workmen's compensation law (Cons. Laws, c. 67) is not a substitute for facts, and does not help the claimant in this particular. The commission is not authorized to make an award under this section in the absence of at least some evidence that the employee might with his cut have taken anthrax while at work about the hides. (*Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N. Y. Supp. 957.)

If this employee had been inoculated through the cut in his neck with anthrax germs from the hides and the cut had been received a few days before at the barber shop while being shaved, a question might arise as to whether the inoculation were an accidental personal injury arising out of the course of his employment.

We do not reach this question, and shall not attempt to decide it, as the facts of the case are not substantiated by any evidence, and the matter must be sent back to the commissioner for a rehearing.

The order of the appellate division and the determination of the industrial commission should be reversed, and the claim remitted to the commission for rehearing, with costs to abide event.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—
GLANDERS—ACCIDENT—*Richardson v. Greenburg*, Supreme Court
of New York, Appellate Division (May 19, 1919), 176 New
York Supplement, page 651.—Greenburg owned a number of horses,

one of which became afflicted with a disease known as glanders. Greenburg instructed one Richardson, who was employed by him as a stableman, to lead the affected horse from the stable to the dock where it was to be killed. While leading the horse from the stable to the dock as instructed, Richardson breathed and inhaled the disease-laden breath of the horse and became also afflicted with the disease, which caused his death 14 days later. His mother brought proceedings for compensation for his death under the workmen's compensation act. The commission granted her an award and the employer appealed. The court denied the award and dismissed the mother's claim on the ground that her son did not meet his death from an accidental personal injury such as is covered by the workmen's compensation law, but died from a disease. In expressing the prevailing opinion of the court Judge Henry T. Kellogg said in part:

Compensation is payable by an employer only "for the disability or death of his employee resulting from an accidental personal injury." (Workmen's compensation law (Consol. Laws, ch. 67, sec. 10).) Of such an injury the definition is given:

"'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." (Workmen's Compensation Law, sec. 3, subd. 7.)

Had it been the intention of the legislature to include within the meaning of "injury" or "personal injury" all diseases of whatever nature, it would not have been necessary expressly to mention, in addition to "accidental injuries," "such disease or infection as may naturally and unavoidably result therefrom." This express mention of a disease which is the consequence of injury would seem to exclude all diseases which are not. The particular disease must "result" from "accidental injury"—that is to say, it must be preceded by such injury, and therefore can not constitute the injury which it follows. Evidently "disease" and "accidental injury" are in contrast with each other, so that the former is never comprehended by the latter. The workmen's compensation law was drawn with painstaking care, and it can not be supposed that words and phrases found therein, particularly in the defining clauses, were needlessly, meaninglessly, or obscurely used. The plain meaning of its words, without the aid of judicial interpretation, induces the conclusion that the legislature intended to make compensable no condition or death resulting from disease, unless the disease itself followed a traumatic injury or other injury not partaking of the nature of a disease.

It is a matter of common knowledge that the conditions generally prevailing in cases of infectious disease are caused by poisons or toxins exuded by living organisms or bacteria present within the human body.

It is in this respect that a condition of disease differs from a condition resulting from the taking of a poisonous drug. In the former all the poisons which harm or kill are generated within the human body, while in the latter all the poisons are extraneous. It is one of the characteristics of injuries that they are the result of the applica-

tion to the human body, internally or externally, of an external force.

We think that for legal purposes glanders is a disease which, when contracted without previous accidental injury occurring in the course of employment, can not be classed under the workmen's compensation law of this State as an accidental injury arising out of and in the course of employment.

A lengthy dissenting opinion was rendered by Presiding Judge John M. Kellogg, in which one other judge concurred, and in which it was declared that death from the disease suffered and contracted as it was in this case was covered by the workmen's compensation law.

The law of New York was amended in 1920 (ch. 538) so as to include certain occupational diseases, naming anthrax and glanders.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—INFLUENZA—CONSTITUTIONALITY OF STATUTE—*City and County of San Francisco v. Industrial Accident Commission et al.*, *Supreme Court of California* (June 30, 1920), *191 Pacific Reporter*, page 26.—The city and county of San Francisco had in its employ in one of its hospitals a steward by the name of Slattery at the time the influenza epidemic came upon the city. The rush of work at the hospital caused him to be continuously and very laboriously occupied. During his labors he was exposed to at least 12 cases of influenza. Ultimately he contracted the disease himself on October 15, 1918, and died eight days later. His widow brought proceedings for compensation under the workmen's compensation act and was granted an award by the industrial accident board on the ground that her husband had died from an occupational disease as defined in subsection 4 of section 3 of the act (St. 1917, p. 831). The city and county of San Francisco appealed, declaring, first, that the law gave the commission no power to award compensation for death by disease the origin of which was not a bodily injury suffered through violence, and if it did it was unconstitutional; and, second, that because an epidemic of influenza was raging in the city Slattery was exposed to a danger which was common to the general public, and therefore the disease from which he died could not be held to have been caused by his employment. The court decided both of these contentions against the appellant and affirmed the decision of the industrial accident board. The opinion of the court is in part as follows:

In the present case the legislature has construed the constitution and has placed upon the word "injury" the broader meaning possible to it.

Subdivision 4 of section 3 of the act defines injury as follows:

"4. The term 'injury' as used in this act shall include any injury or disease arising out of the employment. * * *"

The constitution can not be given the more limited meaning contended for by the city without declaring this provision in the statute void. This we can not do unless there is a plain and unmistakable conflict between the statute and the constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction of the constitution. This being the case, it must be held that the provision of the compensation act, whereby a disease arising out of employment is declared to be an injury for which compensation shall be paid, is not unconstitutional, but is operative and controlling.

It is also contended, and truly, that compensation is not due merely for injury by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute or, concretely, it must affirmatively appear here that Slattery contracted the disease from which he died because of his employment.

On the other hand, the evidence shows that the incubation period of the disease is from one to four days; that Slattery in the course of his duties during the five days preceding his being taken ill had had to handle and had been exposed to at least 12 developed cases of influenza; that so far as known he was not exposed to any cases except in the course of his employment; that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard and had gone directly from his home to his work and from his work to his home and had not been out; that his exposure because of his work was far greater than that of the average person; and that among the nurses in the hospitals of the city, a class exposed in much the same degree as Slattery, the proportion who contracted the disease ran from 50 to 85 per cent as against 10 per cent for the community in general. The preponderance of the medical testimony also was to the effect that Slattery contracted the disease as a result of his peculiar exposure to it incidental to his employment.

If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slattery, the question of whether he was attacked because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of persons exposed as was Slattery the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This

ratio is so great that it can not be said that the commission was not justified in concluding from it, in connection with the other facts, that Slattery's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread and to draw conclusions from their observations.

Award affirmed.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—INFLUENZA—*Engels Copper Mining Co. v. Industrial Accident Commission, Supreme Court of California (Sept. 7, 1920), 192 Pacific Reporter, page 845.*—One Rebstock was employed by the mining company at its mine in Plumas County as a "safety engineer." In the fall of 1918 the influenza epidemic swept the small community of miners and their families where he lived. Medical attendants and hospital facilities proved inadequate to accommodate those afflicted with the disease, and among the temporary places used in which to care for the sick was Rebstock's office. At the request of the mine superintendent he was required to aid in the nursing of the patients. A few days later he contracted influenza himself, the result of which left him with a weak heart so that he was incapacitated for anything but light work. He was granted an award of compensation and the employer appealed. In affirming the award the court said in part:

The case markedly resembles what is known as the Slattery case, *San Francisco v. Industrial Accident Commission*, 191 Pac. 26 [above], decided by us since the submission of the present case, and the question presented by the first ground urged for annulment, which is purely a question of law, was there discussed and determined adversely to the contention of the petitioner here. No discussion, therefore, of that question is necessary other than a reference to that decision and the statement that we adhere to the views there expressed.

The company's first claim is that the exceptional exposure to which Rebstock was subjected, and by reason of which alone it can be claimed that he contracted his illness in the course of his employment, was incurred by him, not in the performance of the duties for which he was employed, but in the performance of services outside his duties, voluntary in nature, and not so much for the benefit of his employer as for that of the little community of which he was a part. The second claim of the company is that in any case there is nothing to show that Rebstock contracted his disease by reason of the exceptional exposure to which he was subjected; that it is not at all improbable that he acquired it by reason of the general exposure to which every member of the community was subjected at the time; that it is not possible to determine with any reasonable certainty whatever which exposure was the cause of his illness, and to endeavor to do so is but guessing; and that the award of the commis-

sion can not be justified by a mere guess, but in order to be valid requires for its support an affirmative showing which takes the determination out of the realm of mere conjecture.

As to the first claim, it is true that an injury suffered by an employee in voluntarily doing something entirely outside of his employment, even though of benefit to his employer, is not an injury suffered by him in the course of his employment, and if the facts of this case were only those we have stated, it might be that the award would have to be annulled on that ground. But there was evidence in the case which would justify the commission in believing that the further fact was present that the company's superintendent had directed Rebstock to assist in caring for the company's influenza patients. This fact, for we must take it to be the fact, at once took Rebstock's services in that respect out of the class of purely voluntary services. Although the services were exceptional, and without the usual scope of Rebstock's employment, they were within its actual scope at the immediate time, because rendered in response to the company's direction. (*Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 75 Atl. 653.)

As to the second contention of the company, it is of course true that the burden rested upon Rebstock to show that his illness resulted from the exceptional exposure to which he was subjected in caring for the patients of the company. It is also true that it can not be said from the facts of the case that it is certain that Rebstock contracted the disease because of his exceptional exposure to it. But as was said in the *Slattery* case, 191 Pac. 29:

"Certainty is not required. It is not even required that the award be, in our judgment, in accord with the preponderance of the evidence in order that we be not at liberty to annul it. We can not disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did."

The test so stated in the last sentence just quoted is that which must be applied here.

Upon the point as to how the disease was contracted by the employee, whether because of the exceptional exposure to which he was subjected or because of the exposure to which he was subjected in common with the rest of the community, the material facts are the same as those of the *Slattery* case.

WORKMEN'S COMPENSATION—INJURIES—OCCUPATIONAL DISEASE—
NEURALGIC PAIN DUE TO FAULTY POSTURE—*Pimental's case*, *Supreme Judicial Court of Massachusetts* (May 22, 1920), 127 *Northeastern Reporter*, page 424.—Moses Pimental was a cigar maker and had worked continually at his trade for 14 or 15 years. Early in 1918 he experienced pains at the back of his neck and in February, 1919, when he consulted his physician he was told he was suffering from occupational neurosis. In May, 1919, he was unable to continue at his work. He thereupon put in an application for compensation under the Massachusetts compensation law and was granted an award which, on appeal, was affirmed by the superior court. The employer

again appealed and the decision was reversed by the supreme court, and the award annulled on the ground that Pimental had not suffered an injury covered by the workmen's compensation law.

Pimental was examined by several physicians to determine his condition and the causes of his disability. One impartial physician testified in part that:

In consequence of his working and using the movements he did his work as a cigar maker was a certain consequence of causing his condition. In the first place he sits faulty; his left buttock being undeveloped [due to an old trouble with the hip], his left pelvis sags. He does not sit evenly on the buttocks. In that way he crowds the vertebra unevenly in the other parts of the spine, so that any sitting occupation could contribute to the brachial pain. The particular movements which produce this condition are the rolling process at the end of the making of a cigar, whereby a weight of the forearm, the arm, and some of the shoulder and shoulder girdle are brought down upon the cigar in order to make a firm wrapper.

He was "of opinion that if the employee had a sitting-down job where there was no muscular loading or tension, as in the rolling process, he might have supported the condition of his spine for years longer without trouble. He believed that the upset factor in the thing was the muscular tension and the loading incidental upon the rolling movements. * * * That the employee's condition would come on or did come on quicker because he rolled cigars than it would have had he worked at any other sitting-down occupation. * * * He thought that the rolling movements are the movements which brought about the pain. * * * This employee has not neuritis."

In his opinion, any sitting occupation is likely to cause the neuralgic pain which this employee experienced in the region of his neck. If he sat for eight hours a day in his home reading a book "with his hip in that position, in any position" he would be likely to have the same sort of a pressure in that brachial region as he had while sitting at work. If he sat in a chair at his home over a period of 14 years, reading a book every day, he might get from that the neuralgic pain which he experienced in March of 1919.

Upon a hearing of all the evidence a single member of the industrial-accident board made a finding which was adopted by the full board. It is in part as follows:

That "while there was an underlying and preexisting condition following hip disease it was the muscular action in rolling cigars for a number of years which precipitated the neuralgic pain and brought into being the personal injury which totally incapacitated the employee for work," and that "finally, as a result of the effect of the muscular movements required by his employment in making cigars, acting upon his particular condition of health, neuralgic pain, a personal injury under this act, developed. The employee's total incapacity for work is due to that personal injury, and will continue for a period which is not now determinable."

Notwithstanding these findings and testimony, the court reversed the decision of the board, Judge Crosby rendering an opinion, from which the following is quoted:

The case at bar is similar in many respects to Maggelet's case (228 Mass. 57, 116 N. E. 972 [Bul. 246, p. 274]), and is governed by it. While the board found that the neuralgic pain was induced by muscular action in rolling cigars for a number of years, the impartial physician testified that any other occupation was likely to cause the pain from which the employee suffered, and that this condition could result independently of any occupation and could come from any sitting or standing occupation. In view of this, together with all the other evidence, we are of opinion that the pain could not have been found to have been a reasonably necessary result of the employment, and can not be said to have been a personal injury peculiar to it. We are also of opinion that there was no sufficient evidence to warrant a finding that the employee had neurosis—a disease with which cigar makers are sometimes afflicted—and the impartial physician so testified; nor is there evidence that he had any disease, the reasonable inference being that the neuralgic pain was not due to his occupation but was rather the result of faulty posture brought about by long and laborious work, a condition which would have been equally liable to arise in whatever employment he might have been engaged or if not employed at all. Although the condition arose during the course of the employment, it can not be found to have arisen from it.

WORKMEN'S COMPENSATION—INJURY ARISING IN COURSE OF EMPLOYMENT—EVIDENCE—ENGINEER KILLED BY BULLET—*Keyes et al. v. New York, O. & W. Ry. Co., Supreme Court of Pennsylvania (May 21, 1919), 108 Atlantic Reporter, page 406.*—Minor T. Keyes was employed on an engine by the defendant company. He was alive and engaged at his work at 2.30 a. m. on November 23, 1916. Ten minutes later he was found lying on the ground by the engine dead from a bullet wound through the jaw. No evidence appeared to indicate a suicide nor could it be proved that the death had been inflicted by a third person. Keyes' widow and minor child were awarded compensation under the workmen's compensation act, and the employer appealed. The point in dispute is, upon whom lies the burden of proof of how the death was caused. The compensation board held the burden was upon the employer to prove that the death was caused by suicide or by the intentional act of a third person so as to prevent a recovery under the act, but on appeal the lower court decided to the contrary. The widow appealed to the supreme court, which reversed the lower court and sustained the award. The opinion in part is as follows:

A claimant's case is *prima facie* made out by proof of affirmative facts showing the employer's liability, and that rule is not changed

by the fact that earlier in the section the burden of proving suicide is expressly placed upon the employer. When, as here, there is nothing to throw light upon the occurrence, it would impose an unreasonable burden upon claimants and defeat the beneficent purpose of the act, to require them to establish the negative proposition that the injury was not inflicted by a third person because of some reason personal to the employee. The court below concludes, in effect, that the affirmative of the proposition should be presumed, as it was not suicide; but that view can not be accepted. There is always a presumption of innocence, and we can not assume that the wound was feloniously inflicted. It may have been accidental. No one heard the sound of a shot or knows whence it came. It was in the dark, and may have been a random shot, discharged by some officer or other person for an innocent purpose and with no thought of harm. Probably not 1 shot in 20 fired upon the street is with felonious intent; so the fact that a man sustains a fatal bullet wound, while exposed at night, does not of itself prove an intentional homicide. To sustain defendant's contention we must presume a felonious homicide, and add to that the further presumption that it was committed because of some reason personal to the victim. Assuming a willful killing, it may have been because of the employment or from some other motive, entirely aside from Mr. Keyes, and by a stranger, or by one possessed of a homicidal mania, in which cases the employer would be liable. Our act is broad, and embraces cases of injury sustained in course of the employment, although not arising therefrom, and therein differs from enactments in many jurisdictions.

WORKMEN'S COMPENSATION—INJURY ARISING IN COURSE OF EMPLOYMENT—PRANKS OF FELLOW SERVANTS—*White v. Kansas City Stockyards Co., Supreme Court of Kansas (Jan. 11, 1919), 177 Pacific Reporter, page 522.*—White was in the employ of the defendant company. One day while washing up preparatory to going home after the day's work some of White's coemployees, among whom was one of the defendant's foremen, attached a highly charged electric wire to an iron door through which White would have to pass on leaving the place. This form of joke had been practiced a number of times previously on other employees. White grasped the door to open it and received a severe shock and other injuries, for which he claimed compensation. In affirming the lower court's award of compensation Judge Dawson, expressing the opinion of the court, said in part:

It is needless to discuss the question whether plaintiff was injured in the course of his employment. Under not dissimilar circumstances it has been so held in this State.

It has also been held that while ordinarily a master is not liable under the compensation act for injuries to a workman which have been caused through the mischievous pranks and sportive jokes of his coemployees, yet the rule is otherwise where the master has know-

ingly permitted such mischievous pranks to continue. In such cases the pranks become an incident to the employment.

It is true that this foreman had no general authority, but he was the person plaintiff had to obey while in the defendant's employment. To that extent he was a foreman, and his knowledge of the electrical mantrap on the door was notice to his principal.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACCIDENT—PROOF—CARRYING MATCHES IN POCKETS—*Steel Sales Corporation v. Industrial Commission et al., Supreme Court of Illinois (June 16, 1920), 127 Northeastern Reporter, page 698.*—Frederick Schwinn was an employee of the steel company, working as a machine hand in the basement of the company's plant, and was engaged in cutting steel plates. His work caused his overalls to become very greasy and oil soaked. Adjoining his workroom was a toilet room containing lockers where the company's employees could change out of their work clothes. The toilet room had only one window and no electric light of its own, and as a consequence was very dim. Schwinn went into the toilet room and shortly afterward emerged again with his clothing on fire. He rushed up the stairs and into an alley, where a blanket was thrown around him and the fire extinguished. He died from his injuries. His brother, who was a fellow employee, testified that Schwinn said to him shortly after the accident, "I went into the washroom and bumped into the locker, and had matches in my pocket." There was a rule of the company in force prohibiting smoking during working hours, but as no one was present when Schwinn's clothing caught on fire it was not known exactly how the accident occurred. The arbitrator refused an award for compensation, but his decision was reversed by the industrial commission, which was upheld by the circuit court. The supreme court, in again affirming the award of the commission allowing compensation, spoke in part as follows:

The principal question raised here is whether the injury arose out of and in the course of the employment. The applicant has the burden of proof as to whether the injury was accidental and as to its cause, but it is not necessary in order to make this proof that such testimony be given by an eyewitness. The proof may be made by direct or circumstantial evidence. (*Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. [Bul. No. 246, p. 249].) An employee while at work for his employer may do those things which are necessary to his own health and comfort, even though they are personal to himself, and such acts will be considered incidental to his employment. (*Rainford v. Chicago City Railway Co.*, 289 Ill. 427, 124 N. E. 648.) There can be no question, under the authorities, that the deceased had a right to be where he was at the time of the accident. Somewhat analogous as to facts, though with,

perhaps, not the same reason for the application of compensation acts, are those cases where an accident arises from something incidental to smoking where smoking has not been prohibited by the employer. Such acts have frequently been held to be covered by compensation acts as arising out of the employment. (Bradbury on Workmen's Comp. (3d ed.), sec. 88, p. 660; Boyd on Workmen's Comp. Act (1913), sec. 482.)

Counsel for plaintiff in error (company) argue that the brother's testimony that the deceased told him the matches were ignited by striking against the locker was hearsay testimony, and therefore improperly admitted. We do not see how counsel for plaintiff in error are entitled to raise this question. That evidence was brought out on cross-examination by counsel for plaintiff in error, and we can find no objection made to it or motion to strike it from the record. The word "accident" as used in the workmen's compensation act should not be construed technically.

Carrying matches is a very common practice among men, especially those who smoke, in all employments, and unless expressly prohibited where the surroundings are not apparently dangerous to employees to carry matches it could hardly be held unreasonable as a matter of law for an employee under the circumstances here shown to have matches in his possession. Under the evidence in this record we think the industrial commission was justified in finding that it was a reasonable inference that the accident arose out of and in the course of the employment, and there being such evidence in the record it can not be held as a matter of law by the court that such accident did not arise out of or in the course of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—COMMON HAZARD—*Moran's case*, *Supreme Judicial Court of Massachusetts* (Jan. 9, 1920), 125 *Northeastern Reporter*, page 591.—John Moran was employed by the John Hancock Mutual Life Insurance Co. as a solicitor and collector. In accordance with instructions from his superior officer he left his home on the evening of January 2, 1919, and in attempting to catch a street car he was accidentally killed. The employer claimed that Moran's widow was not entitled to an award of compensation under the workmen's compensation act because he met his death from an accident upon the street, the hazards of which are common to all persons. In affirming the decree allowing the award of compensation the court said in part:

Upon the facts the insurer contends that the hazards of the street in their relation to the employment of the decedent are hazards common to persons engaged in any employment who have occasion to travel along the streets and are not a causative danger peculiar to Moran's employment, and cites as authorities for his position *Hewitt's case*, 225 Mass. 1, 113 N. E. 572 [Bul. No. 224, p. 318], and *Donohue's case*, 226 Mass. 595, 116 N. E. 226 [Bul. No. 246, p. 251]. These were cases "where the causative relation between injury and

employment was too remote to charge the employment with the risk of the particular injury received." (Kearney's case, 232 Mass. 532, 534, 122 N. E. 739, 740.)

In the case at bar the workman to do the work of his employment must continually stand in danger of receiving an injury from accidents resulting from exposure of whatever risks or hazards are commonly attendant on the use of public streets and conveyances, which risks to him are greater because more constant than those that are incidental to the occasional and casual use of such streets by persons who use them in the ordinary way. We are of opinion that the risk and hazard of the decedent's employment were not too remote in their causative relation to the employment, and that the case is governed by Kearney's case, *supra*, and similar cases, and is distinguishable from Hewitt's case, *supra*, and from Donohue's case, *supra*.

Decree affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH CAUSED BY FELLOW EMPLOYEE.—*Industrial Commission of Ohio v. Pora, Supreme Court of Ohio (June 24, 1919), 125 Northeastern Reporter, page 662.*—Sylvester Pora had been employed as a helper to a molder by the Youngstown Foundry and Machine Co. The molder, who was his superior, ordered Pora to get an electric riddle. Pora went after the riddle but found it in the possession of the helper of another molder who had as much right to have the riddle as Pora and who refused to surrender the implement. A controversy was engaged in, and the other helper struck Pora over the head with a shovel, injuring him so that he subsequently died. The industrial commission refused to allow Pora's widow an award of compensation under the workmen's compensation act, on the ground that the injury was not sustained in the course of the employment. The widow appealed to the common pleas court and was awarded judgment in the sum of \$8.63 per week for 312 weeks, which was affirmed by the court of appeals. The commission again appealed and the supreme court, in affirming the judgment in favor of the widow, said in part:

With the advantage of the hindsight we now possess, it would have been wiser if Pora, when denied possession, had retired from the scene and reported the situation to his superior. It was, however, the natural thing that he should be disposed to argue the matter when denied the thing to which he was entitled in an equal sense with the immediate possessor.

In seeking to obtain the possession he was carrying out the order of his superior, and his failure to make some reasonable effort to obtain it would have constituted a breach of his apparent duty. He was seeking the implement that would enable him to properly pursue his employment, and without which it must be assumed he could not labor to the advantage of his employer.

Conflicting inferences might be drawn, it is to be admitted, from the use of the descriptive term "controversy"; but the inference most favorable to the prevailing party below is to be accepted by a court of review.

It was held in the case of the *Mentone Irrigation Co. v. Redlands Electric Light & Power Co.*, 155 Cal. 323, 331, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222, that where the decision of the trial court is based on conflicting inferences reasonably deducible from the evidence, it is as conclusive on the appellate court as though based directly on conflicting evidence.

This rule of law appeals to us as being altogether sound and its adoption calls for the application, as its supplement, of the long-established rule of law, that the judgment must be sustained if there is any evidence in its support.

With this conception of the law, we are not willing to say that Pora's conduct was such as to place him outside the pale of his course of employment.

To deny the defendant in error the compensation she has been awarded would be sadly missing the fine spirit of the workmen's compensation act.

Section 1465-91, Page & A. General Code Supp., provides that—

"Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules or procedure, other than as herein provided, but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

The real spirit of this act is to measurably banish technicality and to do away with the nicety of distinction so often observable in the law, and commands a liberal construction in favor of employees.

The judgment of the court of appeals is affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH CAUSED BY FELLOW EMPLOYEE—*Mueller v. Klingman*, Appellate Court of Indiana, Division No. 1 (Dec. 18, 1919), 125 *Northeastern Reporter*, page 464.—Mueller employed Klingman as a laborer to aid in the construction of a reinforced concrete building. He made it a rule among his workmen that they should aid each other in their tasks; that is, one workman was not to remain idle while waiting for another workman to complete a particular task but he was to aid him as much as possible. Three workmen, one of them Klingman, were carrying a 40-foot steel rod to its appointed place to be used as reinforcement for the concrete. When they were about to place the rod the discovery was made that one of the U-irons into which it was to be placed was out of position. One of the workmen asked Howard, the other workman, to "straighten up" the U-iron, which he accordingly did, but in doing so he remarked, "I ain't got time to fool with you people." Klingman replied to this by saying, "I won't ask anybody to help

me do my work, I will do it myself." Whereupon Howard threw a hammer at Klingman, striking him on the back of his head inflicting an injury from which he later died. Klingman's widow was awarded compensation under the workmen's compensation act and the employer appealed. In affirming the decision the court said in part:

It has been held that an employee is injured in the course of his employment, where the injury occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental thereto. (*Swift & Co. v. Industrial Com.*, 287 Ill. 564, 122 N. E. 796.) It has also been said that there must be some causal relation between the employment and the injury; that it is not necessary to be one which ought to have been foreseen or expected, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment. In *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530 [Bul. No. 258, p. 191], it was said, after reviewing a number of cases:

"All concur in the rule that the accident, to be within the compensation act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmary of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

Under the above rules, upon the record before us, there can be no question as to the death of deceased having been caused by an accident arising out of and in the course of his employment. The findings are sustained by the evidence.

The award of the Industrial Board is affirmed, and the amount thereof is increased 5 per cent, as provided by section 3 of the amendment of 1917. (Acts 1917, p. 155.) [This amendment provides that where an appeal is taken from an award made by a full board, and the award is affirmed, it shall be increased 5 per cent.]

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH FROM CYCLONE—*Central Illinois Public Service Co. v. Industrial Commission et al.*, Supreme Court of Illinois (Feb. 18, 1920), 126 *Northeastern Reporter*, page 144.—Kilgore was employed as an engineer in the electric generating station and ice plant of the Central Illinois Public Service Co. While closing the plant a tornado swept down upon the building housing the engines and ice machine and destroyed it. Kilgore was found in a standing posture completely surrounded by bricks. The steam from

the boilers had severely scalded him and the fumes from the broken ammonia pipes of the ice machine tended to cause suffocation. Kilgore died from his injuries, and proceedings were brought by his administratrix for compensation. An award was made which on appeal was reversed by the circuit court and the industrial commission appealed. It was contended by the company that Kilgore met his death from a catastrophe, to which all persons in the immediate vicinity were subject, and that therefore it could not be said that the injury arose out of the employee's employment. The supreme court refused to take this view of the question and reversed the decision of the circuit court which had set aside the award of compensation. The opinion is in part as follows:

We believe the reasonable rule to be that if deceased, by reason of his employment, was exposed to a risk of being injured by a storm which was greater than the risk to which the public in that vicinity was subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment, although unexpected and unusual. An injury, to come within the compensation act (Laws 1913, p. 335), need not be an anticipated one, nor, in general, need it be one peculiar to the particular employment in which one is engaged at the time. While the risk arising from the action of the elements, such as a cyclone, is such a risk as all people of the same locality are subjected to, independent of employment, yet the circumstances of a particular employment may make the danger of receiving a particular injury through such storm an exceptional risk, and one to which the public generally is not subjected. Such injury may be then said to arise out of the employment. In the instant case, while the risk of being injured by this cyclone may be said to have been a risk common to the public in the vicinity of such cyclone, regardless of employment, yet if there was in the circumstances of Kilgore's employment an unusual risk or danger of injury from the destruction by storm of the building in which he was employed, such risk may be said to be incident to the employment of the deceased, and the injury received to arise out of such employment. Deceased at the time the storm broke was engaged in assisting and directing the closing up of the plant of defendant in error. These duties took him among the steam pipes and ammonia coils, which subjected him to an unusual risk of being injured from escaping steam and ammonia fumes should the building be destroyed by storm. The evidence shows that the ammonia fumes and scalding steam contributed most largely to the injuries which caused his death. We are therefore of the opinion that there were in the circumstances of the employment of the deceased risks of being injured by the storm not common to the public in that vicinity, and the circuit court therefore erred in setting aside the award.

The judgment of the circuit court will therefore be reversed, and the cause remanded, with directions to that court to enter an order confirming the award.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH FROM LIGHTNING—*Chiulla de Luca v. Board of Park Commissioners of City of Hartford, Supreme Court of Errors of Connecticut (July 31, 1919), 107 Atlantic Reporter, page 611.*—The late husband of the plaintiff was employed by the defendant as a park workman in Colt Park. He was raking leaves in said park when a violent thunderstorm arose, and no other shelter being provided he took refuge from the storm under a tree, which was struck by lightning and he was killed. The compensation commissioner allowed the widow compensation for his death and the defendants appealed. In advising the superior court to affirm the award the court said in part:

The remaining reasons of appeal present the claim that as a matter of law under no circumstances can death by lightning constitute a personal injury for which an allowance can be made under our compensation act.

If the place under the tree were the more dangerous, the fact that the deceased chose it as the place of refuge from the storm and that he was injured at this place does not prevent recovery. The act of seeking and obtaining shelter arose out of—that is, was within—the scope or sphere of his employment and was a necessary adjunct and an incident to his engaging in and continuing such employment. Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over was not only necessary to the preservation of the deceased's health, and perhaps his life, but was incident to the deceased's work, and was an act promoting the business of the master. (L. R. A. 1916A, 348.)

"A personal injury to an employee which is sustained while he is doing what he was employed to do, and as a proximate result thereof, arises out of and in the course of his employment."

"An injury which is the natural and necessary incident of one's employment is proximately caused by such employment, as it is also when the employment carries with it a greater exposure to the injury sustained than the exposure to which persons generally in that locality are subjected."

The superior court is advised to affirm the award of the compensation commissioner.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEATH OF SUPERINTENDENT CAUSED BY FELLOW SERVANT—INSURANCE OF EMPLOYEE—*American Smelting & Refining Co. v. Cassil, Supreme Court of Nebraska (Jan. 17, 1920), 175 Northwestern Reporter, page 1021.*—Cassil was killed while in the employ of the American Smelting & Refining Co. and his widow brought proceedings for compensation. She was allowed an award, but on appeal the district court disallowed it, and the widow brought this appeal from the decision of the district court.

Cassil was an assistant superintendent of a department and one Casey was head watchman of the plant. Cassil and Casey could not

get along together and were constantly quarreling. It seems Cassil owed Casey \$35, and Cassil accused Casey of intimacy with his wife. These were long-standing grounds for dispute. On the occasion of Cassil's death, Casey came into Cassil's office on the premises of the employer and said that he understood that Cassil had accused him of saying that one Sweetman, who was to relieve Cassil as assistant superintendent, "was no good in and around the plant." A dispute arose into which the above grounds for dispute were also injected. When Cassil turned to go away, Casey drew his revolver and shot Cassil in the back. Later Casey was tried for murder and sentenced to life imprisonment. The employer contended that the injury did not arise out of and in the course of the employment but was the result of a personal quarrel. The court failed to take this view of the matter and reversed the decision of the district court, which set aside the award. The opinion is in part as follows:

The workmen's compensation act is by construction a part of the contract of employment. It is a remedial statute, enacted for the benefit of workmen and is liberally construed to carry out the legislative intent. The protection of workmen and dependents under the act should not be limited by general principles of law having no application to the claim for compensation.

Is the evidence in support of defendant's theory that the quarrel and resulting homicide arose out of the employment more convincing than that in favor of plaintiff's theory that Cassil lost his life in a quarrel over personal matters? The tragedy occurred at a time and place where defendant was protected by the workmen's compensation act if the homicide arose out of the employment. The participants were on the premises of their employer. Cassil was in his office and was about to leave for the night. The fatal shots were fired after Cassil left his office. The bullets struck him in the back on the left side. The revolver used was the property of plaintiff, the employer. It was carried by Casey as a duty of his employment. He was officious, meddlesome, and irritating in his conduct toward other employees over whom he had no authority. He had been twice reprimanded by the superintendent for misconduct in these respects. Complaints of his bringing whisky into the plant in violation of the rules had been made to an employee described as the "safety first" man. Cassil was the superior. On his recommendation Casey had been promoted. A few minutes before the shooting occurred Cassil in preparing to leave for the night had gone into his office. While there with other workmen intending to depart with him Casey came in and started the quarrel by a reference to George W. Sweetman, jr., who had arrived at the usual hour to relieve Cassil as assistant superintendent. In accosting Cassil, Casey said he understood he had been accused of saying that "Sweetman was no good." Cassil denounced Casey as a liar. The latter then asked about Cassil's debt of \$35 and the whisky. Casey testified he had been told by Sweetman in the morning before the quarrel that Cassil said to Sweetman that Casey had said he "was no good in and around the plant." Casey also said he had promised to ask Cassil

about this statement in presence of Sweetman before Cassil left the plant that night. Casey also testified that during the quarrel he had accused Cassil of borrowing money from workmen without intending to pay it back; of permitting employees to sleep on the job; of complaining because Casey performed his duty; of beating workmen out of a portion of their wages; of defrauding the employer out of a portion of the labor; of bringing whisky into the plant in violation of the rules; of being drunk on duty; of allowing drunken employees in the plant; of disparaging the work of Casey and of plotting against him as watchman. Some of these charges related to the duties of both Casey and Cassil as employees of plaintiff. They were made by Casey during the quarrel culminating in the homicide, according to his version of the controversy as told at his trial for murder. These charges against Cassil, the superior, would naturally imperil Casey's position if Cassil were left to tell the tale. The unpaid loans amounting to \$35 and the conversion of the keg of whisky, old grievances, were mere trifles compared with the loss of Casey's position. This suggests a more substantial motive for the homicide than revenge for personal grievances. The preponderance of the evidence seems to indicate that the quarrel and resulting tragedy arose out of the employment within the meaning of the workmen's compensation law. In these views of the statute and the evidence defendant established her claim to compensation.

There remains to be considered a demand for a credit of \$1,690 on account of insurance carried by plaintiff on the life of Cassil and paid to defendant. This insurance was procured and kept in force by plaintiff without any expense whatever to insured. Nothing was deducted from his compensation for premiums. Payment of insurance was to be made only in absence of a recovery for compensation or for damages. It was paid to defendant before the liability of plaintiff for compensation had been determined. It should therefore be allowed as credits. The judgment of the district court is reversed, with directions to award compensation and to allow credits to the extent of \$1,690 on account of the insurance received by defendant from plaintiff.

Reversed with directions.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—DEPENDENTS—"ORPHANS"—*State ex rel. Radisson Hotel et al. v. District Court of Hennepin County, Supreme Court of Minnesota (June 20, 1919), 172 Northwestern Reporter, page 897.*—Compensation was awarded by the district court for the death of one Vera Meakins, who had been employed as an elevator starter by the hotel. The hotel and the surety company bring certiorari to review the judgment in an effort to have it reversed. Vera Meakins had been employed by the hotel company as starter in charge of its elevators at a salary of \$80 per month and her room and board. She left surviving her a husband and three minor dependent children. The husband had deserted his family three years before the accident. On the occasion of the accident

Mrs. Meakins had removed her uniform and donned her street attire and punched out on the time clock. A few minutes later she entered an elevator and rode up and down a number of times conversing with the operator. While so occupied she got out of the car after a passenger on the tenth floor and the operator closed the door and the car started to move upward. Mrs. Meakins pushed the doors open and attempted to reenter the car. She tripped and fell under the car into the elevator shaft to her death. The employer contends that because she was in her street costume and had punched out on the time clock the accident did not occur during the course of her employment. It is also contended that her dependent children are not orphans, because the father is living. In answering these arguments and affirming the award the court said, in part:

Relators make much of the fact that deceased had "punched out" on the time clock and that she was dressed for the street; hence, it is said, the finding is not sustained that she met death in the course of her employment from an accident arising out of it. This overlooks some persuasive testimony given by the assistant manager of the employer, to the effect that deceased had no stated hours of work, but was practically on duty all the time, as he put it, "24 hours in the day"; that she used her own discretion as to the time within which she was to do that which was expected of her; that the wearing of the uniform was not obligatory for her; and that she was not required to punch the time clock, for her wages were not paid upon its record. The inference is near at hand that she was at the moment of the accident engaged in her work, endeavoring to ascertain whether the doors of the elevator she was riding on locked properly. It seems their defective condition in this respect was the direct cause of her death. We can not say that the court's finding is not sustained under the rule announced in *State ex rel. Niessen v. District Court*, 172 N. W., 133.

We need not determine whether the evidence justifies a finding that the children were in fact wholly dependents, for section 8208(1), G. S. 1913, as amended by section 5, chapter 209, Laws 1915 (Gen. St. Supp. 1917, p. 8208), provides that minor children under the age of 16 years shall be conclusively presumed to be wholly dependent. The minor children thus referred to are the children of an employee accidentally killed in the course of the employment. The law does not in terms exclude the children of the female employee, and no good reason occurs to us why they should be excluded by construction. That dependents of female employees are intended to be protected by the act is clear, for a dependent husband is specifically provided for in subdivision 11 of said section 5.

The decisions, as well as the dictionaries, recognizing that the term "orphan" may properly be applied to a motherless as well as to a fatherless child, we think it meets with no difficulty of construction to hold that the minors here in question are orphans within the meaning of subdivision 10 of section 5, chapter 209, Laws 1915. They have been deserted by their father and bereft by death of their mother, the only parent who for the last three years made any attempt to

support them. The original idea of designating fatherless children orphans, the same as those who had lost both parents, seems to be that the father was the head of the household and responsible for the care and support of the minors therein. When the father has abdicated that place and deserted the family the children become indeed orphans when also bereft of their mother. The purpose of the workmen's compensation law is to provide for the dependents of the employee who accidentally meets with death in the employment. To accomplish the beneficent purpose intended the law should be given a broad rather than a narrow construction.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO WORK—*Great Lakes Dredge & Dock Co. v. Totzke, Appellate Court of Indiana, Division No. 2 (Jan. 31, 1919), 121 Northeastern Reporter, page 675.*—The dock company was engaged, under contract, in driving piles on the Lake Michigan water front of the Inland Steel Co., which covered a large tract of ground and upon which were many railway tracks over which trains and cars were constantly being switched. Only persons with passes could get into this tract. Totzke, an employee, presented his pass, issued by the dock company, and was admitted, and while walking on the regular and usual road to his work on the water front he was run down and killed by a locomotive. His dependents recovered an award and on appeal the award was affirmed, the court saying in part:

In all these cases the question whether the injury or death arises out of and in the course of the employment does not depend upon the minute details of what the workman was doing at the time of the accident, or how he was doing it, or whether he was in any manner at fault. It depends rather upon the broader and simpler question whether the injury or death was due to a hazard to which the workman would not have been exposed, apart from the business in which he was employed. (See Dow's case (Mass.), 121 N. E. 19.) The workmen's compensation law of the State of Iowa (Acts 35th Gen. Assem., ch. 147, sec. 17) contains the following declaration:

"The words 'personal injury arising out of and in the course of such employment' shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business."

There is much sense and wisdom in this legislative interpretation of a group of words which has caused the courts no end of trouble. It will be observed that the idea of place is the controlling feature of this interpretation, and we approve and adopt it. When Totzke entered the inclosure of the Inland Steel Co. undoubtedly he was in a place where his employer's business required him to be, and so long as he remained in that place he was exposed to certain inherent

dangers to which he would not have been exposed apart from the business of his employer. By one of the inherent hazards of that place he was fatally injured, and the industrial board was justified in finding that the injury which resulted in his death arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO WORK—*Scalia v. American Sumatra Tobacco Co., Supreme Court of Errors of Connecticut (Dec. 17, 1918), 105 Atlantic Reporter, page 346.*—Catherine Scalia and some other women were employed as tobacco pickers on the Vietts plantation. The defendant company, whose plantation was some distance away from that of Vietts, sent an agent to the Vietts plantation to engage some tobacco pickers who had completed their work there. The agent of the defendant company told them that if they wanted work they should go to the waiting station in Thompsonville the next morning to be transported to the defendant's plantation. This they did and were placed in an automobile owned and run by the defendant company and were transported to the plantation of the defendant. While on the way the automobile skidded and struck a tree, killing Catherine Scalia and another woman. The dependents of the deceased women sued for compensation under the workmen's compensation act and recovered awards which the defendant attacks on the ground that the women were not at the time of their death in its employ. In rendering decision in favor of the awards the court said in part the following:

There is no difficulty in reaching the conclusion that at the time these women were injured there was a contract of employment existing between them and the American Sumatra Tobacco Co. A more serious question presented by the evidence is: Were they injured before this employment began?

There was not any direct evidence as to the time when the employment of these women began. The compensation commissioner inferred that their transportation was an essential part of the contract of employment and reasonably incident thereto. There was evidence which reasonably supported such a conclusion. Although the decedents at the time of the accident had not actually commenced their work upon the plantation of the defendant company, it is plain that their transportation was part of the contract of employment with this defendant. When they were injured they were not passengers, paying a stipulated fare for the conveyance to their work. The automobile which skidded and caused the accident in question was furnished and paid for by the defendant company. The relation that then existed between the women and the Sumatra Tobacco Co. was that of master and servant and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the tobacco company. This being so, the case is like *Swanson v.*

Latham et al., 92 Conn. 87, 101 Atl. 492 [Bul. 246, pp. 249, 250], in which we stated that:

"An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment."

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INTENTIONAL INJURIES—ACTS OF STRIKERS—*Baum v. Industrial Commission, Supreme Court of Illinois, (June 18, 1919) 123 Northwestern Reporter, page 625.*—This is a proceeding by the employer, Baum, against the commission to secure the reversal of an award made by the latter in favor of Constance Tomczyk for the death of Edward Tomczyk, employed as a cutter in his factory in Chicago. The workroom was a large one, and 25 women and 2 men were employed in it. The International Garment Workers' Union sent Baum a letter demanding that he sign up with the union to avoid strikes and other difficulties. This Baum refused to do. Some time later this union declared a strike which was more or less general throughout Chicago. Baum's employees did not belong to the union, but continued to work. During the course of the strike a party of rioting strikers rushed into Baum's workroom, in spite of efforts to prevent them from entering. The women in the room became frightened and screamed and fled to the rear of the room in a panic. Tomczyk came to the assistance of his employer, Baum, and tried to eject the rioters, and while doing so he was stabbed, causing injuries from which he died. Baum contends that he is not liable under the workmen's compensation act for Tomczyk's death. The court held that Baum was so liable, saying in part:

While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected. It must, however, be one which, after the event, may be seen to have had its origin in the nature of the employment. Such was our holding in *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530 [Bul. No. 258, p. 191]. Where a workman voluntarily performs an act during an emergency, which he has reason to believe is in the interest of his employer, and is injured thereby, he is not acting beyond the scope of his employment.

It is conceded that Tomczyk was a peaceable and law-abiding citizen. It is also conceded that the strikers rushed into the workroom without any warning and that plaintiff in error tried to eject them. The evidence shows that there was great excitement in the workroom, and that the women employees fled, screaming, to the back of the room. Nothing was said between the plaintiff in error and Tomczyk. Tomczyk, seeing his employer and his fellow employees in apparent danger, came to the rescue. He was assisting his employer in the de-

fense of his person and his property, and was acting in defense of his fellow employees, all of whom were women. We have held that it is the duty of an employee to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. (*Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999 [Bul. No. 189, p. 267].) That the fellow employees of deceased were not actually in danger of losing their lives can not change the rule. The danger was clearly apparent to Tomczyk. He acted as any man would have acted under the circumstances. The rioters had rushed in without warning and threw the women employees into a panic. It was up to deceased to act, or to abandon the workroom and its occupants to trespassing strangers, apparently bent upon doing damage to whatever came in their path. The situation was an unusual and unforeseen one, and called for quick action. From every point of view it was the duty of deceased to defend himself and his employer, and to assist his employer in defending the persons of his women coworkers. Where the trouble arises out of the employer's work, and as a result of it one of the trespassers injures an employee who is defending his employer's business, it may be inferred the injury arose out of the employment.

An assault arises out of one's employment in a case where the duties of the employee, under the particular situation, are such as are likely to cause him to have to deal with persons who, under the circumstances, are liable to attack him. (*Ohio Building Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 221 [Bul. No. 246, p. 249].) Such was the situation in this case. Deceased was assaulted, not for anything he had done, but because he was in the employ of the plaintiff in error, who was in bad favor with the union on account of not having complied with its demands. We are therefore of the opinion that the injury, which occurred in the course of the employment, arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH HOUR ACCIDENT—*Rochford's case*, *Appeal of Liberty Mut. Ins. Co.*, *Supreme Judicial Court of Massachusetts* (Nov. 25, 1919), 124 *Northeastern Reporter*, page 891.—Francis Rochford was employed by the Woodbury Shoe Co. and worked on the second floor. In order to reach his place of work he had to pass through a packing room. His lunch hour was from 12 to 1 p. m. On returning from his home, about 20 minutes before 1 o'clock, he stopped in the packing room to talk to some other employees who ate their lunch there. He sat in a chair near a monogram press and took one of the girl employees of about 17 years of age on his knee. When the whistle blew to go back to work he put his hand on a part of the press in order to enable him to arise. At that time the machinery started and the press came down on his hand and injured it. The industrial accident commission allowed him compensation and the employer's insurer appealed. In reversing the decision the court said in part:

It is apparent from this recital of facts that there was no causal connection between the employment and the injury. It was no part of the employment to wait for 20 minutes under the circumstances disclosed in the packing room, although the employee was required to pass through it in a reasonable and orderly way to reach his labor. Whatever else may be said respecting his manner of spending that period of time, plainly it was no part of his duty and had no relation to it. The injury occurred while he was attempting to extricate himself from a posture and course of behavior utterly foreign to the business of the subscriber. That risk was not incidental to his employment. The subscriber was in no wise responsible for it. It was intentionally, intelligently and voluntarily incurred by the employee on an escapade of his own. Conditions may arise where the employee on the way to or on the return from meals may be injured on the master's premises as a rational result of the contract of service, although not actually engaged at the moment in the work for which he was hired. (Sundine's case, 218 Mass. 1, 105 N. E. 433 [Bul. No. 169, p. 244]; Hallett's case, 232 Mass. 49, 121 N. E. 503.) The case at bar is not of that nature; it belongs to the class illustrated by Savage's case, 222 Mass. 205, 110 N. E. 283 [Bul. No. 189, p. 269].

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH HOUR ACCIDENTS—*Thomas v. Proctor & Gamble Mfg. Co., Supreme Court of Kansas (Mar. 8, 1919) 179 Pacific Reporter, page 372.*—Daisy Thomas, a 17-year-old girl, was in the employ of the defendant company. She was paid by the hour and was allowed a lunch period of half an hour. During the lunch period it was the habit or custom of the plaintiff and other girls to play on some trucks used in their department to pull boxes about on. On the day of the accident plaintiff and two other girls were riding on the truck when it slid, causing two of them to fall to the floor, injuring plaintiff's knee and ankle. She brought proceedings to recover compensation and was allowed an award, and the employer now appeals on the ground that the injury did not arise out of and in the course of her employment, because it happened during the lunch hour when she was not at work. In affirming the award the court said, in part:

We conclude that there was room for a finding that the plaintiff's injury occurred in the course of her employment. If it had been the result of some accident which was due to the physical conditions under which the work was performed—say to the falling of plaster in the rooms where the girls were playing—this would be quite obvious, and the judgment for the plaintiff would be clearly warranted.

Whether the plaintiff's injury arose out of her employment is a more difficult question. Injuries received in play are not usually capable of being so classified. If the present case is to be taken out of the general rule, it must be upon the ground that the habit of the

girl employees to play with the trucks during the noon intermission, with the knowledge and express consent of the foreman and without objection by anyone representing the defendant, made such practice one of the conditions under which the business was carried on, upon much the same principle as employers are held liable for the results of horse play which had grown into a custom. (*White v. Stockyards*, 157 Pac. 522 [p. 402].)

Inasmuch as the evidence may be regarded as establishing that the play in which the plaintiff was injured has become a settled custom, with the knowledge and, indeed, the express approval of the foreman in charge of the department, and without objection on the part of anyone, the court is of the opinion that her injury may be regarded not only as having occurred in the course of her employment but as having arisen out of it.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VISITING ABOUT SHOP—*Barber v. Jones Shoe Co., Supreme Court of New Hampshire (Dec. 2, 1919), 108 Atlantic Reporter, page 690.*—Barber, a minor of 19 years, was injured while in the employ of the Jones Shoe Co. and brought this action to recover compensation under the workmen's compensation law. At the time of the injury Barber had been in the employ of the company for about one week. He had completed the work he had been given, and when he attempted to do some other work the foreman stopped him. While waiting for more work, he walked across the shop about 20 feet and engaged in a conversation with the operative of a "heel breast shaving" machine. This machine had a set of unguarded revolving knives on each end of it, and while Barber was talking to the operative the suction from the air blower caught the right sleeve of his jumper and drew his right arm into the revolving knives so that the back of his arm was cut just above the elbow. The employer contended that because Barber was "visiting" about the shop and was not doing any work at the time of the accident his injury did not arise out of and in the course of his employment. The court in affirming an award in favor of Barber said in part:

The employers' liability and workmen's compensation statute was enacted for the benefit and protection of the mill and factory operatives of the State. It is a remedial statute, and should be liberally construed to fully and adequately effectuate the purpose of its enactment.

Such a construction of the statute would warrant a finding upon the evidence that the plaintiff was in the course of his employment when he was injured. It could be found that it was customary for the employees to go about and talk with their fellow workmen when waiting for work, and that this custom was known to the plaintiff, and had existed for such a length of time that the defendants knew it, or ought to have known it; that it was the fault of the defendants,

and not of the plaintiff, that he had no work; that while he was without work he simply did what he had seen others do, and what was customarily done, and did not do anything that he had been told not to do; that he was not enjoying a rest for a definite period, but his leisure was for an indefinite time, and might be terminated at any minute, and while it continued he was there in the room, holding himself in readiness to return to work, and subject to the orders of the defendants. Some latitude must be allowed a workman while engaged in his employment. It can not be said as a matter of law, if he is without work for a brief space of time and goes away from his work place a few yards to speak to a fellow workman employed in the same room, that he places himself beyond the protection of the statute. Such an interpretation of the law would be repugnant to the humane intent and purpose of the act.

The defendants claim that no duty was imposed upon them to guard the machine upon which the accident occurred to protect the plaintiff from injury. As it can be found that it was a custom in that room, which was known, or ought to have been known, to the defendants, for employees, when waiting for work, to go about the room and talk with the operatives at the machines, it can also be found that it was the duty of the defendants to reasonably guard this machine to protect the employees from injury while they were there engaged in the course of their employment.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—COMMON-LAW ACTION DISMISSED—*Hansen v. Northwestern Fuel Co.*, Supreme Court of Minnesota (Nov. 7, 1919), 174 *Northwestern Reporter*, page 726.—Hansen was employed by the Standard Laundry Co. to collect and deliver laundry. When he returned to the laundry on the occasion of the accident and had stabled his horse during the noon hour, he discovered he had forgotten a bundle of laundry from a hotel and returned on foot to get it. While returning with the bag on his back he was run into and injured by a truck driven by an employee of the defendant fuel company. Hansen, the laundry company, and the defendant were all under the workmen's compensation act. Hansen elected to sue the fuel company at common law for damages, as under the compensation law he was entitled to do. As the fuel company was also under the compensation act, no more could be recovered against it at common law than the amount for which the laundry company as employer was liable in compensation. The defendants moved that plaintiff's common-law action be dismissed and that the court either grant or deny compensation under the compensation act, and the motion was granted. Hansen appealed from the order granting this motion. In affirming the order the supreme court approved the finding of the court below that the injury, though due to a "street risk," arose out of and in the course of the employment.

Continuing, the court said:

The compensation act provides that the person injured may proceed under the compensation act against his employer, or against a third party by a common-law action for negligence. To recover against the third party he must prove his common-law cause of action. If he recovers in a common-law action he can have no greater amount than that fixed by the compensation act. If he takes under the compensation act his employer is subrogated to his common-law action against the third party and his recovery is limited to the amount payable under the compensation act. (G. S. 1913, p. 8229.) The statute gives no right to proceed against the third party under the compensation act.

At the close of all the testimony the defendant moved that the case be dismissed as a common-law action and that the court either grant or deny compensation under the workmen's compensation act. The motion was granted. The defendant invited an award of compensation. It can not contest the question of its liability to the extent to which the laundry company was liable. There is nothing now to do but fix compensation. (See *Mahowald v. Thompson-Starrett Co.*, 134 Minn. 113, 158 N. W. 913, 159 N. W. 565 [Bul. No. 224, p. 326].)

The order is affirmed and the case remanded with directions to the court to entertain such further proceedings as may be appropriate.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—ELECTION—RECOVERY OF COMPENSATION—*Mayor and Council of Hagerstown v. Schreiner et al.*, *Court of Appeals of Maryland* (Jan. 16, 1920), 109 *Atlantic Reporter*, page 464.—Clarence M. Schreiner was killed by an accident arising out of and in the course of his employment with the Cumberland Valley Telephone Co. The accident was due, according to the allegations of the widow, to the joint negligence of the employer and the municipality of Hagerstown. Schreiner's widow brought proceedings under the workmen's compensation act (ch. 800, Acts of 1914) in behalf of herself and minor children, and the industrial board granted her an award of \$8.08 per week. She then brought suit for damages against the mayor and council of Hagerstown under section 57 of the compensation act (codified as sec. 58, art. 101, of the Code), which permits damage suits against negligent third parties. She recovered judgment and the mayor et al. appealed, declaring that Mrs. Schreiner having elected to take compensation was estopped from suing for damages. The court accepted the defendant's contention and reversed the decision. The opinion is in part as follows:

We think the plain meaning of section 58, so far as concerns the question here involved, is this: If the injury or death has been caused under such circumstances as to fix a legal liability upon some person or persons other than the employer, the employee or in case of his death his personal representatives or dependents, may elect to sue

such other person or persons at law, or may claim compensation under the act, but he or they can not pursue both remedies. If he or they accept compensation under the act such payment must be held as declared by section 36, article 101, to be "in lieu of any and all rights of action whatsoever against any person whomsoever." This construction is in accord with the design and general purpose of the act and is in harmony with its provisions.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—RECOVERY OF COMPENSATION—*Podgorski v. Kerwin*, Supreme Court of Minnesota (Dec. 19, 1919), 175 Northwestern Reporter, page 694.—The plaintiff Podgorski, was an employee of the People's Coal & Ice Co., and while at work making a delivery of coal to a customer was run into and injured by one Kerwin who was driving his automobile on his way to work. An agreement for the payment of compensation was entered into between Podgorski and the ice company. Thereafter Podgorski brought an action for damages against Kerwin, alleging negligence on the part of the latter, and succeeded in securing a judgment in his favor for \$7,000. Podgorski and his employer were both subject to the workmen's compensation act (Gen. Stat. 1913, secs. 8195–8280), and as to his employees Kerwin was also subject to this act. Kerwin was in the wholesale paper business and was on his way to work when he injured the plaintiff. It is his contention that, being himself under the compensation law, Podgorski must proceed against him in accordance with that law and can not maintain an action for damages. Kerwin also contended that Podgorski, having entered into an agreement for compensation with his employer, was no longer entitled to proceed against a third party, that right resting solely with the employer. The court failed to accept either of these contentions and affirmed the decision. The following is in part the decision:

By the terms of section 8203, where both the employer and the employee are subject to the act, the latter is entitled to compensation for an injury received during the course of his employment without regard to the question of negligence on the part of the employer; compensation follows from an accidental injury. Under subdivision 1 of the section under consideration an employer who is within the act is made liable for compensation for injuries to the employees of another employer where the injury is caused under circumstances creating a legal liability against him. While the statute makes it clear that in either case the injury for which compensation is given must as to the employee arise out of and in the course of the employment, there is no express provision prescribing when and under what circumstances the third party employer may or may not claim the benefits of the limited liability thus imposed upon him; it does not prescribe that to be entitled to the protection

of the statute he must show that the act causing the injury was committed at a time when he was engaged in the affairs of his own employment. But we think, though the statute is silent upon the particular point, that it should be so construed. It seems clear that the legislature did not intend to extend the protection of the statute to the culpable third party employer merely because he happened to be an employer of labor and as to his own employees within the statute. No reason occurs to us why such an employer should receive protection from a negligent injury occasioned while in the pursuit of his personal affairs, wholly disconnected with and unrelated to his business employment, as upon a pleasure drive with his automobile on a holiday or of a Sunday. It is a well-known fact that business concerns, through their servants and employees, have frequent and almost daily transactions with each other in the delivery of commodities by one to the other, which necessarily expose their employees to injury when upon or about the premises of the employer with whom such transactions are had, as well as when the employees come in contact with each other in the discharge of their duties elsewhere. This was well understood by the legislature when framing and enacting the statute, and we conceive the purpose of that body to have been to limit the liability of the third party employer to injuries arising from relations of that kind, and not to extend to him a blanket exemption from liability for his wrongful acts, based on the naked fact that he occupies that relation to industrial life. (*Hade v. Simmons*, 132 Minn. 344, 157 N. W. 506.) We so construe the statute, from which it follows that the limited liability is not available to defendant, unless the act causing the injury here complained of had some relation to and connected with the business which he then carried on, as to which he was an employer within the meaning of the law.

The further contention of defendant that, though the case comes within the second subdivision of the third-party provisions of the act, plaintiff can not maintain the action, for the reason that the settlement for his injuries with his employer and the payment of the amount agreed upon operated by force of the statute to transfer his right of action to his employer. The contention is not sustained. The right of action against the third person not subject to the act is expressly given to the employee notwithstanding settlement has been made with his employer. The statute is clear on the subject, and a recovery in such an action necessarily will conclude all parties and not expose the third party to a second suit. Such is the rule in practically all of the States having statutory provisions similar to our own. (*Book v. City of Henderson*, 176 Ky. 875, 197 S. W. 449; *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95; *Rogers v. Ill. Central Railway Co.*, 210 Ill. App. 577.)

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—SUBROGATION OF EMPLOYER PAYING COMPENSATION—*Black v. Chicago Great Western R. Co.*, Supreme Court of Iowa (Nov. 22, 1919), 174 Northwestern Reporter, page 774.—Black was an employee of the Ware Transfer Co. and was injured by the defend-

ant railroad in the course of his employment. He was paid \$378 as compensation for his injuries by his employer. Later he brought this action against the railroad for damages and recovered judgment. The defendant appealed, claiming that the action could not be maintained by this plaintiff as his rights had passed to his employer. In affirming the judgment the court said in part:

Was the plaintiff, after having received from his employer payments due him under the provisions of the workmen's compensation act (Code Supp. 1913, ch. 8a), entitled to maintain this action for damages against the defendant? The trial court held the issues of negligence and contributory negligence, under the evidence, to be issues of fact, and submitted the same to the jury. It also held that the recovery, by plaintiff, from his employer, of benefits of the compensation act, did not prevent his recovery of damages from the defendant for its negligence and instructed the jury, in case it found for plaintiff in excess of \$378, to deduct from the amount to which they found plaintiff entitled the amount he had received as compensation. The amount of compensation which had been paid plaintiff by his employer was \$378. The verdict and judgment was \$7,197. Plaintiff has not appealed, and says in argument that he does not object to the deduction made.

The compensation was paid solely because plaintiff was an employee of the transfer company. Plaintiff seeks to hold the defendant for its negligence, and to hold it liable as a person other than the employer, for damages under section 2477m6 of the Supplement to the Code.

Defendant's theory is, as we understand it, that the transfer company is completely subrogated to all the rights of the plaintiff, and that this has the force of an assignment of plaintiff's entire claim, and that therefore plaintiff may not maintain this action, because the employer is substituted in the right of plaintiff to recover damages from the defendant.

We hold that appellant's contention that plaintiff can not maintain the action can not be sustained. The statute does not provide how the employer's indemnity or subrogation shall be adjusted, whether by intervention after verdict in the action for damages, or during the trial, or whether it should be made a party defendant, or whether the wrongdoer may serve notice on employer before paying the judgment or payment of money on settlement, if there is one, and so protect itself. At any rate, where it appears that compensation has been made under the compensation act, the employer should in some way be brought in. (37 Cyc. 388; 25 R. C. L. 1395.)

Under the peculiar circumstances shown, the cause is removed, with directions that the employer be brought in, to the end that any compensation which has been paid by him may be deducted from the judgment and paid to him, and the balance to plaintiff. We find no prejudicial error, and the judgment is therefore affirmed.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—ELECTION—LETTER ANNOUNCING INTENTION TO SEEK COMPENSATION—*Arkansas Valley Ry., Light, and Power Co. v. Ballinger, Supreme*

Court of Colorado (Jan. 6, 1919), 178 Pacific Reporter, page 566.—This is an action for damages by the widow of one Ballinger who was killed during the course of his employment while working for the Colorado Trading & Transfer Co., which was engaged in installing a generator in the power company's premises. Ballinger and another man were working together. The generator which they were to move into the power company's plant would not go through the door, and so under instructions they undertook to remove the door, but a rope which was used to open and close the door would not pass through its pulley. Ballinger thereupon mounted a ladder, after first being told by an employee of the power company that two wires over the pulley were "dead," and attempted to remove the clevis from the pulley. While doing this his monkey wrench slipped from the nut and struck one of the wires, which was in fact charged with electricity, causing him to receive a shock so that he fell upon a lightning arrester and was electrocuted. After writing to the compensation commission on the subject of a claim his widow sued for damages, and the power company appealed from a judgment in her favor, contending that as she had elected to take compensation she could not sue for damages. The opinion of the court in affirming the judgment is in part as follows:

The plaintiff in error (power company) contends that the court erred in refusing to permit it to introduce testimony in support of its defense alleging that the plaintiff had filed her claim for compensation with the industrial commission under the workmen's compensation law, and that thereby and by operation of law she has assigned whatever right or cause of action she may have had against the defendant on account of the death of her husband, and is not now the owner of said claim.

But the testimony offered shows that the plaintiff did not make any such application. What she did was to write the commission a letter stating the fact of the accident and death of her husband, and that she would apply for compensation. The commission replied to this letter inclosing an application blank, but nothing further was done. This can not constitute an election under the law, even though the parties had been subject to its provisions, which does not appear either from the pleadings or proof offered.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—FEDERAL STATUTE—EXCLUSIVENESS OF REMEDY—*Dahn v. McAdoo, Director General of Railroads, et al., United States District Court, Northern District of Iowa (Apr. 16, 1919), 256 Federal Reporter, page 549.*—Dahn was a railway mail clerk in the employ of the Post Office Department of the United States, working on the Illinois Central Railroad in Iowa when he received injuries alleged to have resulted from

the negligence of the railroad company. He brought suit for damages for personal injuries against the Illinois Central Railroad Co. and the United States Director General of Railroads. The action was dismissed as to the railroad company but not as to the director general, who was given permission to file a demurrer, which was done. After dismissing the first ground of demurrer as to the liability of the director general, the court proceeded to consider the second ground, which was that Dahn being a Federal employee his remedy was under the Federal employees' compensation law and no other action could be maintained. In overruling this demurrer the court said in part:

It is next urged in support of the demurrer that plaintiff, a railway mail clerk, at the time of his alleged injury, can recover for that injury, if at all, only under the "Federal employees' compensation act" of Congress, approved September 7, 1916.

The petition alleges that the plaintiff was an employee of the Government, in the performance of his duties as a mail clerk upon the Illinois Central Railroad in Iowa, at the time of the accident which resulted in the injuries of which he complains. The Congress, in the act to which reference is above made, has imposed upon the United States a liability for injuries to its employees when in the performance of their duties, except under the conditions prescribed in the act; and it may be that Congress might have required the injured employee to seek redress for such disability or injury exclusively from the United States, and in the manner provided in the act. But, be this as it may, the Congress has not done so. By section 1 of that act it is provided:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty," except under the conditions prescribed in the act. (Comp. St., sec. 8932a.)

Other sections of the act provide in detail the method and procedure by which the injured employee may recover from the United States the compensation therein provided for such injury. That a mail clerk employed by the United States in a mail car used in the carriage of mails upon railroads is an employee of the United States, within the meaning of this act, is not doubted, nor is it disputed, and when such an employee is disabled or killed in the performance of his duties, and seeks to recover from the United States the compensation so provided, it is obvious he must proceed in the manner provided by this act. But in no part of the act is it directly or by reasonable implication provided that the injured employee or his legal representatives shall be limited to the amount of compensation so provided in this act as against a wrongdoer, who by some negligent or other wrongful act has caused the death or disability of the injured employee, and to so prohibit would be to amend the act, which the court will not do.

This ground of demurrer is also overruled, and it is accordingly so ordered.

WORKMEN'S COMPENSATION—INJURY DUE TO ACCIDENT—DEATH FROM STREPTOCOCCIC INFECTION—CAUSAL CONNECTION—*Bethlehem Shipbuilding Corporation (Ltd.) v. Industrial Accident Commission of California, Supreme Court of California (Nov. 8, 1919), 185 Pacific Reporter, page 179.*—An employee of the plaintiff company by the name of Caffrey while engaged at his work sustained a contused wound of the great toe of his right foot, from an injury which arose out of and in the course of his employment. Caffrey went to a doctor to have the toe dressed several days later. The following day the toe caused him so much pain that he was compelled to go home, but instead of calling a doctor he sought to treat the wound himself, and in so doing he communicated the infectious germs from his toe to his face. The toe developed erysipelas, and by reason of the transmission of the infection erysipelas developed in the face also and resulted in septicemia from which Caffrey died. Compensation was awarded to Caffrey's dependents, and the employer appealed, contending that Caffrey's death was not the proximate result of the injury to his toe. In refusing to accept this view and in affirming the award, the court said in part:

In the light of medical knowledge properly presented to the commission that such a transfer of a streptococcic infection from a discharging wound as that found to have taken place in Caffrey's case is not only possible but highly probable, we are of the opinion that the fact that the germs reached the face by external means and not through the system can not, as a matter of law, be said in itself to have broken the chain of causation. But petitioner contends that Caffrey's conduct was such as to require a finding of negligence on his part. Caffrey was, of course, under a duty to use reasonable care to restore himself to health. But if he conducted himself as would a reasonably prudent person in his situation and circumstances and innocently enhanced the original injury it was within the province of the commission to find that the original cause continued to the end and accomplished the final result and was therefore the proximate cause.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—RETURNING HOME FROM JOURNEY—*Haddock v. Edgewater Steel Co., Supreme Court of Pennsylvania (Jan. 4, 1919), 106 Atlantic Reporter, page 196.*—Haddock was a mechanical engineer employed on a salary by the defendant steel company, with no fixed hours of service. He had been directed to go to another city for information for use in his employer's business, and on his return, after 11.30 p. m., and while going from the station to his home before reporting, was killed by an automobile. Compensation was awarded and defendant appealed. In affirming the award and holding that the injury occurred in the course of the employment, the court said in part:

This is not the case of an employee injured after regular working hours on the way to his home, and we agree with the court below that there is nothing on the record to show Haddock had, at the time of the accident, "ceased to be active in the furtherance of his employer's business." True, the facts as found indicate that plaintiff's husband intended stopping at his own residence to sleep for the night before reporting the results of his trip of investigation to the president of the defendant corporation; but, none the less, he was still upon his employer's errand, and in that sense actually engaged in the furtherance of the latter's business or affairs. Since deceased was compelled to return to the city at an hour when he could not at once communicate with his superior, and had to stay somewhere until he could report, he can not be charged with a departure from his employer's service because when hurt he was going to his home for a lodging rather than to a hotel; hence the findings of the referee are ample to sustain the ultimate conclusion upon which the award of compensation rests, to the effect that plaintiff's husband met his death by accident during the course of his employment with the defendant company.

WORKMEN'S COMPENSATION—INJURY IN COURSE OF EMPLOYMENT—VIOLATING RULES OF EMPLOYER—*Employers' Liability Assur. Corp. (Ltd.) v. Industrial Accident Commission, District Court of Appeal, Second District of California (Mar. 22, 1918), 177 Pacific Reporter, page 171.*—Tryon & Brain operated some motor-driven street flushers on the streets of Los Angeles and had in their employ as a chauffeur one Booth. The employer had specifically instructed him that he was not to permit anyone to ride upon the vehicle entrusted to him to operate. Booth on the occasion of his injury permitted one Schilling, an experienced motor driver, to ride with him and drive the vehicle while he manipulated the levers which permitted the water to flow upon the street. While manipulating these levers he saw a wrench lying on the footboard of the truck. Thinking that the wrench was about to fall to the ground and in an effort to save it, he leaned over to pick it up, but losing his balance he fell and sustained injuries for which he was awarded compensation. The employer's insurers contest the award. In affirming the award the court said in part the following:

Petitioners' first point is that Booth's injury did not occur in the course of his employment, for the reason that when he surrendered the running of the truck to Schilling he stepped aside from his employment and took upon himself an added risk not within the course of the employment.

The employee of Tryon & Brain did not abdicate either the place or the character of his employment. He gave up a part of his work to another, it is true, as he permitted Schilling to run the truck, but it was strictly within the line of his duty to operate and care for the levers which controlled the flow of water from the tank of the truck

to the street. The same may be said of his attempt to prevent the wrench from falling from the footboard. He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the performance of the remainder of it.

WORKMEN'S COMPENSATION—INJURY “INCIDENTAL TO EMPLOYMENT”—**SALESMAN INJURED ON STREET**—*Schroeder & Daly Co. et al. v. Industrial Commission of Wisconsin, Supreme Court of Wisconsin (June 25, 1919), 173 Northwestern Reporter, page 328.*—One Toll was a salesman in the employ of the Schroeder & Daly Co. His duties required him to go from place to place in the city of Milwaukee to sell produce to grocerymen. While so engaged and while traveling from one place to another, and while on the public street, he slipped and injured his right leg. Upon application he was awarded compensation by the industrial commission. The employer appealed on the ground that Toll's injury was not one growing out of and incidental to his employment, because it was sustained on the public street and did not happen as a result of a peculiar hazard of the industry, but was the result of a hazard to which the entire public was subject. In upholding the award the court said in part:

If it should be held that messengers, deliverymen, salesmen, and others who by the nature of their employment are required to be continually on the streets and highways are not entitled to compensation for injuries received in the course of their employment, if the injury occur on a street or highway, a large class of worthy applicants would be cut off and the workmen's compensation law emasculated. If an employee in the course of his employment is required to go up and down a stairway occasionally or frequently, and while so doing falls and injures himself, should he be denied compensation because everyone uses stairways and is continually liable to receive like injuries? Clearly not. The risk of injury to the applicant in this case was incidental to his use of the street in the course of his employment, and was peculiar to the employment in that the work of the employee could not be carried on without his subjecting himself to that risk. It therefore grew out of his employment. The fact that others may be exposed to like risks does not change the character of the risk to which the applicant was exposed. (*Globe Indemnity Co. v. Industrial Commission (Cal. App.)*, 171 Pac. 1088.)

WORKMEN'S COMPENSATION—INSURANCE—EMPLOYER—SCHOOL DISTRICT—ACTION FOR PREMIUMS—*School District No. 1 in City and County of Denver v. Industrial Commission of Colorado, Supreme Court of Colorado (Nov. 3, 1919), 185 Pacific Reporter, page 348.*—This was an action brought by the industrial commission against the school district for the recovery of compensation insurance premiums

in the amount of \$16,865.74 alleged to be due the State insurance fund under the provisions of the workmen's compensation act (Laws 1915, p. 515). Judgment was rendered for the commission after a trial upon stipulated facts, and the school district brings a writ of error to review the decision. It is claimed by the school district that it is not an employer and that the action here instituted can not be maintained, but that the proper action is one for a writ of mandamus to compel the school officials to pay the premiums. The court reviewed the various provisions of the compensation act and came to the conclusion that the proper action had been brought and affirmed the award. The opinion is, in part, as follows:

Section 21 of the act provides as follows:

"If any employer shall be in arrears for more than five days in any payment required to be made by him to the State compensation insurance fund, as provided in this act, he shall by virtue of such arrearage be in default of such payment, and the amounts due from him shall be collected by civil action against him in the name of the commission as plaintiff."

This section plainly provides the proper proceedings in court, to which reference is made in section 47.

By section 4, subsection *d* (1), of the act, the term "employer" is expressly and directly made to include school districts, and all public institutions and administrative boards thereof, without regard to the number of persons in the service of any such public employer; and provides that all such public employers shall at all times be subject to the compensation act. In order to hold that by the provisions of section 47 a school district is immune from the penalties and process of section 21, it would be necessary to construe section 47 as declaring that in case of nonpayment by a school district the only remedy provided was one against delinquent State or county officers, and in effect to withdraw from the section in cases where a school district is involved, the provision therein that:

"When any default is made in the payment of the sums hereinbefore required to be contributed, * * * it shall be the duty of the commission forthwith to institute the proper proceedings in court to compel such payment or payments to be made."

To so hold as to school districts would manifestly be unreasonable, discriminatory, and in view of section 21, illogical and utterly unwarranted.

The decision of the court below was therefore affirmed.

WORKMEN'S COMPENSATION — INSURANCE — EXCLUSIVE STATE FUND — REGULATION OF INSURANCE BY COMMISSION — *Thornton v. Duffy et al.*, Supreme Court of Ohio (Dec. 31, 1918), 124 *North-eastern Reporter*, page 54.—This is a proceeding for an injunction against the members of the Ohio Industrial Commission to prevent them from changing or modifying certain findings of fact previously

made by them with regard to Thornton's insurance. In 1914 Thornton, who is an employer of some 40 workmen under the workmen's compensation law, applied according to the provisions of the law as it then read for a certification by the commission of its financial ability to pay directly to its injured employees its liabilities for compensation and medical benefits under the act. The commission investigated and made findings of fact and certified to the fact that Thornton was financially able to pay his liabilities direct to his injured employees. Thornton thereupon entered into an annual contract of insurance with the Aetna Life Insurance Co. on April 29, 1914, by which the latter company undertook to pay Thornton's liabilities under the workmen's compensation act. In 1917 the General Assembly of Ohio made several amendments to the compensation law, pursuant to which the commission adopted a resolution revoking the privileges of self-insurance to all employers who protected themselves from liability as self-insurers by insuring with private insurance companies. Thornton attempted to prevent, by injunction, the commission from revoking its findings of fact as to his financial ability and enforcing its resolution. He asked for a temporary injunction to April 29, 1918, the date of the expiration of his annual insurance contract with the Aetna company, which was granted, and also asked for a perpetual injunction, which was refused. Plaintiff, Thornton, appealed, and in refusing to grant the perpetual injunction against the commission the court upheld the commission's authority to revoke its own findings of fact, speaking in part as follows:

The question in this case does not depend merely upon the general authority of the legislature to exercise police powers, but rather directly upon the constitutional grant of power and the further consideration that the privilege granted to certain employers by section 22 of the workmen's compensation act, to pay compensation direct, is an exception to the general provision of that act in their favor.

There is therefore no reasonable hypothesis upon which to base the theory that a private contract, to continue for an indefinite number of years, could in any way prevent the legislature from withdrawing this privilege or adding other and further conditions.

There is, however, a further provision in section 22 of the original act that seems to have been overlooked in the argument of this case. That provision (as amended, 107 O. L. 160) reads as follows:

"The Industrial Commission of Ohio may at any time change or modify its findings of fact herein provided for, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of the law in reference to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured and the dependents of killed employees."

The experience of four or more years under this workmen's compensation law may have demonstrated to the entire satisfaction of

this commission that it is necessary or desirable to change or modify its former findings of fact in order to secure or assure a strict compliance with the law, where employers have elected to pay this compensation direct and have later entered into a contract with an indemnity company.

While section 54 of the workmen's compensation law (section 1464-101, General Code), as it read prior to the amendment of February 16, 1917, undoubtedly permitted the writing of such a contract, nevertheless that section must be construed in connection with section 22 of the same act, which authorizes the industrial commission to change or modify its findings of fact provided for in that section, whenever in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of that act.

It therefore follows that the industrial commission would have the power under this provision of section 22 to change or modify its former findings of fact in reference to employers who had elected to pay individually from a benefit fund, department, or association such compensation direct, if it should find that such contracts furnish an opportunity for unfair or fraudulent settlement, and had resulted or might result, not only in avoiding a strict compliance with the provisions of the act, but also in some instances defeat its intent and purpose, especially where the injured employee or the dependents of an employee killed in the course of his employment are not fully advised of their rights under section 27 of this act and rule 18 adopted by the industrial commission under authority of the act creating that commission.

But the right of the Industrial Commission of Ohio to change or modify its former findings of fact does not now depend upon this construction of this paragraph of section 22. The amendment of March 20, 1917, of section 1465-69, General Code (107 O. L. 159), specifically limits the privilege of electing to pay compensation individually or from a benefit fund, department, or association, to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof," and therefore it becomes the duty of the Industrial Commission to change or modify its former findings of fact in reference to such employers, and make the same conform to the provisions of the amended section.

This added condition precedent to the exemption of certain employers from the general provisions of the act is not only clearly within the power of the general assembly, but it is in furtherance of the purpose and intent of the constitution and the law, to create and maintain one insurance fund, to be administered by the State, out of which fund compensation shall be paid to workmen and their dependents for death, injuries, or occupational diseases occasioned in the course of employment.

If insurance is desired, the State will furnish it out of the fund created and maintained for that purpose; for it would not only be arbitrary, unfair, and without purpose, to permit some employers of labor to enter into contracts of insurance with private companies and compel all other employers to contribute to the State insurance fund, but it would also hinder and perhaps utterly demoralize the

method and defeat the object and purpose of the creation of such a fund.

This case was heard in the United States Supreme Court on a writ of error, and the decision of the Supreme Court of Ohio was affirmed (Dec. 20, 1920), 41 Supreme Court Reporter, page 137. The opinion of the court as delivered by Mr. Justice McKenna is in part as follows:

In support of the contention that the Constitution of the United States makes the legislation and the action under it illegal, it is said that insurance against loss is the right of everybody, and specifically it is the right of employers to indemnify themselves against their liability to employees and that the right is so fixed and inherent as to be an attribute of liberty removed from the interference of the State.

The provisions of the legislation are necessary elements in the consideration of the contention: The constitution of Ohio authorizes workmen's compensation laws. Explicitly it provides for the passage of laws establishing a State fund to be created by compulsory contributions thereto by employers, the fund to be administered by the State. The constitutionality of a law passed under that authorization was sustained by this court in *Jeffrey Manufacturing Co. v. Blagg*, 235 U. S. 571, 35 Sup. Ct. 167 [Bul. No. 169, p. 203], against the charge that its classifications were arbitrary and unreasonable.

We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the constitution of the State, as much a part of both as if expressed in them, and we are unable to yield to the contention that the legislation or the requirement transcends the power of the State, or in anyway violates the Constitution of the United States. The law expressed the constitutional and legislative policy of the State to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions.

We are not disposed to extend the discussion. Indeed, we think the case is in narrow compass. We are not called upon to controvert the right to insure against contingent losses or liabilities, or to minimize the value of insurance to business activities and enterprises, or discuss the general power or want of power of the State over it. We are only called upon to consider its relation to and possible effect upon the policy of a workmen's compensation law, and we can readily see that it may be, as it is said the experience of Ohio demonstrated, inimical to that policy to permit the erection of an interest or a power that may be exerted against it or its subsidiary provisions. This was the view of the supreme court of the State, and by it the court justified the power conferred upon and exercised by the commission.

WORKMEN'S COMPENSATION — INSURANCE — SELF-INSURANCE — REQUIREMENT OF BOND — AMOUNT — *Bank of Los Banos et al. v. Industrial Accident Commission of California*, Supreme Court of Cali-

*for*nia (Aug. 26, 1919), 183 *Pacific Reporter*, page 538.—This proceeding is a petition for a writ of certiorari, to review the action of the industrial accident commission in requiring Miller & Lux (Inc.) to deposit a bond or securities in the sum of \$20,000 as a prerequisite to the issuance of a certificate permitting self-insurance under the workmen's compensation act. The petitioners are subsidiaries of Miller & Lux (Inc.), which is a very rich corporation, employing many employees. In demonstrating its ability to carry its own insurance under the compensation law, Miller & Lux listed among its assets United States Liberty bonds in the sum of \$28,000, and the commission requested the deposit of \$20,000 of these bonds as the security of Miller & Lux and all its subsidiaries for the payment of their compensation liabilities. The petitioners claim that under the law they can not be required to give a bond or securities, inasmuch as they have demonstrated their solvency and financial ability. The court upheld the action of the commission, saying in part:

We must decide, therefore, whether or not any bond or deposit may be required, and if that question be answered in the affirmative, whether or not the amount (\$20,000) is reasonable, under all the circumstances. By the workmen's compensation act of 1917 (Stats. 1917, p. 831), it is provided (p. 857) that—

“Every employer as defined in section 7 hereof, except the State and all political subdivisions or institutions thereof, shall secure the payment of compensation in one or more of the following ways: * * *

“2. By securing from the commission a certificate of consent to self-insure, which may be given upon his furnishing proof satisfactory to the commission of ability to carry his own insurance and pay any compensation that may become due to his employees. The commission may, in its discretion, require such employer to deposit with the State treasurer a bond or securities approved by the commission, in an amount to be determined by the commission. Such certificate may be revoked at any time for good cause shown.”

Petitioners insist that the commission may require the bond or securities specified in the statute when there is any reasonable doubt of the employer's ability to carry his own insurance, but that where no such doubt exists the commission must grant the certificate of consent without the giving by the applicant of any security. There might be some force in this position if solvency of the petitioning employer were the only matter involved, but the highest purpose of the workmen's compensation statutes is not merely to obtain payment of just claims, but to have such demands promptly adjudicated and paid in such way as to be available to the injured employees when most needed. Any corporation, no matter how rich, may be subject to lawsuits, and it is easily conceivable that all the funds of a given corporation might be held by injunction, or other order of court, in such manner as not to be immediately available for settlement of awards of compensation found by the industrial accident commission. It is therefore highly desirable that a proper fund or

bond be provided and that such security be under the control of the industrial accident commission. The requirement of security is also justified by the fact that payments of compensation sometimes extend over long periods of time. A corporation solvent at the time it may secure permission to carry its own compensation insurance may have many changes in its financial status during the years of its obligation to pay persons who may be injured while in its service. The fund or bond authorized by the statute not only keeps safe the installments of indemnity due from time to time to the injured employees, but it makes unnecessary the otherwise constant watchfulness of the industrial accident commission over the possibly diminishing resources of the self-insurer.

We can not say, from the record before us, that the industrial accident commission abused its discretion when acting upon the applications of these petitioners. This record discloses the fact that petitioners are engaged in very extensive business operations of many sorts. These activities are only made possible by the employment of many persons.

In view of the magnitude of the business of petitioners, and the probability of frequent injuries to their employees, we can not say that this record reveals an abuse of discretion on the part of the industrial accident commission.

WORKMEN'S COMPENSATION—INSURANCE—WHEN NOT REQUIRED—
DIFFERENT CLASSES OF EMPLOYEES—*Puget Sound Bridge & Dredging Co. v. Industrial Insurance Commission, Supreme Court of Washington (Jan. 10, 1919), 177 Pacific Reporter, page 788.*—The industrial insurance commission, the defendant in this action, claims that all employees of the plaintiff are subject to the workmen's compensation act (Laws 1911, p. 345), and that premiums should be paid on account of the work of all the employees engaged in dredging operations. Employees of the plaintiff company may be said to be engaged in three kinds of work: First, those who work on the dredge entirely; second, those who work on land entirely; and, third, those who work partly on land and partly on the dredge and who are often engaged in going back and forth. The dredge was operating in navigable waters, and would be covered by the admiralty laws. The court, in deciding whether the plaintiff must pay premiums, said in part:

As to those employees who work exclusively upon the dredge, we are firmly of the opinion that the plaintiff should pay no premiums. for the dredge, as a vessel, is subject to admiralty jurisdiction, and if premiums were paid for employees engaged exclusively thereon the company, in the event of an injury occurring to one of such employees, would receive no protection under the act.

The second class of workmen, employed solely on land, comes within the operations of the provisions of this act, and for them premiums are collectible.

As to the third class, we are confronted by the perplexing question of this case. The workmen's compensation act was passed with the avowed purpose of providing the exclusive manner of compensating employees engaged in hazardous work and occupations, and within the scope of the act all employees of a company such as the plaintiff are to be brought within the operation of that act, so far as it is within the power of the legislature to do so. The legislature, not bringing within the act those employees who are within the jurisdiction of admiralty, can not compel the employer to pay premiums for those employees for whose injuries the employer would be liable in admiralty. On the other hand, the employer is not absolved from the duty of paying premiums for those employees who are not within the admiralty jurisdiction and for whose injury the employer would have been liable in a suit at common law before the passage of the workmen's compensation act. It may be, as here, an onerous task to so segregate for the purpose of computing the premium to be paid the time of employees who are alternately on land and on the navigable water, but this is a matter of detail of the business which must be worked out by the employer and the commission, and it is not one which calls for judicial action. If this segregation is impracticable, the remedy must lie in some alteration of the act by the legislature.

As to those employees falling within the third class, the industrial insurance commission is entitled to a collection of premiums for such time as those employees are engaged in work upon the land and is not entitled to receive premiums representing the time that they are without the protection of the act and subject to the rules of admiralty jurisdiction.

WORKMEN'S COMPENSATION—INTOXICATION—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—*State ex. rel. Green et al. v. District Court of Ramsey County, Supreme Court of Minnesota (Feb. 6, 1920), 176 Northwestern Reporter, page 155.*—Thomas Davis was employed as a furnace man in the Fey Hotel by Nancy Green, the defendant, at a wage of \$35 per month. To reach the furnace he was required to enter the building in the rear from the alley and descend to the basement by means of a stairway. The stairway had no railing or banister and was not in very good repair. Davis came to work in an intoxicated condition, and while descending the stairs tripped and fell, sustaining injuries from which he died. The district court awarded compensation under the workmen's compensation act (Gen. St. 1913, secs. 8195-8230) and the employer appealed. The decision of the supreme court affirming the award is in part as follows:

General Statutes 1913, section 8203, of the compensation act provides that compensation shall be paid according to the schedules therein contained in every case of injury or death of an employee by accidental means, without regard to the question of negligence, "except accidents which are intentionally self-inflicted or when the intoxi-

cation of such employee is the natural or proximate cause of the injury, and the burden of proof of such fact shall be upon the employer."

The question whether the intoxication of the decedent was the natural cause of his injury and death may be passed without comment. It clearly was not. Whether it was the proximate cause thereof presents another and different question, though on the facts here presented we hold that it was correctly disposed of by the trial court.

In controversies under the workmen's compensation act the contributory negligence of an injured employee is not a bar to his right to compensation. The intoxication of a person injured by the alleged negligence of another has usually been treated in actions at law for damages as a contributing cause thereof, and sufficient to defeat a recovery. But that condition of the injured person is not per se contributory negligence. (2 Dunnell's Dig. 7028 and cases there cited.) It constitutes a bar to relief under the compensation act only when shown to be the proximate, as distinguished from the contributory, cause of the injury complained of. This distinction necessarily follows from the express language of the statute by which contributory negligence of the employee is expressly excluded from consideration in determining the liability of the employer.

The record also shows that at the time of the accident the stairway, the means of access to decedent's place of work, was to some extent not in good order. There was no railing by which one might guard his course up or down the stairway; one was placed therein soon after the accident. On the day following the injury some ice and snow was found on the first three or four steps of the stairway, and the trial court might well enough have assumed its presence on the day of the accident. From this state of the evidence we conclude that the proximate cause of the accident lay between the intoxication of decedent and the condition of the stairway, presenting a question of fact for the trial judge, whose conclusion thereon is not open to review in this court.

Judgment affirmed.

WORKMEN'S COMPENSATION—LUMP-SUM COMMUTATIONS—"UNUSUAL CIRCUMSTANCES"—*Jensen v. F. W. Woolworth Co., Court of Errors and Appeals of New Jersey (Feb. 6, 1919), 106 Atlantic Reporter, page 808.*—Tressa M. Jensen was employed by the defendant as a window trimmer. While engaged in her work she swallowed some pins, causing her great injury. One of the pins lodged near the base of her brain. She was bedridden and needed constant attention. In the opinion of the physician attending her an operation was necessary to save her life. For the purpose of securing funds for her care and the operation she requested that the award for compensation which she had received be commuted to a lump sum. This request was granted and the employer appealed. In affirming the judgment allowing the lump-sum award the court said in part:

The statute provides, among other things, that, as commutation is a departure from the normal method of payment, it is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. If to be bedridden, with the requirement of a surgical operation to save the patient's life, is not an unusual circumstance, and such a one as warrants commutation of future weekly payments into a lump sum, to enable the patient to procure the services of a surgeon and the proper medical attention and nursing, it is hard to conceive of circumstances that would call for the making of an order for commutation. It is plain, therefore, that there was sufficient evidence before the Morris County court of common pleas to support the order.

Going now to the letter and spirit of section 6 of the act of 1913, amending section 2, paragraph 21, of the act of 1911, we find that the court may order commutation if it appear that it will be for the best interest of the employee. Surely it will be for the best interest of Miss Jensen to be placed in funds which it appears may save her life, rather than that she be compelled to take the chance of almost certain death without them. Then, too, commutation may be made to prevent undue hardship. The same reasoning applies.

Commutation in these circumstances is not to be defeated by the concluding provision of the statute that it shall not be made to enable the employee to satisfy a debt, or to make payment to physicians, lawyers, or other persons. This inhibition against commutation for payment to physicians, lawyers, or other persons is evidently meant to protect the employee in the enjoyment of the periodical payments, by making it impossible for him to yield to importunities of creditors for the discharge of their already due obligations, or to raise money to be spent in enterprises of a doubtful or hazardous nature, or where it does not appear that commutation will otherwise be for the best interest of the employee, or is not needed to avoid undue expense or hardship, or when it does not appear that some unusual circumstances warrant a departure from the normal method of periodical payments.

In our opinion the Supreme Court reached the right result in this case, and its judgment should be affirmed, for the reasons above expressed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN BY EMPLOYEE—*Leadbetter v. Industrial Accident Commission, Supreme Court of California (Dec. 30, 1918), 177 Pacific Reporter, page 449.*—Frank G. Pryor was a bridge carpenter in the employ of Leadbetter and was working on a job at Hermosa Beach when he sustained an injury to his back by reason of a bent falling upon it. His foreman knew of the injury. He went at once to a doctor for examination and then returned to his work, although he was suffering considerable pain at the time. He later went to Porterville and consulted another physician, who after examining him sent him to an osteopath for treatment. Thereafter he went to Portland, Oreg., and incurred further medical and hospital bills. The treatment received in Porterville was with the knowledge of the em-

ployer, Leadbetter, who made no tender of other medical service of his own choosing, but the treatment in Portland was unknown to the employer. In fact, Pryor wrote a letter to Leadbetter which was sufficient to make the latter believe no further treatment was necessary. Pryor's claim for medical services came to the commission who considered the matter and found that Pryor had refused medical treatment when tendered him by his employer, but when he sought treatment later the employer had knowledge of the fact and did not again tender medical service, and that therefore the employer was liable for all the medical service received both in Porterville and in Portland. This was done on the ground that under the statute (sec. 15a St. 1913, p. 291) the employer is liable to provide all necessary medical, surgical, and hospital treatment the injured employee may require, and if the employer shall neglect or refuse seasonably to do so the employee may provide the same at the employer's expense.

The supreme court after carefully considering the case allowed the award for medical expenses incurred at Porterville for the reasons above stated, but refused to allow any award for the expenses incurred in Portland on the ground that from Pryor's letter it was plain that no further service was required by him.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN BY EMPLOYER—*Radil v. Morris & Co., Supreme Court of Nebraska (Jan. 4, 1919), 170 Northwestern Reporter, page 363.*—Radil was injured while working for the defendant in its packing house. An award for compensation was confirmed, but the medical-service bill was disallowed. When Radil was hurt he went with his foremen to the office of the company's physician, who was out. The physician's assistant rendered the necessary first-aid service and told Radil to return the next day. Upon the advice of his mother he went the next morning to his family physician, who retained charge of the case. The compensation law of Nebraska makes no specific provision as to who may first choose the physician to treat an injury other than the following:

Provided further, That where the injured employee refuses or neglects to avail himself of such medical or surgical treatment, the employer shall not be liable for any aggravation of such injury due to said neglect or refusal.

Judge Dean, expressing the opinion of the court, affirmed the refusal to allow the bill for medical services of the family physician, saying:

The employer having been made liable for the services contemplated by the act, it seems from the language used that it must have

been the legislative intent that he should be permitted to furnish a physician of his own choice, and if his selection is such as would satisfy a reasonable man under like circumstances the employee would not be heard to complain. That is the general rule in manufacturing centers, where employers' liability acts with provisions similar to ours were in effect before our act was adopted. (Pecott's case, 223 Mass. 546, 112 N. E. 217; *Keigher v. General Electric Co.*, 173 App. Div. 207, 158 N. Y. S. 939.)

It seems to us that the plaintiff's conduct was in effect and within the meaning of the act an unjustifiable refusal to allow the defendant to furnish the reasonable services and medicines that the act contemplates, and that the defendant is not therefore liable for the medical expenses that he incurred. We have examined the case de novo, and our conclusion is the same as that arrived at by the trial court.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN—OFFER BY EMPLOYER—*Cella v. Industrial Accident Commission, District Court of Appeal, First District, Division 1, California (Nov. 25, 1918), 177 Pacific Reporter, page 490.*—Cella made application to have an order of the commission denying him an award annulled. The opinion of the court, which also states the facts, is as follows:

This is an application for a writ of review for the purpose of having annulled an order made by the respondents refusing to make an award in behalf of the petitioner covering hospital charges.

About November 9, 1917, Rafaelo Cella was injured while in the employment of Producers' Hay Co. (which is hereinafter referred to as the company). On the 16th he was told by the company's physician to go to the St. Francis Hospital. The petitioner did not do so, but went to the St. Joseph's Hospital, and now claims that he did so through ignorance. In this behalf he alleges that he is an Italian and can neither read, write, nor speak English. However, the fact was clearly established that the petitioner was directed to go to the St. Francis Hospital and the address was given in writing. These facts do not show any neglect or refusal on the part of the company to furnish the petitioner hospital service. Yet it is clear that the commission could not make an award to the petitioner for such services except it be first shown that the company had neglected or refused to furnish such service. (Stat. 1913, p. 279, sec. 19, subd. (b).) The respondent commission did not exceed its jurisdiction in refusing the petitioner an award. The order is therefore affirmed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—CHOICE OF PHYSICIAN—REFUSAL TO ACCEPT PROFFERED AID—*Neary v. Philadelphia & Reading Coal & Iron Co., Supreme Court of Pennsylvania (Mar. 24, 1919), 107 Atlantic Reporter, page 696.*—This is a case brought under the Pennsylvania workmen's compensation act of June 2, 1915 (P. L. 736). Neary was employed as a car runner by

the iron company and while engaged in his duties he got one of his fingers so crushed as to require surgical aid. For three days he accepted the surgical aid provided by his employer, but thereafter he consulted his own family doctor, who assumed charge of the case. The employer contends that by refusing the surgical aid proffered by it Neary forfeited his right to compensation. It appears that the change of physicians in no wise injured the claimant or increased his incapacity. The employer appealed from an award allowing compensation. The court affirmed the award, saying in part:

It is strenuously contended that plaintiff, by his refusal to accept the reasonable assistance so tendered, forfeited all right to compensation for the injury. This contention is based on the last clause of paragraph "e" of section 306 of the act (p. 743), which states:

"If the employee shall refuse reasonable surgical, medical, and hospital services, medicines, and supplies, tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

The manifest purpose is to protect the master from any loss that might result because of the servant's refusal to accept the tendered assistance, not to penalize the latter for exercising the important privilege of employing his own physician. However, by so doing the employee assumes the responsibility for his own treatment, and must bear the loss resulting from neglect or lack of skill therein.

If by refusing the tendered assistance the servant forfeits all right to compensation for the injury he has sustained, then the balance of the sentence is meaningless; for if his right to recover for the primary disability is gone, the whole claim is gone, and the master has no concern with the question of increased incapacity, which would be but a part of the claim already forfeited; and the fact that the employer is expressly released from liability for the increased incapacity caused by the employee's refusal to accept the proffered medical assistance is inconsistent with the claim of an entire forfeiture, as the express provision that certain conduct shall constitute a forfeiture of a designated part of the claim implies that the balance remains.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SERVICE IN EXCESS OF STATUTORY OBLIGATION—*Collins v. Joyce et al.*, Supreme Court of Minnesota (July 2, 1920), 178 Northwestern Reporter, page 503.—This is an action by Dr. J. S. Collins against Joyce & Rasmussen, employers of one Boltz, who was injured in their employ, for the recovery of \$325, which sum represented the value of hospital services and medicines. The compensation law fixes the limit of an employer's liability for medical services at \$200. The services were rendered to Boltz, in this case at the request of Rasmussen, who assured Dr. Collins that he would be paid for his serv-

ices. Joyce & Rasmussen later refused to be held liable for any sum greater than that fixed in the workmen's compensation law—namely, \$200. Dr. Collins was awarded judgment for the full amount of the bill in the lower court and the defendants appealed. In affirming the decision in favor of the plaintiff the court said in part:

The services were rendered at the request of defendants to one Levi Boltz, one of their employees, who was injured while in their employ. Defendants and Boltz were both within the scope of the workmen's compensation act (Gen. St. 1913, secs. 8195-8230). That act made it the duty of the defendants to provide Boltz with medical and surgical treatment and medicines and medical and surgical supplies, up to \$100. The court administering the compensation act might, under certain conditions, allow \$200. (G. S. 1913, sec. 8212.)

Defendants contend that, inasmuch as the statute made it the duty of defendants to provide this service for Boltz up to a certain amount only, a contract to pay more than that amount would not be implied from a request to perform this service, and that neither can a verdict be sustained for more than the amount fixed by the compensation law, on the theory of an express contract.

We are not called upon to consider the principles of implied contract applicable to such cases, for this action is plainly based on an express contract, and the trial court so submitted the case to the jury.

We see no good reason why defendants might not agree to furnish medical and hospital attention and supplies to their employee in excess of their statutory obligation, if they saw fit to do so, and no reason why they might not obligate themselves to pay plaintiff the full value of such services, furnished to their employee at their request.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO EXAMINATION—PENALTY OF REFUSAL—*Rose v. Desmond Charcoal & Chemical Co., Supreme Court of Michigan (May 29, 1919), 172 Northwestern Reporter, page 415.*—Rose was injured while in the employ of the chemical company, and as a result of the disability thus sustained he entered into an agreement with the company, which was approved by the industrial accident board and which provided that the employer's insurer was to pay to Rose the sum of \$6.125 per week during disability. The employer and insurer after an investigation came to the conclusion that after paying compensation for over three years Rose had recovered from the disability he had sustained from the injury, and they accordingly invited him to submit himself at their expense to a medical examination. Rose agreed several times to do this, but each time found some excuse for not doing so. It was believed that an X-ray examination would reveal the fact that Rose was no longer disabled, and the insurer and employer brought action for permission to cease the payment of com-

pensation, but the industrial commission issued an order denying this permission. The employer then brought certiorari, and the court in setting aside the order of the commission said in part:

Whether claimant's recovery is established depends upon the evidence of his present condition.

We have read the evidence upon the subject of the claimant's injury and condition, the medical testimony and his own. We think it can not be said that it is conclusive establishing the fact that he has recovered from his injury. It must be said there is some, if slight, evidence supporting a contrary conclusion. It tends strongly to prove that claimant is recovered. But the doubt which it leaves in the mind is a small one, and the refusals of claimant to submit his person to expert X-ray examination demand, we think, application of section 19, part 2, No. 10, Public Acts 1912 (ex. sess.) and such application will suspend his right to compensation. This, in our opinion, is the order which the board ought to have made in the premises. We do not intimate that it is our opinion that he has not had expert X-ray examination, which was some time in the year 1915. But it is a fair consensus of the opinions expressed by the medical witnesses that any doubts now existing about his condition may be resolved by an expert X-ray examination made presently. Claimant has only to give his time in order that such examination may be made.

Order set aside.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO EXAMINATION—PERMANENT TOTAL DISABILITY—*Texas Employers' Ins. Assn. v. Downing, Court of Civil Appeals of Texas (Jan. 14, 1920), 218 Southwestern Reporter, page 112.*—Downing was injured while in the employ of Alex and Sam Davidson by being crushed between some blocks of ice. His spine and one hand were hurt. The nature of the injury to the spine caused a curvature, which in turn caused one leg to be longer than the other. Downing claimed that he was partially paralyzed, that his hearing and eyesight had been affected by the injury, and that he was totally and permanently disabled. The industrial accident board allowed an award of compensation under the workmen's compensation act and Downing brought suit to have the award set aside and a judgment entered allowing him compensation in a lump sum. The Texas Employers' Insurance Association, the insurer, demanded that Downing submit himself to examination by an X-ray specialist, an eye and ear specialist, and one other doctor. This Downing refused to do, declaring that he was not, in a suit to set aside an award, required to submit to an examination, and further the provisions of the law requiring submission to physical examination were unconstitutional and void. Judgment was rendered in favor of Downing and the defendant appealed, assigning as error, among other things, the

action of the court refusing the physical examination. The court of civil appeals reversed the judgment, holding that such examination should have been ordered. The decision on this point is in part as follows:

The power of the court in the premises is logically the first matter for consideration in the examination of the question, and we will first consider such matter. We may begin its consideration with the proposition that we must look to the workmen's compensation law for any authority the court may have to order a physical examination without the consent of the plaintiff, for in the ordinary case the court is without such power. (*Austin & Northwestern Ry. Co. v. Cluck*, 97 Tex. 172, 77 S. W. 403.)

The provisions of the said workmen's compensation law that may be applicable are contained in sections 42 and 44 of the act (arts. 5246-42 and 5246-44, *Vernon's Civil Statutes*, 1918 Supp.). In the first article named it is provided that the industrial accident board "may require any employee claiming to have sustained injury to submit himself for examination before such board or someone acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the board to a physician or physicians authorized to practice under the laws of this State. If the employee or the association requests, he or it shall be entitled to have a physician or physicians of his or its own selection present to participate in such examination. Refusal of the employee to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal."

Provisions for examination under the directions of the board in special circumstances are also found in other parts of the law, but we need not further refer thereto, but may say that it appears from the entire act that physical examination, either at the instance of the board or the insurance association, is made an important feature in the administration of the law, and evidently regarded by the law-makers as being an important means of ascertaining the extent of the injury for which compensation is sought. The mere bringing of the suit in the courts in practical effect sets aside the award made by the accident board. The court thereafter has continuing jurisdiction of the proceeding, with power to make such orders therein from time to time in reference to allowing, diminishing, increasing, or discontinuing the weekly compensation that may have been allowed. We think it clear that it was the intention of the legislature that the provisions for physical examination should be applicable after the proceeding should have been transferred to the courts, as well as while it was pending before the board, and the only other inquiry pertinent to this phase of the question is whether such provision is in violation of the personal rights guaranteed by section 9, art. 1, of the Constitution.

The Supreme Court of the United States held that there were no constitutional objections to such a proceeding when it was authorized by legislative enactment. (*Camden Ry. Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617.) Such is also the holding of some other courts. (*R. C. L.*, vol. 14, p. 703, and authorities.) We have found no authority which denies the constitutional power of the legislature to enact

such laws. We conclude that the court had the power to order such an examination as was prayed for in this motion, and must now ascertain how this power is to be exercised, and whether the party may review the action of the court therein.

The motion itself, we think, states sufficient facts to show the necessity for such examination. The facts as developed on the trial of the motion and the case on its merits show that the issue as to the true extent and effect of the plaintiff's injuries is left in doubt after the introduction of the available testimony. The questions propounded by the jury to the court show that the jury was in doubt as to the truth of the case. The facts further show, we think, that an X-ray examination, and an examination by an ear and eye specialist, would probably ascertain the truth and clear up the doubt as to such matter. Under these circumstances we think the court should have granted the motion and ordered an examination under such reasonable conditions as might be named in the order. We therefore sustain the first assignment.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO EXAMINATION—X-RAY—ATTORNEYS' FEES—*United States Fidelity & Guaranty Co. v. Wickline, Supreme Court of Nebraska (Dec. 14, 1918), 170 Northeastern Reporter, page 193.*—Mrs. Wickline was injured while in the employ of the Northwestern Iron & Metal Co., which was insured against compensation liability by the plaintiff company. Mrs. Wickline suffered some injury, presumably a tear, to her kidney. She submitted herself to the required physical examination and was awarded compensation for her disability. The plaintiff company paid the compensation for eight weeks and then stopped because Mrs. Wickline refused to submit to having an X-ray photograph taken. The compensation law of the State of Nebraska requires that persons injured who claim compensation under the act must submit themselves for physical examination, making as a penalty for refusal the denial of compensation. The lower court gave judgment to the plaintiff company and the defendant appealed. In reversing the judgment, the court rendered its decision, in part, as follows:

Under the statute the request for an examination must be reasonable, but it does not appear to have been so in this case. The testimony before us shows affirmatively that neither an X-ray examination nor an X-ray photograph was necessary. No physician or other person testified that either was necessary, nor does it appear that a request was made by plaintiffs to the court to require defendant to submit to either.

The compensation law provides that upon request the county attorneys or attorney general for the State shall appear for the claimant for compensation, and in view of this provision the court held

that the court below had properly refused to assess attorneys' fees as a part of the award, saying:

The employers' liability act in its entirety is a summary proceeding. One of its objects is to facilitate an inexpensive and speedy settlement of controversies between employer and employee that arise out of personal injuries. It does not appear that the county attorney was requested to appear as counsel for claimant, or that he refused to appear. That such official would perform his duty in the premises when called upon to act in his official capacity is presumed.

For the error in regard to the physical examination, the case was reversed and remanded for a new trial.

On the new trial a judgment was again rendered in favor of the claimant, Wickline, and both parties appealed, the Supreme Court of Nebraska rendering its decision on July 16, 1919 (173 N. W. 689). The opinion reads in part:

Defendant's physician testified that she "thought an X-ray picture was a reasonable and a necessary thing," and that she had so advised defendant. A physician skilled in the art of making and reading X-ray photographs testified that in order to properly determine the extent and character of defendant's injury an X-ray photograph of the kidney ought to be made. He stated that in order to make a proper photograph it might be necessary to inject into the kidney an opaque solution called "colorogol," and described in detail the method of making this injection, stating:

"In the hands of an expert there is no danger whatever."

He further testified:

"That is a procedure that is not used so extensively as formerly because we are now able to X-ray the kidney without difficulty without injecting it."

He explained that he found it necessary to use this solution in a few cases. Defendant testified that if the court called upon her to have an X-ray picture taken, she would permit that to be done, but she would refuse to have colorogol injected into her kidney.

The district court found that the demand upon her was not reasonable, and that her refusal ought not to bar her from a recovery.

The district court was required (under our former opinion) to determine whether under the circumstances the request in this case was reasonable. It will be seen from the testimony of the expert produced by plaintiff that it is only in rare instances that it is necessary to inject this substance into the kidney, and it would seem that plaintiff ought to have availed itself of defendant's offer to submit to an X-ray examination without this injection. It may be that an injection was not necessary. We are constrained to hold, with the trial court, that the demand upon Mrs. Wickline was not reasonable.

By cross-appeal, counsel for defendant again asks us to tax an attorney fee against plaintiff. In the former opinion it was properly held that an attorney fee could not be taxed as part of the costs, and that holding is the law of the case. The statute was amended by the legislature of 1919 (Laws 1919, ch. 103), but the amendment is not applicable to this case.

The supreme court held that the lower court, in view of the facts before it, should have fixed the amount of compensation due to date. Its judgment was therefore modified by adding an award of the amount, and with this addition, the judgment was affirmed.

WORKMEN'S COMPENSATION—MEDICAL AND SURGICAL AID—SUBMISSION TO OPERATION—PENALTY FOR REFUSAL—CONCURRENT AWARDS—*O'Brien v. Albert A. Albrecht Co., Supreme Court of Michigan (May 29, 1919), 172 Northwestern Reporter, page 601.*—O'Brien sustained injuries to his feet and ankles while working for the Bryant & Detwiler Co. in the capacity of a carpenter. He and the company entered into an agreement whereby he was to receive compensation in the amount of \$9.45 per week, and later another agreement was made fixing the compensation at \$7 per week: both agreements having been approved by the industrial accident board. Later O'Brien entered the employ of the Albrecht company and sustained another injury resulting in a hernia. The board allowed him compensation in the amount of \$10 per week for total disability against the Albrecht company and failed to require him to submit to an operation to cure the hernia which the Albrecht company had tendered. In reversing the order of the board the court said, in part:

In the Jendrus case (*Jendrus v. Detroit Steel Products Co.*, 178 Mich. 265, 144 N. W. 563) Mr. Justice Stone fully considers this question. It was a case of a major operation of a very serious character. The workman was an ignorant foreigner, who refused for some time to consent to the operation, but who finally did consent. Under all the circumstances of that case it was held that the refusal to consent to the operation was not an unreasonable one.

Applying then the rule announced by Lord McLaren and adopted by this court to the facts of the instant case, we are impressed that the plaintiff's refusal was unreasonable. The operation was not as serious a one as in the Jendrus case. Indeed the record discloses that it was not a serious case of hernia. The operation is not attended with danger to life or health, and could be performed by the use of either a general or local anesthetic. The doctors agree that it is advisable, and it is not disputed that it is the only thing that can be done to affect a cure. Until the plaintiff submits to an operation, which should be at the expense of the defendants, he is not entitled to compensation from them.

It will be noted from the above facts that O'Brien was already receiving \$7 per week for partial disability from the Bryant & Detwiler Co. when he was granted the award of \$10 per week for total disability against the Albrecht company. On this point the court said in part:

The maximum compensation for total disability fixed by the statute is \$10 per week. (Section 5439, Comp. Laws 1915.) It must be obvious that a man can not be more than totally disabled. It should be equally obvious that he can not receive compensation for more than total disability. Our statute does not provide for concurrent compensation. It fixes a maximum of \$10 per week, and it can not exceed that sum, whether it is paid by one employer or several.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ACTION FOR DAMAGES NOT PERMITTED—*Rasi v. Howard Mfg. Co., Supreme Court of Washington (Jan. 19, 1920), 187 Pacific Reporter, page 327.*—The defendant was a manufacturer of woodenware in the city of Seattle and was under the workmen's compensation act. Hilda Rasi was a girl between 15 and 16 years of age who was employed by the defendant without a working certificate, which was contrary to the law. While so employed she lost four fingers of her left hand by getting them caught in the rollers of a machine on which she was working as an off-bearer. She brought suit at common law for damages for her injuries and recovered a judgment. Defendant appealed, claiming that the case came under the workmen's compensation act and that the present action should be dismissed. The court adopted this view, speaking in part as follows:

The appellant insists that the sole remedy of respondent is to be found in the terms of the workmen's compensation act and that she has no redress by statute against her employer. This position must be sustained. The first section (Rem. Code, sec. 6604-1) of that act provides as follows:

"The common law system governing the remedy of the workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. * * * The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this act provided."

If the respondent was a workman, within the meaning of this act, there can be no doubt that her sole redress must be found in the terms of the act. If she had been of the age of 16 years, there could be no reasonable contention that she did not come within the terms of the act.

Respondent's position seems to be that, because it was unlawful for appellant to employ the child under the age of 16 years, she was not confined for redress to the terms of the workmen's compensation

act. Counsel rely principally upon the case of *Hillestad v. Industrial Insurance Commission*, 80 Wash. 426, 141 Pac. 913 [Bul. No. 169, p. 269]. We are satisfied that case is not authority for the position of the respondent here. Section 2447, Rem. Code, makes it a misdemeanor for an employer to employ "any male child under the age of 14 years or any female child under the age of 16 years at any labor" in any factory without the written permit of a judge of a superior court of the county wherein such child may live. This statute does not make it unlawful for a child under the prohibited age to work and imposes no penalty upon the child when it does work. It follows that the child neither gains nor loses any rights by such employment, even though the employer may be penalized.

The workmen's compensation act plainly recognizes that a child less than the maximum age for the employment of a minor is a workman within the meaning of that act. It follows that whether the child is employed either lawfully or unlawfully such child is entitled to all the privileges of the workmen's compensation act and must seek its remedies under the terms of that act.

The judgment must therefore be reversed and the action dismissed.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—ACTION FOR DAMAGES PERMITTED—*New Albany Box & Basket Co. v. Davidson*, *Supreme Court of Indiana* (Jan. 28, 1920), 125 *Northeastern Reporter*, page 904.—The New Albany Box & Basket Co. employed Davidson and put him to work to assist in the operation of a wood joiner. Davidson was a minor under 16 years of age, and was engaged by the company without the consent of his parents and without a work certificate. On the same day that he was employed, and while working at the wood joiner, his right hand came in contact with one of the knives of the machine and cut off his fingers. He brought suit for damages under the common law, and the company in defense pleaded the workmen's compensation act (Laws 1915, ch. 106), contending that the common-law action could not be maintained.

On appeal of the company the supreme court affirmed a judgment in favor of Davidson for \$4,500. In rendering its opinion the court quoted statutes as to age certificates and the employment of children under 16 at designated dangerous employments. The appellant company admitted liability to penalties for violation of these laws but claimed their violation carried no further consequences. As to this the court said:

We can not agree with appellant that this is the extent of the application of the statute in the instant case. In *Hetzel v. Wasson Piston Ring Co.* (Court of Errors and Appeals of New Jersey), 89 N. J. Law, 201, 98 Atl. 306, it was held that the workmen's compensation act has no application to a child under 14 years of age employed in a workshop, factory, or mill or other place in violation

of a statute, and an action for injuries to such child, based upon the common-law liability of the employer, may be maintained.

All decided cases which we have examined hold that employment when referred to in the workmen's compensation laws means lawful employment. We think that a fair construction of the Indiana workmen's compensation act requires us to hold that in enacting the law with reference to the rights and remedies of employers and employees the legislature referred to legal employment.

In the instant case the appellee was employed in direct violation of sections 8022 and 8022-e of the statutes (Burns, 1914), and, such being the case, the employment was illegal, and he is not embraced within the provisions of the workmen's compensation act, and his action was properly brought.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—INSURANCE—*Maryland Casualty Co. v. Industrial Accident Commission, Supreme Court of California (Feb. 11, 1919), 178 Pacific Reporter, page 858.*—This action is a writ of review brought by the Maryland Casualty Co., which was the insurer of Bronstein & Le Blanc, employers of Frank T. Sharon, a minor of the age of 15 years and 2 months, who was killed while in their employ, against the industrial accident commission to have an award by that body annulled. An agent of the casualty company induced Sharon's employers to agree to insure their workmen's compensation liabilities after calling their attention to the liabilities incurred in employing such young men as Sharon. The policy of insurance which was delivered after but with full knowledge of Sharon's injury and death contained a provision stating that it would cover "such injuries, including death, sustained by an employee legally employed." Bronstein & Le Blanc employed Sharon without his having issued to him and presented to them an age and schooling certificate as required by the child-labor law. The court in annulling the award of the commission in favor of the mother said in part:

Among other places in which employment is prohibited by the provisions of section 1 so referred to is "any manufacturing establishment or workshop," which would include the employment in which the decedent was engaged at the time of his death. It is therefore argued that even though the employment during the hours the schools were in session was illegal without an age and school certificate it was not illegal at the hour in question, for although the schools of the city were in session November 14 they had adjourned before 4.30, and that therefore the decedent was not working "during the hours that the public schools are in session." But the contract of employment was an entirety and required the decedent to work six days in a week during the whole day and while school was in session. The contract was therefore one prohibited by law, and the fact that decedent might have been legally employed after school

hours on the day in question does not alter the fact that the contract of employment in question was illegal and in violation of the plain terms of the law.

Respondents, however, claim that in construing the child-labor law the court should look to its purposes, and that as the main purpose is to secure the education of the child that purpose had been fully accomplished in the case of Frank T. Sharon by reason of the fact that he had entered a public night school on November 13 and was intending there to continue his education. No consideration of the general purposes of the law would justify a departure from the plain provisions of the law, nor is it true that education was the main consideration entering into the child-labor law. The compulsory school law (Stats. 1905, p. 388, and its amendments, 1907, p. 95; 1911, p. 949; 1915, p. 762) provides for the attendance of all children between 8 and 15 years, with certain exceptions. The age and schooling certificate required by the child-labor law is also required by the compulsory school law, but the main purpose of the child-labor law is, as therein stated, to prohibit children under certain ages from engaging in certain forms of labor. Considerations of public health and safety enter into the general plan as well as matters of education.

There is no significance in the issuance of the policy after the death of the employee, and the cases of fire insurance in which such issuance after a loss have been held to waive certain conditions do not apply to this character of insurance where the policy is a continuing liability even after an accident, nor for the same reason does the acceptance or retention of the premium under the circumstances operate as a waiver.

On the whole, therefore, the contract of employment in violation of the child-labor law was illegal and not included in the policy of insurance, and there being no waiver or estoppel the petitioner is not liable under the policy for the accident in question.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—TREBLE COMPENSATION—CONSTITUTIONALITY OF STATUTE—*Brenner v. Heruben*, Supreme Court of Wisconsin (Feb. 10, 1920), 176 Northwestern Reporter, page 228.—Peter Heruben, a minor under 17 years of age, was employed by Brenner in his restaurant as a helper. While grinding some meat for a Hamburg steak Heruben was injured, and he instituted proceedings for compensation under the workmen's compensation law. He was awarded treble compensation under subsection 6 of section 2394-9 of the statutes, which provides that if a minor under 17 years of age be employed without an employment certificate and is injured his employer shall be held liable to pay compensation under the workmen's compensation act at treble the regular rate. When Heruben was employed he was over 16 years of age and did not need, as the law then stood, an employment certificate, but by an amendment (ch. 674, Laws of 1917) the age of minors for whom work certificates must be issued was raised from 14 to 17

years, and Brenner failed to demand the necessary work certificate. He appealed from the award, declaring that the provision of the act allowing treble damages to injured minors without work certificates was unconstitutional and void; but the court affirmed the award and upheld the constitutionality of the provision, although Judge Eschweiler rendered a lengthy dissenting opinion. The decision of the majority of the court is in part as follows:

The argument against its constitutionality runs, in substance, like this: Treble compensation is a penalty and its exaction is in fact the enforcement of a penal or criminal statute, namely, that of the child-labor law, which is not in any way germane to the subject of compensation for industrial accidents. The right to a jury trial for the enforcement of a penalty has never been waived by employers in electing to come in under the workmen's compensation act.

The argument is not without force, and were we to justify the amendment upon common-law principles alone, without reference to the wide departure therefrom made by the workmen's compensation act, the task would not be an easy one. But the question is not whether it is a justifiable common-law scheme, but whether it is fairly germane to, and within the limits of the general scheme of, the workmen's compensation act. If it is, then it is constitutional, for an employer in coming under the act waived his common-law remedies and agreed to be bound by the remedies afforded by the act and all lawful amendments thereto. (*Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106, 170 N. W. 275, 171 N. W. 935.)

It was not until the enactment of chapter 624, Laws of 1917, that section 2394-7 (4) was amended so as to include a minor of permit age, employed without a permit to become an employee under the act. Previous to that amendment injuries to such minors were not compensable thereunder because not employees within the meaning of the law. When this feature of chapter 624 came up for legislative consideration it presented this question: If injuries to minors of permit age employed without a permit are to be compensable under the workmen's compensation act, under what conditions shall they be made compensable so as not to emasculate one of the purposes of the child labor law? If no civil liability was attached to a violation of section 1728a by employers under the workmen's compensation act, who constitute the great bulk of employers of minors of permit age in this State, then a part at least of the purpose of the child labor law would miscarry.

It was no doubt a consideration of those facts that induced the legislature to permit injuries to minors of permit age employed without a permit in direct violation of the law, to be compensated under the workmen's compensation act upon conditions that treble compensation should be paid. It was within the legislative field to prescribe reasonable conditions for permitting injuries under such employments to be so compensated. Conditions thus prescribed can not be set aside by courts unless so severe as to be confiscatory, or to amount to a denial of due process of law. The condition in question does not come within either class, and must be held lawful.

The classification made by the legislature, if any, is one of employers, not one of minors. It divides them into those who obey the

law and those who violate it. Obviously this clear-cut cleavage is one of substance, and furnishes a good basis for classification. (*Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209.)

As before stated, delicts of both employer and employee are recognized by the act, and are made the basis of difference in the amount of compensation granted. No violation of rights is perceived by so doing. A public policy can be effectuated through the workmen's compensation act in connection with other public laws, and especially so where the laws involved are of a cognate nature. We therefore conclude that the amendment is constitutional, and that the judgment must be affirmed.

Judgment affirmed.

WORKMEN'S COMPENSATION—PERMANENT INJURY—IMPAIRMENT—INJURY WITHOUT LOSS OF EARNING CAPACITY—*Hercules Powder Co. v. Morris County Court of Common Pleas, Supreme Court of New Jersey (June 24, 1919), 107 Atlantic Reporter, page 433.*—An employee of the powder company was injured by an explosion arising out of and in the course of his employment. The nature of his injury was the loss of one of his testicles. The defendant court granted the employee an award under the workmen's compensation act and the powder company brings certiorari on the ground that an injury of this nature is not a "permanent bodily impairment" under the compensation law. In affirming the award in favor of the employee the court said in part:

The statute, section 11, concedes the awarded compensation (1) "where the usefulness of the member is permanently impaired," and (2) "where any physical function is permanently impaired."

The lower court found that as a result of the injury, the defendant's morale, courage, and marital efficiency were lessened. Whatever view the medical experts may entertain upon that phase of the case, the indisputable fact remains that the injured defendant has suffered the loss of a portion of his anatomy, which nature implanted in the human organism, as a dual reservoir of complete efficiency equally with eyes, ears, and limbs, and that to deprive him of one of these natural attributes is to take from him a component portion of the perfect genus homo, and to that extent at least impair the physical attributes of his manhood. This impairment may not prove to be so conspicuous in the ability to produce wages, in the industrial world, but there are other spheres for the employment of human energy, talents, and the possession of physical attributes besides the industrial world into the activity of which the defendant is entitled to bring, possess, and enjoy all the physical attributes with which nature endowed him.

In harmony with these considerations, it has been held that the sole criterion of a disability, partial in character and permanent in quality, under the statute, is not limited to the loss of earning power. (*De Zeng Co. v. Pressey*, 86 N. J. Law, 469, 92 Atl. 278, affirmed 96 Atl. 1102 [see *Bul. 169*, p. 207]; *Burbage v. Lee*, 87 N. J. Law, 36, 93 Atl. 859.)

Whether, therefore, we consider the physical status of the injured defendant as lessened by the loss of a physical attribute, which serves to constitute the perfect genus homo, or as possessed of a dual entity which in natural and moral law he had a right to retain, as a reserve factor in the cosmic dispensation, the loss he sustained was a permanent impairment of his physical entity under the provisions of our statute and was properly compensated for as such by the award of the common pleas.

The award will be affirmed.

WORKMEN'S COMPENSATION—PERMANENT INJURY—IMPAIRMENT—INJURY WITHOUT LOSS OF EARNING CAPACITY—"DISABILITY"—*Centlivre Beverage Co. v. Ross, Appellate Court of Indiana, Division No. 2 (Nov. 19, 1919), 125 Northeastern Reporter, page 220.*—The claimant, Ross, who was employed by the Centlivre Beverage Co., strained himself when he slipped while piling kegs upon an icy floor. He was disabled and could work only with pain and was not able to do a full share of work. He was examined by a physician supplied by the employer who declared that Ross was suffering from an orchitis involving the left testicle. Not having been relieved by the prescriptions of the employer's physician, Ross later went to a physician of his own selection who told him he had varicocele and that it would be necessary to remove one of his testicles, which was done. The workmen's compensation act (Laws of 1915, ch. 106), section 31, makes provisions for compensation for certain injuries specified in clauses *a* to *i*. In the last paragraph of the section provision is made in cases of permanent partial disability not covered by clauses *a* to *i*. This section is as follows:

"In all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunity of the injured employee, compensation in lieu of all other compensation shall be paid when and in the amount determined by the industrial board, not to exceed fifty-five per cent of the average weekly wages per week for a period of two hundred weeks."

Compensation was awarded for 100 weeks at \$9.95 per week under this provision and the employer appealed. In reversing the award with directions to modify it the court said in part:

The injury which appellee suffered is not one of the specific injuries provided for in subdivisions *a* to *i* of said section 31. The last paragraph of said section, heretofore quoted, dealing as it does with injuries coming within its terms from the standpoint of permanent disability and resulting diminution in earning power, and the legislature not having specifically provided for said injury, the fact of disability and the resulting diminution of earning power must be found as a matter of fact, and that finding must be sustained by the evidence in order to sustain an award.

We must keep in mind the fact that the act does not give compensation for loss of a member, such as the loss of a limb, but for the loss of earning capacity actually caused by the loss of the limb [citing cases from various States].

That compensation must be based upon a diminution of earning power was clearly recognized by this court in the Denton case, 117 N. E. 520 [Bul. 246, p. 289], wherein it was held that section 31 dealt with injuries from "the standpoint of the consequent permanent disability, and resulting diminution in earning power extending through life."

There was no evidence that the removal of the particular organ mentioned had or would in the slightest degree impair the future usefulness or opportunity of appellee, or that it had or would produce any disability for work, or to work, or a loss of any physical function. Notwithstanding the injury and operation, his earning capacity and every physical function remained unimpaired.

The award of the board is reversed, with directions to modify its findings and award in accordance with this opinion.

WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—PARTIAL LOSS OF USE OF HAND—*State ex rel. Broderick Co. v. District Court of Ramsey County et al., Supreme Court of Minnesota (Nov. 21, 1919), 174 Northwestern Reporter, page 826.*—An employee of the Broderick Co. was injured while at her work. It seems that while feeding a press she in some way got her hand caught in the machinery and mangled so that parts of her little and ring fingers had to be amputated. Infections and poor knittings of the bones served to reduce the usefulness of the hand to the extent of one-half. Judgment was awarded to the employee for compensation for permanent partial disability and the employer appealed, claiming that the award should have been only for the loss of the two fingers. In affirming the judgment of the court below the following opinion was rendered:

The only question presented by the record is whether the findings of the court to the effect that plaintiff suffered a permanent partial disability are sustained by the evidence. Our examination of the record discloses ample evidence to support the findings. A discussion thereof would serve no useful purpose, and we refrain. While the compensation act makes express provision for the loss of fingers, from the thumb down, it does not necessarily follow therefrom that an injury of the character here disclosed should be treated as a matter of law as the loss of the little and ring fingers only. If the nature of the injury in such a case, taken as a whole, shows by relation a reduction in the power and usefulness of the hand, as well as the injury to and loss of the fingers, the court may, and properly should, find the fact accordingly, for the intent and purpose of the compensation act secures to the injured employee compensation for the disability actually sustained. (*State ex rel. Kennedy v. District Court Clay County, 129 Minn. 91, 151 N. W. 530.*)

Within the rule guiding us in cases of this character the evidence sustains the findings, and the judgment must be and is affirmed.

WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—SECOND INJURY—LOSS OF THREE-FOURTHS OF VISION—*State ex rel. Melrose Granite Co. et al. v. District Court, Seventh Judicial District et al., Supreme Court of Minnesota (Aug. 8, 1919), 173 Northwestern Reporter, page 857.*—Zinken was employed by the Melrose Granite Co. as a stone mason. Previous to this employment Zinken had suffered an injury to his left eye, which had reduced its vision one-half. While working at his occupation for the granite company some mortar was negligently splashed into his face and eyes, burning the latter so badly that the right eye had to be removed and the left eye was so injured that he could no longer work at any occupation. Compensation was awarded to Zinken on the basis of permanent partial disability at the rate of \$11 per week for 300 weeks. The employer and its insurer appealed, claiming that compensation should be awarded on the basis of the loss of one eye (\$11 for 100 weeks) and the loss of half the other eye (\$11 for 50 weeks). In affirming the decision of the lower court in favor of Zinken the court rendered in part the following decision:

The amount of compensation to which Zinken was entitled must be ascertained by referring to the following provisions of the compensation act:

G. S., 1913, page 8209, reading as follows:

"If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

It was contended in Zinken's behalf, and the court found, that his is a case of permanent partial disability, entitling him to compensation at the rate of \$11 per week for 100 weeks for the loss of his right eye and to \$5.50 per week for the same period for the injury to his left eye. We are now asked to construe the statute to mean that a workman's eyes are to be valued separately—a good eye, in the case of a man earning the wage of Zinken, at \$1,100, and an eye which is only 50 per cent efficient at \$550. It would be both narrow and illiberal so to construe it, whereas we have consistently held that it is to be liberally construed in favor of workmen.

His employer is liable for compensation for the permanent partial disability suffered by Zinken, and the court so finds. It is also found that the extent of such disability is equivalent to "75 per cent of the loss of both eyes."

Such loss must of necessity be occasioned by an injury to both eyes which may not wholly destroy either of them or may destroy one and reduce the sight of the other one-half as was the case here.

We conclude, therefore, that compensation in such a case as we have here is not to be made on the basis suggested, but rather under

that clause of the schedule which governs in all cases of permanent partial disability not specifically enumerated in the schedule. Zinken is entitled to 50 per cent of the difference between his wages when injured and the wages he is able to earn in his partially disabled condition, subject to a maximum of \$11 per week for not more than 300 weeks.

He has been wholly unable to earn any wages since he was injured, hence he is entitled to \$3,300, less \$1,100 already paid.

WORKMEN'S COMPENSATION—RAILROAD COMPANIES—INTERSTATE COMMERCE—WATCHMAN—*Chicago & A. R. Co. v. Industrial Commission et al.*, *Supreme Court of Illinois* (Dec. 17, 1919), 125 *North-eastern Reporter*, page 378.—Joseph P. Lambert was employed as a watchman by the railroad company. His duties were to guard the property of the company and the property of shippers while it was in the company's yards. Some of his duties were in connection with interstate commerce and some of them were not. Merchandise had been stolen off train No. 98, which was an interstate train, on several occasions, and in an effort to catch the thieves Lambert was sent ahead of the train as it was leaving the company's yards. He hid himself behind a pile of ties to await the arrival of the train. While he was so waiting and before the train arrived he saw two men approaching him carrying sacks filled with coal. When he called to them to stop they opened fire on him and killed him. Lambert's widow was awarded compensation under the workmen's compensation act and the employer appealed, claiming that Lambert when killed was engaged in interstate commerce and that recovery must be had, if at all, under the Federal employers' liability act. The court held that the workmen's compensation act applied, rendering a decision from which the following is quoted:

Some of the duties of the deceased had no connection with interstate commerce or its movement and transportation. His duties were to protect his employer's yards and property from thieves, and to catch thieves found in the yards. Not every employee of an interstate carrier is engaged in interstate commerce. The work of the employee must constitute a real and substantial part of the interstate commerce in which the carrier is engaged. (*Illinois Central Railroad Co. v. Behrens*, 233 U. S., 473, 34 Sup. Ct. 646 [Bul. No. 169, p. 91].) Under the stipulation of facts and the decisions referred to deceased was not at the time of his injury engaged in interstate commerce, and the workmen's compensation act applied.

WORKMEN'S COMPENSATION—RECOVERY OF COMPENSATION—RELEASES—PREEXISTING DISEASE—*Hines, Director General of Railroads, v. Industrial Accident Commission of California et al.*, *Supreme Court of California* (Mar. 4, 1920), 188 *Pacific Reporter*, page 277.—

Desiderio Dell 'Era applied to the Southern Pacific Co. for employment, and was given a physical examination, where it was discovered that he suffered from a condition which made him extremely susceptible to hernia. Before employing him the company required him to sign a release of his rights under the workmen's compensation act for any disability he might sustain from hernia. This release was in the following form:

"Having submitted myself to an examination by an examining physician of the Southern Pacific Co., with a view of entering the service of that company, it has been found that I have a congenital defect—viz, lax inguinal rings. I have been fully advised and informed concerning such condition, and it has been explained to me that because of such congenital defect a protrusion of the abdominal contents, commonly known as rupture or hernia, may take place at any time, and due wholly to said congenital defect. Realizing this and in consideration of my employment by the Southern Pacific Co. I hereby agree to hold the said company blameless in event of said rupture or hernia so appearing and that I will not apply to said company or its hospital department during my term of service for any operation or treatment therefor, and for the consideration hereinabove expressed I do hereby release the Southern Pacific Co. from any and all claims that may arise on account of rupture or hernia so appearing while in its service.

"It is further understood and agreed that I am not entitled to hospital benefits for the following further disability from which I am now suffering, to wit, chronic affection of tonsils.

"It is further understood and agreed that I am entitled to and will be given hospital benefits for all other disabilities than those I am now subject to, in accordance with the rules and regulations of the hospital department of the said company."

It was held that this release was of no effect under the compensation act, which forbids all contracts waiving rights thereunder. The decision of the court is as follows:

We are satisfied that in view of the provisions of section 27a of the workmen's compensation, insurance, and safety act of 1917 (St. 1917, p. 855) petitioner can not avail himself of the agreement relied on.

The application for a writ of review is denied.

WORKMEN'S COMPENSATION—SECOND INJURY—LOSS OF USE OF HAND—*Mark Mfg. Co. v. Industrial Commission, Supreme Court of Illinois (Feb. 20, 1919), 122 Northeastern Reporter, page 84.*—Frank P. Criner had his left hand crushed while in the employ of the plaintiff company, resulting in the loss of the use of his hand. Prior to this injury he had sustained an injury to the second finger of his left hand, which necessitated part of it being amputated. The employer has now raised the question whether it must be held

liable for compensation for the loss of the use of the hand or for the loss of the index, third, and fourth fingers. In affirming the judgment of the lower court in allowing an award for the loss of the use of the hand, the court said in part:

Though the defendant in error had previously lost a part of one finger, he had the use of his hand, with a capacity somewhat reduced by reason of the defect. The fact that his hand was not perfect did not render its loss any less complete. As the result of his injury he has totally lost the use of the hand, which he previously had, and under the statute he is entitled to compensation for that loss. (*Wabash Ry. Co. v. Industrial Commission*, 286 Ill. 194, 121 N. E. 569; *In re Branconnier*, 223 Mass. 273, 111 N. E. 792 [Bul. No. 224, p. 228]; *Schwab v. Emporium Forestry Co.*, 216 N. Y. 712, 111 N. E. 1099 [Bul. No. 189, p. 288]. The fact that he might have recovered for the first injury did not reduce the amount of compensation to which he is entitled for the loss of the use of his hand.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT TOTAL DISABILITY—LOSS OF LEG—*Wabash Ry. Co. v. Industrial Commission*, *Supreme Court of Illinois* (Dec. 18, 1918), 121 *Northeastern Reporter*, page 569.—Claude Williams was employed by the Wabash Railway Co. as a watchman for its locomotive shops. Prior to his employment in this capacity he had lost his left arm by amputation near the shoulder. The watchman of the blacksmith shop was not on duty on one occasion and Williams's duties took him to that shop. While returning to the locomotive shop he stumbled over some scrap iron and injured his knee, which became so painful that he had to surrender his keys to another employee and go to the hospital, where he remained over two months. The employee surrendered his keys to the foreman the following morning and informed him of Williams's injury. On June 20, 1916, on the supposition and belief that the injury was cured, Williams signed a release and went back to work. In October his old injury recurred and he was again sent to the hospital, where it was discovered that tuberculosis of the bone had developed and his leg was amputated 6 inches from the hip joint. Williams applied to the industrial commission to have the release agreement reviewed and compensation allowed. The commission granted an award, which on appeal the circuit court modified, allowing \$2,400 for total permanent disability and after the payment of that sum a pension of \$16 per month for life. The railroad appealed and the court, in affirming the judgment of the circuit court, said in part:

The evidence clearly discloses that the disability of Williams was the result of an injury arising out of and in the course of his employment. The fact that Williams may have been predisposed to tu-

berculosis of the bones does not affect the result, as the evidence shows that the tuberculosis of the left knee developed as a result of the injury.

It is contended that the industrial commission did not have jurisdiction. The notice to the foreman or superintendent of the shops that Williams had been injured was sufficient notice under the statute, as he was the plaintiff in error. (*Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976.)

The principal contention made by the plaintiff in error is that the circuit court erred in holding that it was liable to pay compensation for a total and permanent disability. The basis of this contention is that the loss of one leg does not constitute total permanent disability. The defendant in error, Williams, contends, on the other hand, that the loss of his left leg, combined with the previous loss of his left arm, constitutes total permanent disability, and that the judgment of the circuit court is correct. This precise question has not arisen before in this State. It has arisen in other jurisdictions under compensation acts similar to our own. In Massachusetts and New York it has been held that under such circumstances the disability occasioned is total and permanent. (In re *Branconnier*, 223 Mass. 273; 111 N. E. 792 [Bul. 224, p. 228]; *Schwab v. Emporium Forestry Co.*, 216 N. Y. 712, 111 N. E. 1099 [Bul. No. 189, p. 288].) The Michigan court takes the contrary view. (*Weaver v. Maxwell Motor Co.*, 186 Mich. 588, 152 N. W. 993 [Bul. No. 189, pp. 289, 290].)

We are disposed to follow the reasoning of the Massachusetts court construing a statute quite similar to ours, and hold that this act applies where the loss of one of the members mentioned occurred previous to the employment, and the result of the other is the result of an injury arising out of and in the course of the employment. This, in our opinion, is the fair intent and meaning of the act. When Williams was employed by plaintiff in error he had lost his left arm, and his capacity for work was to that extent impaired. He was employed to do work which could be performed by a man having but one arm, and he was paid upon that basis. By the loss of his leg such capacity as he had for work was entirely destroyed, and under the provisions of the act he was entitled to compensation for total permanent disability. Such a construction of the act works no hardship upon the plaintiff in error. Williams was employed and paid as a man of limited capacity, and the compensation which the plaintiff in error is required to pay is based upon the wages it was paying him as a man of limited capacity.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT TOTAL DISABILITY—LOSS OF SECOND EYE—*Brooks v. Peerless Oil Co. (Inc.)*, Supreme Court of Louisiana (Jan. 7, 1920), 83 Southern Reporter, page 663.—Brooks, the plaintiff, was injured while in the employ of the Peerless Oil Co. His injury resulted in so impairing the vision of his one remaining eye as to totally incapacitate him for the work at which he had spent his entire life. The trial court allowed compensation for permanent total disability under the workmen's compensation (called in the opinion the employers' liability) act, sec-

tion 8, subsection 1 (e). The employer appealed, but the judgment was affirmed. The following is the decision:

While plaintiff was engaged in drilling an oil well for the defendant company, the "tongs" (whatever part of the drilling machinery may be meant by that) "flew around" and hit him on the side of the head, across the left ear, knocking him unconscious, in which state he remained, he says, "you might say, for a week." This was in December, 1918. When this case was being tried, in April, 1919, his condition was that his left eye could not rotate to the left beyond a straight line in front of him, or, in other words, could not rotate to the left at all, and when in repose was turned toward his nose, making him cross-eyed, as an effect of the external muscle on that side being paralyzed, and his distance vision in that eye was so affected that letters which a normal eye can read at 100 feet he could not make out at 20 feet. This was all the vision left to him; for he had already lost one eye. As an effect of the injury and of the imperfection of his vision, the sight of moving objects would bring on dizziness. Even objects in repose he saw so imperfectly that he could not have been able, for instance, to distinguish a cotton plant from grass, if he had undertaken to hoe. That condition was permanent. In addition to the foregoing, he was still subject to pains in the back of his head.

He sues under the employers' liability act (Act 20, p. 44. of 1914, amended by Act 243, p. 512, of 1916), and the question is as to whether he is entitled to recover as for "permanent total disability to do work of any character," under subsection 1 (e) of section 8, which would be \$10 for 400 weeks, or as for the impairment of one eye, under the next to last paragraph of subsection 1 (d) of the same section 8, which would be "such compensation as is reasonable in proportion to the compensation hereinabove specifically provided in the cases of specific disabilities above named," which specific disabilities would in the present case be as for the loss of one eye, the compensation for which is fixed at "50 per centum of wages during 100 weeks."

The learned trial judge found for permanent total disability, reserving to the defendant the right to ask for a revising of the judgment at any time, should the plaintiff recover in part his ability to work, and we agree with that view. Plaintiff is a laborer, whose life work has been as a "rough neck" in oil fields. For that character of work he is now totally incapacitated, and his qualification for laborer's remunerative work of any kind is more than doubtful.

The rationale of these employers' liability acts is that the employment in which the workman has been disabled owes him a living, and it stands to reason that the workman is as totally disabled from work by the loss of one eye as by the loss of two, if he had but one, and by the impairment of the sight as much as by the loss of it, if the impairment be to such a degree as to disable him entirely from work. In speaking of the workman being only partially disabled by the loss of one eye, one arm, or one foot, this employers' liability act has reference evidently to the normal man, having both eyes, arms, or feet.

Judgment affirmed.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT TOTAL DISABILITY—LOSS OF SECOND EYE—*Jennings v. Mason City Sewer Pipe Co., Supreme Court of Iowa (Nov. 22, 1919), 174 Northwestern Reporter, page 785.*—The claimant, Jennings, was injured while in the employ of the defendant pipe company. The injury resulted in the loss of his eye which was the only one he had at the time and the loss left him totally blind. The industrial commissioner awarded him compensation as for total disability, and the employer appealed. In affirming the decision the court spoke in part as follows:

The one question in the case is whether our workmen's compensation act (Code Supp. 1913, ch. 8a) establishes a fixed compensation value for the loss of one eye, regardless of whether the eye thus lost is the only eye of the injured party. The question involves a construction of section 2477m9 (i) and (j).

It will be noted that subdivisions (i) and (j) classify permanent disability as "total" and "partial." For disability total in character and permanent in quality subdivision (i) establishes a weekly compensation of 50 per cent of the wages for 400 weeks. Subsection (16) of subdivision (j) establishes the compensation "for the loss of an eye" at 50 per cent of the wages for 100 weeks.

The contention of appellant is that this section fixes the compensation for the loss of an eye, regardless of whether such loss results in total or only partial disability. It will be noted also that under subsection (17) the loss of both eyes constitutes a total permanent disability. Subdivision (i) deals with disability total in character and permanent in quality. Subdivision (j) deals only with disability partial in character and permanent in quality. Which subdivision, therefore, is applicable to the case before us? We think the case is necessarily ruled by subdivision (i).

In this case the industrial commissioner allowed the compensation rate for 300 weeks only, and not for 400 weeks. It is urged by the appellant that this presents an inconsistency in the action of the commissioner, in that, if there was a total disability, then there should have been an allowance for 400 weeks.

Granting the inconsistency, the appellant is not hurt by it. The theory of the commissioner was that, though the disability was total, nevertheless the extent of the injury was less than would have been the loss of two eyes. The commissioner, therefore, deducted from the allowance for total disability, the compensation value of the first loss of an eye, deeming that as a partial disability. It was an effort on the part of the commissioner at attaining equity and worked no prejudice to the appellant.

The order of the commissioner will be affirmed.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL DISABILITY—LOSS OF INDEX FINGER—LOSS OF USE OF HAND—*Schimmel v. Detroit Pressed Steel Co., Supreme Court of Michigan (July 17, 1919), 173 Northwestern Reporter, page 206.*—Schimmel was an electrician in the employ of the defendant company. While engaged at his work he

was injured by having a traveling crane run over his hand. His hand was badly crushed and it became necessary to amputate the index finger. Schimmel entered into an agreement with the employer whereby he was to receive the maximum weekly compensation of \$10 for a period of 35 weeks, which is the period allowed by law for the loss of an index finger. Later the arbitration board of the industrial accident commission made an award on these terms. Thirty-four weekly payments were made, but Schimmel refused to accept the thirty-fifth or to sign a settlement receipt. He claimed that the condition of his hand was such that he was unable to perform the same duties as prior to the accident. It seems that his second finger and the tendons of his hand were lacerated to such an extent that he could no longer engage in his former occupation of electrician. The case was reopened by the commission and an award was made granting Schimmel the \$10 of the thirty-fifth payment for the loss of his finger and a sum computed at the rate of \$10 per week up to the date of the award, and in addition thereto he was to receive \$10 per week "during the period of his total disability in the employment in which he was engaged when injured." The employer appealed, contending that a greater compensation could not be awarded for the loss of a finger than was allowed by the law for the loss of a hand (150 weeks). In upholding the award the court said in part:

Appellants state in their brief that the only question presented by the record arises out of the failure and refusal of the industrial accident board in its order to properly limit compensation to the amount specified by the workmen's compensation act (Acts Ex. Sess. 1912, No. 10) for the injuries applicant suffered, to wit, "the loss of the index finger of the left hand and an injury to the palmar surface of the same hand." Attention is called to the provision contained in section 10, part 2, of the workmen's compensation act, which reads as follows:

"In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand."

Here the claimant is asking that compensation shall continue during the period of disability as that disability shall from time to time appear. Claimant's position in this court is that the statute does not, under the specific disability section, provide for the loss of use of a hand, except in so far as that loss of use tends to or does actually affect the ability of the injured servant to earn in the same employment in which he sustained his injury.

Attention is called by claimant's counsel * * * to the point that the test of disability lies in the capacity to earn in the same employment in which the employee was injured.

We are of the opinion that, under the authority of the cases cited, the claimant is entitled to compensation as granted by the industrial accident board. As this court said in *Limron v. Blair*, 181 Mich. 76, 147 N. W. 546 [Bul. 169, p. 211]:

"The statute speaks in terms of disability. * * * When the period of disability ends, compensation ceases."

An examination of the record shows that there were ample facts before the board upon which to base its findings, and no error in the record appearing the order of the board is affirmed.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—MULTIPLE INJURIES—LOSS OF USE OF EYE—*Keyworth v. Atlantic Mills, Supreme Court of Rhode Island (Nov. 14, 1919), 108 Atlantic Reporter, page 81.*—Keyworth was employed as a painter by the Atlantic Mills. While so employed he fell out of a second-story window and sustained two broken ribs, the loss of the sight of his right eye, and various bruises. Compensation was awarded for total disability for an indefinite period but not exceeding 500 weeks. Keyworth petitioned for additional or special compensation under section 12, paragraph (b) of article 2 of the workmen's compensation act (Pub. Laws 1911-12, c. 831) for the loss of his eye, but the court refused to grant the additional compensation and he appealed. It seems that although his right eye was so injured that he could no longer use it in any vocational pursuit, he nevertheless still retained 10 per cent of the normal vision which was useful to a limited extent for certain purposes. In affirming the decision refusing special compensation the court said in part:

The petitioner argues that, having lost so much of the vision of the right eye that it would no longer serve him in any occupation in which he might engage in earning his livelihood, this court should give to the words of the statute, "the entire and irrecoverable loss of sight of either eye," an interpretation broad enough to cover his case; in other words, that a man with the sight of his eye reduced to 10 per cent of the normal vision should be deemed to have suffered the "entire and irrecoverable loss of sight" therein.

With this contention of the petitioner we can not agree. We think the words of the statute must be taken in their ordinary sense, and that their meaning is clear. To say that this statute was designed to go any further than to provide for additional compensation for injuries which resulted in total and complete loss of sight would amount to a distortion of its language. The view which we now take is in accord with the opinion of this court in *Weber v. American Silk Spinning Co.*, 38 R. I. 309, 95 Atl. 603.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—AWARD OF ADDITIONAL COMPENSATION—CONSTITUTIONALITY OF STATUTE—*E. Clemens Horst Co. v. Industrial Accident Commission of California et al., Supreme Court of California (Oct. 20, 1920), 193 Pacific Reporter, page 105.*—The E. Clemens Horst Co. maintained a vegetable drying plant at Wheatland, Calif., in which a Mrs. Hamilton was

employed. Potatoes were peeled by machine and conveyed on a revolving belt to a slicing machine. It was Mrs. Hamilton's duty to stand on a platform raised 2 feet from the floor and remove from the belt and peel all improperly treated potatoes. Directly overhead and parallel with the conveyor belt and about 5½ feet from the platform was a rapidly revolving shaft, which operated the various machines in the plant. This shaft was protected by a board on the side nearest the employee but was unprotected below. The slicer machine became clogged, and Mrs. Hamilton leaned over the belt and under the shaft to clear the potatoes away. As she did so her hair was caught in the rapidly revolving machinery and pulled off so that she was completely scalped. She was awarded \$8.89 regular weekly compensation for temporary total disability and the weekly sum of \$4.45 as additional compensation because of the company's "willful misconduct" in failing to guard the overhead shaft and render the work place safe. The company denied it had been guilty of willful misconduct and appealed. In affirming the award granting the additional compensation the court rendered an opinion, of which the following is a part:

The first question presented is, then, was the commission justified in finding that the petitioner was guilty of "serious misconduct"? There is no statutory definition of this term.

There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. "Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that, according to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting immediately over and in close proximity to the conveyor belt was such serious misconduct. Mrs. Hamilton's testimony that she had been instructed to keep the belt and the "slicer" clear is uncontroverted, and it plainly appears from the testimony of the other employee that in order to do so it was natural that she should lean over the belt, thereby bringing her head in dangerous proximity to the revolving shaft. From the evidence which we have summarized we can not hold that the commission was not justified in finding that the place at which the employee was required to work was unsafe.

Next as to whether such serious misconduct was "willful." It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of."

According to the findings, the failure to guard the shafting was in direct violation of a general safety order of the commission. It is not contended that the making of this regulation was not within the power of the commission, and, by sections 48 and 49 of the workmen's compensation act, such orders "are conclusively presumed to be reasonable and lawful." In the face of the evidence it can not be held that the finding that the petitioner was guilty of serious and willful misconduct in maintaining the unguarded shafting is without support.

We now turn to consider petitioner's claim that section 6 (b) authorizing increased benefits in cases of willful misconduct is unconstitutional. The constitution as it stood at the time the legislation in force on June 7, 1919, was enacted, empowered the legislature to create a liability on the part of employers "to compensate their employees" for any injury received in the course of their employment, "irrespective of the fault of either party." (Article 20, 21.) This language does not authorize the creation of a liability for anything more than compensation. If the 50 per cent to be added in cases where the injury is caused by the willful misconduct of the employer is given as a penalty on the employer for such misconduct, and not as compensation to the employee for his injury, the provision is not within the power given to the legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.

But the provision in question is founded upon a different theory. It is obvious from the language of sections 6 and 9 of the act of 1917, and from the act as a whole, that the ordinary schedule of compensation there established was not considered to be full and complete compensation for the injuries received. The purpose was to take a part of the burden imposed by the injury from the injured employee and transfer that part to the employer, to be ultimately borne by the community in general as an addition to the cost of production.

It is therefore to be assumed the legislature found that the actual injury by loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least 50 per cent more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by willful misconduct of the employer, he should be made to pay a greater proportion of the burden, and the allowance in such a case should be increased by adding 50 per cent thereto. This considered, the additional allowance is really for additional compensation in the strict sense, and not for exemplary damages. This being the case, the power to enforce it was properly given to the commission under the provisions of section 21, article 20, of the constitution.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—DISOBEDIENCE OF RULES—*Indianapolis Light & Heat Co. v. Fitzwater*, Appellate Court of Indiana (Dec. 11, 1918), 121 *Northeastern Reporter*, page 126.—Fitzwater was employed by the heat company as a lineman.

While in the company's employ he was engaged in removing some heavy copper wires from a pole of the company and replacing them with lighter wires. He had fastened a rope to one of the heavy wires and cut it and had lowered it to the ground. He then proceeded to fasten some tape to the wire where the rope was fastened to it, and while doing so he received an electric shock which killed him. The company had issued written rules for its employees designed to make them observe habits that would promote their safety. Copies of these rules had been given to Fitzwater long before his death, but the company had never made any great attempt to enforce them. An award was made to Fitzwater's widow, from which the employer company appealed, claiming that the failure of the deceased to use rubber gloves and an insulating stool and to otherwise obey its rules constituted willful negligence, for which no recovery could be lawfully had. In allowing the award to stand, Judge Ibach, speaking for the court, said, in part:

As we have said, the determination of the controversy in this case depends entirely upon whether the injury and death of the decedent was caused by his own willful misconduct, and the burden of showing this fact rested upon the appellant (employer). It has repeatedly been held that "willful misconduct" means something different from and more than negligence, however great; it involves conduct of a quasi criminal nature, the intentional doing of something, either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences. (*Haskell Barker Car Co. v. Kay*, 119 N. E. 811 [Bul. No. 258, p. 230].)

It may be conceded that the evidence shows decedent to have been guilty of contributory negligence in doing the particular work required of him—that is to say, he did not exercise that degree of care which the conditions and circumstances called for; but negligence does not prevent compensation. And it might be said that there was some evidence before the board which would justify the inference that the decedent was guilty of an infraction of certain rules of appellant company which were enforced with little or no diligence and were left largely to the option and discretion of its employees for their enforcement, but this falls far short of willful misconduct as intended and contemplated by the statute. There must be shown an intentional disobedience to a strictly enforced rule to support the defense of willful misconduct.

WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT—EXCLUSIVENESS OF REMEDY—EXEMPLARY DAMAGES—*Stricklen v. Pearson Const. Co.*, *Supreme Court of Iowa* (Dec. 14, 1918), 169 *Northwestern Reporter*, page 628.—The plaintiff, Stricklen, was in the employ of the defendant company, and during the construction of a pier the foreman ordered Stricklen to descend into a pier hole to do some work there. While working in this hole the earth caved in and he was

injured. Both parties had chosen to be governed by the workmen's compensation law, and Stricklen was granted an award for compensation, which the defendant has paid. Stricklen now, however, brings an action at law for exemplary damages because of the gross and reckless negligence of the defendant and its foreman. The lower court refused to allow the exemplary damages, and the plaintiff appeals. In affirming the judgment of the lower court Judge Weaver spoke in part as follows:

The pleadings are not in all respects quite clear, but, as we understand the record, the first and principal claim advanced by the plaintiff is that, although both parties had accepted the terms of the compensation act and damages had been awarded and paid pursuant to such act, the plaintiff may still sue his employer at law and recover exemplary damages if his injury was received under circumstances which would have justified the assessment of exemplary damages had the compensation act not been adopted.

The proposition is unsound, and no authority holding otherwise has been called to our attention. Generally speaking, exemplary damages are never a matter of right. If a party suffers an actionable injury, the extent of his right to demand a recovery of damages is the sum or amount which the jury (or court if it be tried without jury) finds from the evidence will fairly compensate him. If the jury or court in any given case goes beyond that measure of recovery and increases that amount found in his favor by an allowance of exemplary damages, it is not because they are needed to make him whole but because the wrongful act of which he complains has been done in malice or in such high-handed and reckless disregard of duty that the award is thus increased by way of punishment or example. It is true the plaintiff gets the benefit of exemplary damages when recovered and collected, but they come to him by the grace of the law, and not as a matter of right. If a plaintiff is awarded a fair compensation for his injuries no court will grant him a new trial because the jury has failed to award him exemplary or punitive damages.

In short, plaintiff, having accepted compensation from his employer for the injuries of which he complains, can have no standing in court to assert the employer's further liability to him on that account.

WORKMEN'S COMPENSATION—"WILLFUL MISCONDUCT"—FAILURE TO USE RESPIRATOR—*General American Tank Car Corporation v. Borchardt, Appellate Court of Indiana (March 13, 1919), 122 North-eastern Reporter, page 433.*—Borchardt was in the employ of the tank car corporation when he and another employee were instructed to dry out three tank cars and paint their interior. This they proceeded to do at the command of a foreman, who provided them with a respirator and cautioned them not to go into the tank cars without wearing it. After the tanks had been dried out Borchardt went into the tank wearing the respirator and proceeded to paint the interior

of the tank. After several minutes he came out and announced that the respirator did not work, whereupon his coemployee went into the tank to continue with the painting and without wearing the respirator. When he came out after four or five minutes, Borchardt again went into the tank, but this time he did not wear the respirator and stayed eight or ten minutes, but did not come out. Upon investigation it was discovered that he was dead, having been overcome by the poisonous fumes of the paint. His mother applied for and received compensation, which the corporation contested on the ground that Borchardt met his death through his own willful misconduct. In affirming the judgment of the lower court which sustained the award, the court said in part:

There is no evidence that the deceased ever refused to obey orders or to follow instructions. The fair and reasonable inference to be drawn from the finding of the board, as well as from the evidence, is that, if the respirator had not become out of order he would have used it. He put it on and tried to use it, but for some unknown cause it was out of order and would not work. His failure to use the respirator was not because of willfulness on his part, but because it was out of order.

"Willful misconduct" means a deliberate purpose not to discharge some duty necessary to safety. It implies obstinacy, stubbornness, design, set purpose, and conduct quasi criminal in nature.

WORKMEN'S COMPENSATION — WILLFUL MISCONDUCT — IMPULSIVE ACT—*Hyman Bros. Box & Label Co. v. Industrial Accident Commission, Supreme Court of California (May 29, 1919), 181 Pacific Reporter, page 784.*—This is a proceeding for a writ of certiorari to review an award of the industrial commission made in favor of one Fred Weiss, a minor 20 years of age, who was employed by the Hyman company as a press feeder. Weiss was injured by having his hand caught in a printing press, to which he was "feeding" pieces of pasteboard that were cut by the machinery into proper shape for use in making pasteboard boxes. At the time of the injury he was an experienced worker. When he was first employed by the Hyman company he had been explicitly instructed and warned that he must not place his hand in the machinery while it was in motion, but on the occasion of the injury he impulsively made a grab for some loose sheets which were falling into the body of the press and had his hand caught and injured. The Hyman company claimed that Weiss's act, in disregard of his instructions and the warning, amounted to willful misconduct and that he was therefore not entitled to compensation. The court rejected this contention, saying in part:

The industrial accident commission found that in attempting to catch the card "the employee acted instinctively, without reflection, and such act did not constitute willful misconduct, and that therefore said injury was not caused by willful misconduct of the employee." Petitioners attack this finding as contrary to the evidence. This, they say, is the case of an employee who, with full appreciation of the danger, violated specific instructions given him for his own protection. The question before us, therefore, is whether or not the described actions of the employee amounted to willful misconduct. That an answer to such a problem goes to the jurisdiction of the industrial accident commission is settled by decisions of this court. (*Great Western Power Co. v. Pillsbury*, 170 Calif. 180, 149 Pac. 35 [Bul. No. 189, p. 292]; *Fidelity & Deposit Co. v. Industrial Accident Commission*, 171 Cal. 728, 154 Pac. 834 [Bul. No. 224, p. 351].)

The doctrine that an unpremeditated and impulsive act in violation of orders may not be willful misconduct finds some support in the authorities, but usually nonage is an element of the decisions in which such doctrine has been upheld. It seems to us, however, that the age of the person injured does not necessarily make a material difference. The tendency to recover something falling from a machine; to reach for a hat blown off the head by a sudden gust of wind; to apply the brakes to a "skidding" automobile; in short, to perform acts of many sorts upon the impulse of the moment is not the failing of youth alone. The true tests to be applied have reference to the nature of the work being performed and the circumstances of each particular case. This court has been at pains more than once to define "willful misconduct." Perhaps the best definition (and, incidentally, the one cited by both parties to this controversy) is the one found in the opinion in *Great Western Power Co. v. Industrial Accident Commission*, 170 Calif. 180, at page 189, 149 Pac. 35 [Bul. No. 189, p. 292]. The court used this language:

"Willful misconduct means something more than negligence. It does not include every violation or disregard of a rule. But it can not be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct."

In that case there was no room for the application of the doctrine of sudden impulse. The facts of the present case are vastly different. Admittedly the petitioner Weiss knew the rule. Admittedly he did something in apparent violation of the rule, which, if it had been the result of deliberate intention, would have amounted to willful misconduct; but the circumstances were such that any person, experienced or not, might have impulsively put himself in jeopardy as this young man did, without any intent to violate a known rule. There is evidence to support the conclusion reached by the industrial accident commission, and we are of the opinion that upon this branch of the case a correct conclusion was reached.

The decision in this case was followed in a subsequent case (*Western Pacific R. Co. v. Industrial Accident Commission*, 181 Pac., 787) where one Earl Dean, a young man of 18, operating a drill with an

upright shaft, which machine carried the warning sign, "Stop before oiling, repairing," etc., on seeing a stream of grease running down the framework made an impulsive dive with a cloth at it, so that his hand was drawn into the machine and injured.

But where a workman undertook to chip a burr off a bar in which he was drilling holes and neglected to obtain and use goggles, the use of which was specifically directed in such cases, and suffered injury thereby, it was said:

He voluntarily and intentionally omitted to obtain and use goggles, contrary to rules of which he had knowledge and contrary to specific instructions, all of which were laid down for his protection. The only reasonable explanation is that he disliked the goggles because they were, as he said, "in his way," and so he preferred to take the chance of personal injury. This was misconduct and it was serious. (McAdoo, Director General of Railroads, *v.* Industrial Accident Commission, 181 Pac. 400.)

The customary award was therefore reduced one-half, as provided in such cases.

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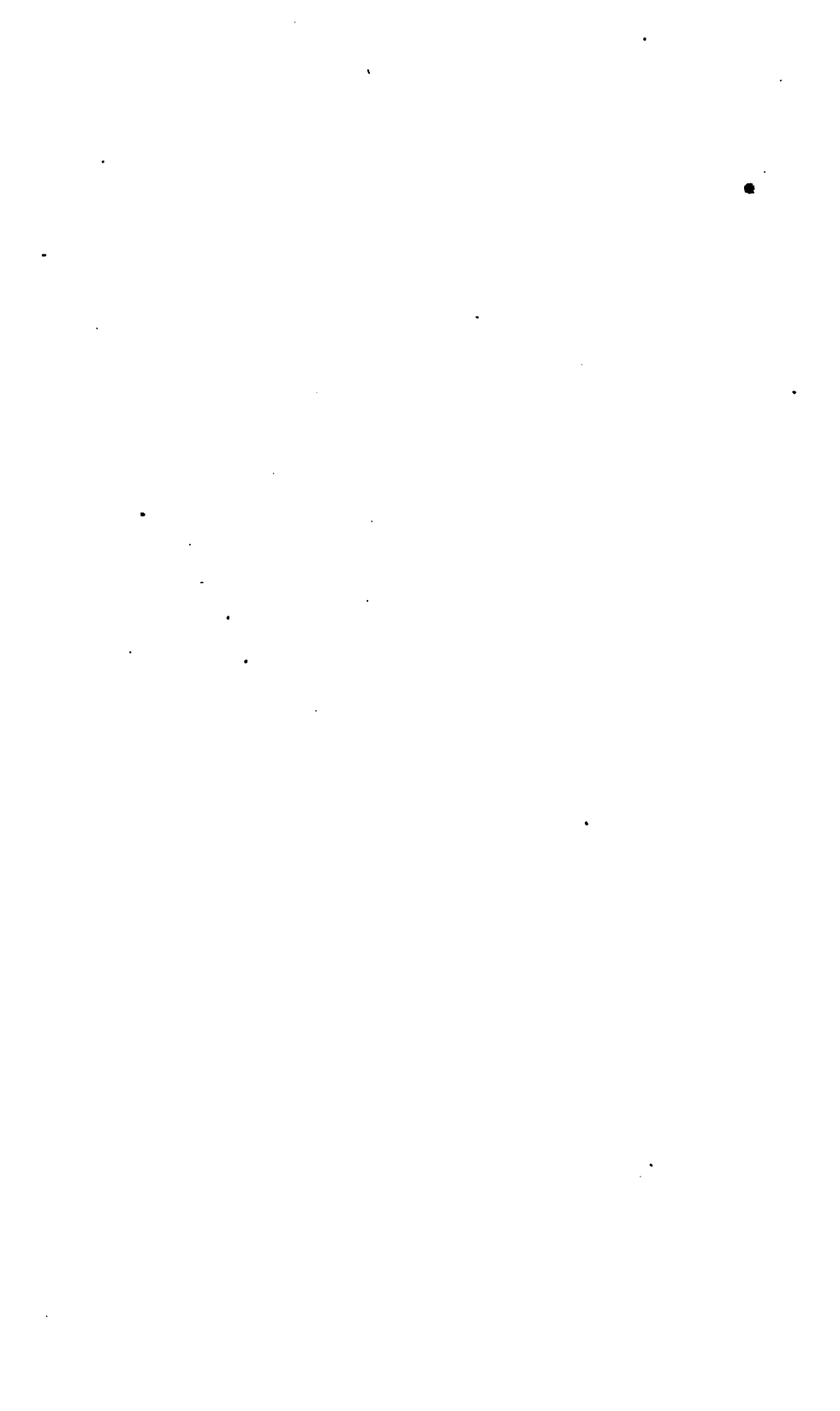
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U. S. DEPARTMENT OF LABOR
JAMES L. BEATTY, Director
BUREAU OF LABOR STATISTICS
STATISTICAL SERVICE DIVISION

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No. 309

TABLES OF THE UNITED STATES SERIES

DECISIONS OF COURTS AND
OPINIONS AFFECTING LABOR
1921

Compiled by
JAMES L. BEATTY
Director



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The publication of the annual and special reports and of the bi-monthly bulletins was discontinued in July, 1912, and since that time a bulletin has been published at irregular intervals. Each number contains matter devoted to one of a series of general subjects. The bulletins are numbered consecutively, beginning with No. 101. Up to No. 228 they also carried consecutive numbers under each series. Beginning with No. 229 the serial numbering has been discontinued. A complete list of the reports and bulletins of the Bureau will be furnished on application.

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*Second Annual Report, 1889, Industrial Labor.

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*Fourth Annual Report, 1893, Railroad Labor.

*Fourth Special Report, 1893, Labor Laws of the United States (compiled under the title, 1893).

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*Eighth Annual Report, 1900, Mines and Industries (1891 to 1900).

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*Tenth Special Report, 1901, Labor Laws of the United States, with comments of courts relating thereto.

*Eleventh 25, May, 1904, Child Labor in the United States.

*Twelfth 22, November, 1904, Labor Legislation in the United States.

*Thirteenth Annual Report, 1905, General Labor.

*Fourteenth Annual Report, 1906, Employment Statistics (1891 to 1905).

*Fifteenth 29, January, 1906, Laws relating to the employment of children in the United States.

*Sixteenth Annual Report, 1907, Labor Laws of the United States, with comments of courts relating thereto.

*Seventeenth 28, January, 1907, Free Public Employment Office in the United States.

*Eighteenth 21, November, 1907.

Laws relating to employment of women and children.

Laws relating to child labor and the hours and wages of women.

*Nineteenth Annual Report, 1909, Workmen's Compensation and Unemployment in the United States.

*Twentieth 23, November, 1909, Labor Statistics of Employment in various States in the United States.

*Twenty-first 21, January, 1910, Compensation for injuries and diseases in the United States.

*Twenty-second 26, November, 1910.

History of labor legislation of 1910 and 1911.

Laws of various States relating to labor contracts since 1900.

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JAMES J. DAVIS, Secretary
BUREAU OF LABOR STATISTICS
ETHELBERT STEWART, Commissioner

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LINDLEY D. CLARK
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DANIEL F. CALLAHAN



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REVIEW OF DECISIONS OF COURTS AND OPINIONS AFFECTING LABOR, 1921.

INTRODUCTION.

Prior to the year 1912 the series of bimonthly bulletins of the Bureau (earlier the Department of Labor, now the Bureau of Labor Statistics) carried court decisions as a part of their contents. Beginning with that year, annual bulletins have been published, devoted exclusively to the presentation of the decisions of courts and the opinions of the Attorney General of the United States bearing on various phases of labor. These bulletins are numbered 112, 152, 169, 189, 224, 246, 258, and 290. The last number named carries decisions for 1919 and 1920, the material for these two years having been combined for a variety of reasons.

It is not attempted to present a complete list of cases of the classes used, but rather to present illustrative cases embodying the principles under consideration from time to time. No bulletin is therefore a complete treatise of the law of labor, but, taking the series together, practically every form of legal question within the field is passed upon. The cases used are in the main from the State courts of last resort and the Federal courts, though in some instances cases from courts of appellate but not final jurisdiction are taken. This is notably true with regard to the Supreme Court of New York, which furnishes a number of important cases affecting labor organizations, the appellate court of Indiana determining many compensation cases, and a few other courts of secondary rank for which decisions are published by the West Publishing Co. in the National Reporter System. This system of reports is depended upon in the main for the cases presented, the Washington Law Reporter furnishing material for the District of Columbia, and advance sheets of the opinions of the Attorney General for the Department of Justice.

The material is abridged, the statement of facts being in the language of the editors, usually with quotations from the language of

the court setting forth the conclusions of law, though occasionally the findings are stated in a briefer form by the editors without quotations. The decisions used are for the most part those appearing in the publications named during the calendar year covered. The present bulletin presents material as follows:

Opinions of the Attorney General, volume 32, page 369 to volume 33, page 106.

Supreme Court Reporter, volume 41, page 65 to volume 42, page 70.

Federal Reporter, volume 268, page 97 to volume 275, page 880.

Northeastern Reporter, volume 128, page 801 to volume 132, page 927.

Northwestern Reporter, volume 180, page 1 to volume 185, page 352.

Pacific Reporter, volume 193, page 561 to volume 201, page 1119.

Atlantic Reporter, volume 111, page 689 to volume 115, page 368.

Southwestern Reporter, volume 225, page 289 to volume 234, page 720.

Southeastern Reporter, volume 104, page 785 to volume 109, page 624.

Southern Reporter, volume 86, page 449 to volume 89, page 927.

New York Supplement, volume 184, page 833 to volume 190, page 864.

Washington Law Reporter, volume 49.

OPINIONS OF THE ATTORNEY GENERAL.

The Attorney General of the United States renders opinions on request of the President and certain other officers of the Government, usually referring to a specific case, though in some instances a general principle is considered. No case involving the question of employment relations or other phase of labor was passed upon during the year 1921, unless the retirement law for Federal employees be regarded as an exception. The law became operative in August, 1920, and some rulings under it were noted in Bulletin No. 290. The act applies to "all employees in the classified civil service," providing retirement benefits for those who have reached the prescribed age (70 years for the great majority of employees) who have rendered at least 15 years of service.

The question of status was involved in the case of a plate printer of long experience and service in the Bureau of Engraving and Printing, who had resigned in 1914. During the war emergency, appointments without examination were authorized, and the employee was reinstated. On reaching the age of 70 years he was automatically dropped, but was denied an annuity on the ground that he did not possess a classified status. This ruling of the Commissioner of Pensions, who is charged with the general administration of the act, was approved by the Attorney General (Bradford case, 33 Op. A. G.

93). Similarly, a disabled employee, wishing retirement on account of disability prior to the attainment of the statutory age limit was regarded by the Civil Service Commission as not eligible to an annuity because he had been appointed without examination. This, too, was submitted to the Attorney General, and approved (Shelley case, 33 Op. A. G. 106). The definition of the "classified civil service" was held to include "only those positions to which appointment must be made from lists certified by the Civil Service Commission after examination, and to those persons only who are thus appointed." A broader inclusion indicated by the language of a rule of the commission quoted in the opinion was said to refer only "to the potentiality, not the actuality, of classification." If the President excepts any position from the requirements for examination and certification by the Civil Service Commission, "the effect, in law, is to withdraw the said positions and persons from the classified service, and to leave them in the same situation as if, to that extent, no classification whatsoever had been made."

This, of course, resulted in a denial of the application for a retirement annuity in both cases.

It may be noted that on March 27, 1922, following the foregoing opinions, Congress enacted an interpretative law, construing the retirement act "to include all persons who have been heretofore or who may hereafter be given a competitive status in the classified civil service with or without competitive examination," thus enlarging the act somewhat, as compared with the foregoing opinions.

Benefits accruing but not paid on account of the procedure required between the time of application and the death of the applicant were held to belong to the estate of the deceased claimant. (Weller case, 32 Op. A. G. 552.) "The annuity granted under the provisions of this act, while partaking of the nature of a reward for faithful service, is not to be construed as a pure gratuity." The contributions made by the employee differentiate this annuity from Army and Navy pensions.

An employee on protracted leave without pay on account of sickness was held entitled to compensation though she had rendered no service from July 12, 1918, to the date the act became effective in August, 1920. The status of the employee was of one on furlough without separation from the service, and she retained the rights conferred by the law upon employees to whom the law applies. (Heth case, 32 Op. A. G. 424.) However, where one has been separated from the service and is beyond the retirement age he can not be reinstated nor can a person beyond retirement age be employed after the taking effect of the act. (McCammon case, 32 Op. A. G. 553.)

DECISIONS OF THE COURTS.

ALIENS.

The Federal contract labor law, so called, also forbids encouragement of immigration "in any way." The United States Circuit Court of Appeals found an employer guilty of a violation of this statute where in the course of correspondence he informed a citizen of Nova Scotia that he had a place for him and would keep one open for his wife when she might be able to come (*U. S. v. International Silver Co.*, p. 51), reversing the court below. (See *Bul. No. 290*, p. 71.)

An attempt by the State of California to tax unnaturalized aliens, making employers liable for the annual poll tax, was held unconstitutional by the Supreme Court of the State (*Ex parte Kotta*, p. 52), as denying persons within the jurisdiction of the State equal protection of the laws.

CONTRACT OF EMPLOYMENT.

ENFORCEMENT.

A theatrical company was held entitled to an injunction against certain performers who undertook to repudiate a contract for one year, which gave the employer an option for a second year's service. (*Shubert Theatrical Co. v. Rath*, p. 64.) The court held that a contract for exclusive services would sustain the injunction against a contract with a rival manager. The fact that the contract called for the performance of acrobatic feats on Sunday was held not to invalidate the law, since it was not shown that such exhibitions as were contemplated were unlawful.

Another case involving the enforcement of an alleged agreement as to engaging in competitive business was before the Supreme Court of New York, Appellate Division. (*Kaunagraph Co. v. Stampagraph Co.*, p. 57.) Here the question involved was one of trade secrets, and the court below granted a perpetual injunction against former employees of the plaintiff company, forbidding their ever engaging in a similar business. The appellate division reversed this, saying there was no evidence that there was a secret process involved or that the plaintiff had exclusive rights in the process used.

The enforcement of an agreement to arbitrate was attempted in *In re Division 132 of Amalgamated Association of Street and Electric Railway Employees of America* (p. 59). The court found, however, that the petitioners themselves had unjustifiably abandoned the employment and had no status as employees, even if there had been a valid agreement to arbitrate, which was not found in the contract under consideration.

BREACH.

A Georgia statute provides penalties for the acceptance of advances and failure to perform the services contracted for where fraud is shown to exist. In *Crayton v. State* (p. 60) an alleged offender was discharged where it appeared that there was not sufficient evidence of a lack of good cause for the failure to carry out the contract, the burden of doing so resting on the State. Much the same situation is discussed in *Smith v. State* (p. 60), where the same statute was involved. The court of appeals reversed a judgment of the court below, holding that the fraudulent intent must exist at the time the contract is made, and that this was not proved.

Breach by an employer was the ground of an action by a discharged employee who had a contract for 5 years' service and was discharged at the end of one year. (*Golden Rod Mills v. Green*, p. 61.) The right to discharge for unsatisfactory service was not specifically retained, and the question of the nature of the service rendered was held properly one for a jury. The same question as to right of discharge was involved in the case, *American Trading Company v. Steele* (p. 61). The discharged employee was under a contract to do his work "in an efficient and satisfactory way," which was held not to be the same as "satisfactory to the employer."

The nature of an agreement for employment for the remainder of one's life was passed upon by the Court of Appeals of Georgia. The right to recover damages for unwarranted discharge was sustained as against the contention that a contract for life was indefinite and could be terminated at the option of either party. However, recovery was from the date of discharge to the date of the filing of the suit, and not for the life expectancy as originally sued for. (*Southern Cotton Oil Co. v. Yarborough*, p. 56.)

Not involving breach, but related thereto in an indirect way, was the case of *Woodson v. McLaughlin* (p. 63). A share cropper occupying a house of his employer during the time of his employment on the farm was held not entitled to occupancy of the premises after the termination of his employment relation, the occupancy being simply an incident of the employment. A second case that may be noted here involved the question of making a new contract before the old one had expired. (*Schwartzreich v. Bauman-Basch (Inc.)*, p. 67.) An employee was given a new contract at an increased rate of pay to retain his services over the competition of a rival bidder. It was decided that the prior contract was canceled at the time of the making of the new one, so that a valid contract at a higher rate was in force at the time that the employer discharged the workman after but a few weeks' service.

INTERFERENCE WITH EMPLOYMENT.

A statute of Mississippi provides penalties for willfully interfering with or enticing away an employee under contract with and actually in the service of another. In the case in hand (*Beale v. Yazoo Yarn Mill*, p. 65), the employee had left the service of the original employer, assuming that he had been discharged when he refused to abide by a condition named as essential to continuing in employment. Conviction in the lower court was reversed when it appeared that the new employment, though begun during the term of the original contract, was not entered into until the workman had justifiably abandoned his employment.

A similar statute of Georgia was involved in *Holt v. State* (p. 66), a conviction being reversed for failure to show that there was an inducement offered for the employee "to leave his employer during the term of service." A different aspect of the subject of interference was considered in *United States Fidelity & Guaranty Co. v. Millonas* (p. 67). Here an insurance agent found an employee retained in the service of his employer, who was a policyholder in the company, after having submitted a claim for compensation for injuries. The agent procured the discharge of the workman because of his having brought the claim. The suit for damages for procuring the discharge was successful, the insurance company being held liable for the conduct complained of in maliciously and wrongfully procuring the discharge. The prevention of reemployment by a workman given an unsatisfactory clearance card was held not to sustain a judgment for damages in *Cleary v. Great Northern R. Co.* (p. 76). The plaintiff was a railway employee and could secure no other employment after his discharge because of the statement made on the clearance card, which he claimed was false. The employer had entered the cause of discharge as being unsatisfactory service, and the clearance card contained the same statement. However, there was no proof that this information had been given by the employer to any other railroad company, so that the offense of blacklisting had not been shown to have been committed.

Two cases of difficult classification are noted here, one involving the status of a baggage porter on a railroad during the period of control and operation by the United States. A bribe offered a baggage porter was held not to be an offense against the criminal code, which penalizes bribing an official of the United States. (*Krichman v. U. S.*, p. 76.)

A novel case, and lying on the border line of labor decisions, was one involving the charge of conspiracy to prevent a minstrel performance in a Tennessee city, the motive being to avoid the interruption of farm work. (*Calcutt v. Gerig*, p. 55.) It was claimed that if the

exhibition took place farm laborers would attend it to the neglect of the harvest, and the proprietor of the show was subjected to mob violence and the exhibition prevented. A judgment for damages was affirmed.

SEAMEN.

Seamen stand in a peculiar contract relation as compared with other employees, and special laws regulate their discharge. In *Jenkins v. U. S. Emergency Fleet Corporation* (p. 70), seamen shipped at the port of New York for a trip to various places and back to the final port of discharge in the United States north of Cape Hatteras. It was held that a discharge at Tacoma, Wash., was not warranted under the contract, that not being the port of final discharge, so that the men were entitled to wages during time lost, and transportation to New York if they desired to go. In *The Inland* (p. 71), it was held that seamen signed for a voyage could not be required to accept a lay off while the ship was undergoing unexpected repairs, but that wages must be paid for one month under the statute. Where a contract was for six months, during which time it was considered that a round trip would be completed, but owing to delay the ship was on the African coast at the expiration of this time, it was held that the old contract had expired, and that a new contract entered into by the captain under protest was nevertheless binding. (*Shanley v. U. S.*, p. 69.)

COMPULSORY LABOR.

Kansas City, Mo., adopted an ordinance penalizing vagrancy, idleness, opposition to the war, sabotage, etc. The ordinance was held unconstitutional in the case of *Ex parte Taft* (p. 53), in which the conflict between the ordinance and State laws, as well as its assumption of Federal powers, was condemned.

STATE REGULATION OF EMPLOYMENT, ETC.

Under this head may be noted a group of cases each representing a separate form of intervention by the State in regard to employment or the conduct of business. The first (*Timmons v. Morris*, p. 202) relates to the constitutionality of a statute of a type quite generally found, providing for the licensing of barbers. The law had been upheld by the State supreme court, but the Federal court found that the arbitrary exercise of power by the board of examiners was such as to vitiate the law as a health measure, which was the only ground for sustaining it. The act was therefore declared void.

The second case discussed the power of a city to authorize by ordinance group life insurance for its employees. (*People ex rel. Ter-*

bush & Powell (Inc.) *v.* Dibble, p. 137.) The Supreme Court of New York held that the State possessed no such power, as the objects of insurance did not relate to those interests to which the activities of the city government must be limited.

The Supreme Court of South Dakota furnished the governor of the State an opinion upholding the constitutionality of a law authorizing the State to engage in the manufacture, distribution, and sale of cement and cement products, taking the view that such action was for a public purpose. (In re Opinion of the Judges, p. 204.) Not authorizing a direct entrance into business, but providing for an unusual degree of regulation of business conduct is an act of Congress authorizing the control and regulation of rentals, ejectments, etc., in the District of Columbia. This statute was held constitutional on the ground that the letting of buildings in the District was clothed with a public interest so great as to justify regulation, in view of the existing circumstances. (Block *v.* Hirsh, p. 135.) On the other hand, the so-called Lever Act, undertaking to regulate the cost of food, was declared unconstitutional, the statute being so vague and indefinite as to be repugnant to the Constitution of the United States. (U. S. *v.* L. Cohen Grocery Co., p. 72.) The abstract right of a State to regulate the coal-mining industry was upheld in American Coal Mining Co. *v.* Special Coal and Food Commission (p. 74); however, a temporary injunction restraining proposed regulations was granted, apparently largely subtracting from the value of the first opinion. (Vandalia Coal Co. *v.* Commission, p. 75.)

WAGES.

MINIMUM-WAGE LAW.

Despite an unbroken line of affirmations, so far as State supreme courts are concerned, the constitutionality of the minimum-wage law of Washington was challenged in Spokane Hotel Co. *v.* Younger (p. 207). Various points were raised as to conflict with State and Federal constitutions, procedure, and the powers of the commission. All were resolved in favor of the statute, and the act was upheld. One point raised in this case was as to the necessity of personal notice to all employers before the rate should become binding. The court denied this, holding that the fixing of rates as provided by the statute put the employer on notice. A contrary view was taken by the Supreme Court of Minnesota, which held that criminal prosecution for a violation of the law would not lie in the absence of an affirmative showing that notice had been given employers of the establishment of the rates. (State *v.* Allyn, p. 209.) It was said that the order taken in connection with the statute amounts, in effect, to a penal law, but added that the court would not take judicial

notice of such order—a position that does not commend itself as quite congruous, as a knowledge of the law is presumed.

The constitutionality of orders issued under the minimum wage law of North Dakota was questioned in *Northwestern Telephone Exchange Co. v. Workmen's Compensation Bureau* (p. 211). The defendant bureau was charged with the administration of the act, and the decision turned on technical points with regard to organization, etc., so that the fundamental questions involved were not discussed, but an injunction suspending the operation of the orders was affirmed. New orders have since been issued.

The minimum wage law of Texas, in common with other laws of like nature, contained a provision prohibiting the discharge of employees for appearing before the administrative commission. An employer convicted for violating this provision claimed that the act was unconstitutional, violating due process of law, and impairing the obligation of contracts. The court of criminal appeals of the State rejected this contention and the conviction was affirmed. (*Poye v. State*, p. 209.) No execution was had, however, because on motion for rehearing the case was dismissed, the statute having been repealed in the meantime.

RATES.

Minimum wage laws regulate the rates of wages for women and minors only; for adult males the question of rates has usually been left to open contract, but of late years the tendency to resort to arbitral boards is apparent. In *St. Louis Union Trust Co. v. Missouri & N. A. R. Co.* (p. 217) it was held that the financial condition of the road, rendering it impossible to continue business and pay the standard scale fixed by the United States Railway Labor Board, warranted the receiver in making contracts with the workmen at a lower rate. A similar finding was made in the case of *Birmingham Trust & Savings Co. v. Atlanta, B. & A. R. Co.* (p. 219), though with an exception as to employees engaged in operating trains, as to whom a fixed period must elapse under the statutes before a change can be effective; an interesting point in this case was as to the status of employees who had gone on strike, the court holding that there was a sufficient interest in the order so that striking employees had standing in the court in order to protect their rights during the period that they had continued to work. Overtime pay was claimed by a workman whose contract called for 8½ hours' work per day, but whose duties actually required 12 hours' service; after 17 months he sued for overtime, but in the absence of an express contract, or circumstances implying a contract for additional pay, and also in view of the acceptance of the wages without protest, it was held that no claim

for overtime would be sustained. (*Robinette v. Hubbard Coal Mining Co.*, p. 214.)

An offer of a bonus for all employees in service throughout the year was held not to sustain a claim for such bonus where a workman was discharged before the year expired, there having been no consideration to render the employer's offer binding in law. (*Russell v. H. W. Johns-Manville Co.*, p. 213.)

Mentioned here for lack of a better classification is a case involving concurrent employments. (*Demonstration Plantation Co. v. Kearney*, p. 206.) A bookkeeper serving one corporation was asked to take charge of the books of another company controlled by the same men that controlled the employing company. It was said that the matter of compensation would be fixed later, but after two years payment for services was denied. Suit resulted in a judgment for the bookkeeper, as the service had been rendered with the knowledge and consent and on the request of the responsible parties.

PENALTY FOR NONPAYMENT.

Statutes are found in a number of States providing for the continuance of wages after service ceases where settlement is not made on the termination of employment. The law of Idaho provides for continuance for not more than 30 days, and also an attorney's fee, where the demand is found on trial to be justified. In *Marrs v. Oregon Short Line Ry. Co.* (p. 215), judgment for the wages was upheld, but the allowance for the attorney's fee was stricken out by the supreme court because the demand had exceeded the amount found due as earnings. The California law on this subject was construed by the State district court of appeal. (*Klaffki v. Kaufman*, p. 216.) Failure to plead properly the place of the contract and of the performance of the work necessitated a new trial; the trial court had awarded penalties, but the court of appeal found a lack of compliance with necessary requirements to sustain judgment. There was a reversal and final determination in a case before the United States Supreme Court (*Missouri Pacific R. Co. v. Ault*, p. 216), where the State courts had awarded recovery with penalties under a statute of Arkansas. The railroad was at the time under Federal control, and the Supreme Court held that the Government had permitted itself to be sued only for compensation for actual services and not for punishment.

The right to a penalty was denied in *Franco v. Seas Shipping Corp. (Inc.)* (p. 221), the claim being one of alien seamen who had been found to be diseased, and were required to be sent to a hospital for treatment, under a statute of the United States. Wages were held to be due for the time in the hospital, as the statute required it,

even though the sickness was due to vice, but the circumstances warranted the withholding of any penalty.

MISUSE OF FUNDS BY CONTRACTOR.

A statute of California declares a contractor who appropriates money for other use than that for which it was paid to him to be guilty of embezzlement. This statute was declared unconstitutional, since money paid to a contractor under his contract is his own, and not for the use of any other person, so that it could not be made criminal for him to dispose of it according to his own will. (*People v. Holder*, p. 212.) It was also pointed out that the State constitution does not permit imprisonment for debt, except in cases of fraud.

HOURS OF LABOR.

WOMEN.

A Nebraska statute limiting the hours of labor prohibited night work for women after 10 p. m. in manufacturing, mechanical and mercantile establishments. It was held (*State v. Crounse*, p. 132) that the law was not violated by employing women in a newspaper office at night, the establishment not coming within the classification named in the law.

RAILROADS.

The employment of telegraph operators, limited to 9 hours per day in offices continuously operated, but allowing 13 hours in offices operated only during the daytime, was the subject of discussion by a Federal court in *United States v. Cornwall & L. R. Co.* (p. 133). An office remaining open from 6 a. m. to 9 p. m. in winter and to 10.30 in summer was held not to be "operated only during the daytime," so that an operator on duty for 11 hours, from 6 a. m. to 5 p. m., was held to be employed in violation of the law. In another case (*United States v. N. Y., N. H. & H. R. Co.*, p. 134) an employee working from 5 to 7 hours within a 12-hour period, but relieved for definite times during which he was not subject to call, was held not to be continuously on duty for 12 hours, so that there was no violation of the law in his case.

GENERAL EMPLOYMENTS.

The Kansas law creating a court of industrial relations gives this body control over industries affected with a public interest, authorizing the fixing of wages and hours of labor. In the case, *Court of Industrial Relations v. Chas. Wolff Packing Co.* (p. 128), the Supreme Court of Kansas upheld the law as constitutional and declared the schedule of wages and hours binding upon the defendant company.

Not involving specific work time, but taking into consideration the right of the employer to all the products of the workman, is a case (*Ingle v. Landis Tool Co.*, p. 64) in which the right of the employer to inventions by the employee was discussed. In the absence of any contract to assign inventions to the employer, it was held that the company had no right to the invention, and a judgment ordering an assignment of the patent to the employer was reversed.

SUNDAY LABOR.

An Oklahoma statute forbids work on the first day of the week, including "servile labor, except works of necessity or charity." A ticket seller for a moving-picture theater was arrested under this statute, but the prosecution failed on the ground that the work in which he was engaged was not "servile labor" within the contemplation of the law. (*State v. Smith*, p. 205.)

MINE REGULATIONS.

The laws of a number of States require the establishment of wash-houses at coal mines and other places where the employee is exposed to dirt, grease, and grime. The question of the responsibility of the operator for clothing left by the employees in such washhouse was passed upon by the Supreme Court of Oklahoma in the case, *Prince v. King Coal Co.* (p. 203). The washhouse was supplied in compliance with the law of the State, but through the negligence of the company the building was destroyed by fire, together with its contents, while the miners were in the mine. The provision of the statute exempting the employer from liability for the destruction of property left in the bathhouse was held by the supreme court of the State not to relieve it from liability for losses due to its lack of ordinary care.

EMPLOYERS' LIABILITY.

ASSUMPTION OF RISK.

Perhaps the most deeply rooted of the common-law defenses against suits by employees for the recovery of damages for injuries during employment is that of assumption of risk. Naturally the intelligence and experience of the employee is a factor in determining whether or not the risk is assumed. This point is brought out in two cases decided on the same day by the same (Virginia Supreme) court, and involving quite similar physical circumstances. In one case (*Addington v. Guests River Coal Co.*, p. 88) an experienced miner was killed by a large piece of rock falling on him

at his work place. It was his duty to place his own props, which had been duly supplied. The court found that he had assumed the risk, being familiar with the conditions and requirements of his employment, and his failure to use the props was also contributory negligence. On the other hand, a young man without previous experience in the mine, sent with an experienced miner to load coal into the cars, was held entitled to recover for an injury received from falling slate, the court finding that he had not been instructed as to the dangers of the situation and was unacquainted with them. (*Clinchfield Coal Corp. v. Hawkins*, p. 89.) The Court of Civil Appeals of Texas held that a worker had assumed the risk where he needlessly overexerted himself, knowing that assistance was readily available. (*Hines v. Ross*, p. 89.)

NEGLIGENCE.

The negligence of the employer in failing to cut off the current from electrical connections at the working place of an employee was held by the trial court in *Egan v. Trenton Gas & Electric Co.* (p. 103) to warrant a judgment for damages, but the Supreme Court of Missouri, while recognizing the hazardous nature of this business, found that the workman had failed to take reasonable precaution for his own safety, knowing the dangers, and could not recover because of contributory negligence.

Negligence of a quite different form was involved in the case, *Carey v. Davis* (p. 105), determined by the Supreme Court of Iowa. Here the plaintiff was a farm laborer, overcome by heat while working in a gravel pit. No sufficient care was taken to provide for his comfort, and the resultant exposure led to illness on account of which it was held that he was entitled to sue for damages.

The responsibility of an employer for the negligent act of the driver of a truck transporting employees to their place of work was asserted in *Phillips v. Armour & Co.* (p. 104).

VICE PRINCIPALS.

The fact that a foreman was supposed to retain and direct employees under him will sustain a judgment for damages for an assault committed in anger at an employee who refused to obey orders or to continue service. (*Nash v. Longville Lumber Co.*, p. 86.) This principle was held, however, not to extend to a subforeman who got into an altercation with a workman engaged with him, the Supreme Court of Mississippi holding that the parties to the dispute were fellow servants, and further that neither was acting within the course of his employment. (*Petroleum Iron Works v. Bailey*, p. 87.)

A case lying between the above was one in which the son of the proprietor of a hotel was employed to assist his father and look after his interests. A disagreement with an employee as to terms led to the latter's leaving employment, whereupon the son engaged in a dispute and an assault. A judgment for damages and exemplary damages was affirmed by the Supreme Court of Minnesota, the master being said to be charged with responsibility of knowing what sort of person he invests with authority to act for him. (*Schmidt v. Minor*, p. 85.)

INJURIES TO THIRD PERSONS.

The liability of an employer to third persons for the injurious acts of his employees was affirmed in the case of *City of Indianapolis v. Lee* (p. 103), the rule carrying so far as to entail responsibility where the immediate employee has directed an outsider to operate the employer's instrumentality through which the injury occurred. This principle was held to make an employer of strike guards responsible for their acts in assaulting and arresting an innocent bystander under the assumption that he was one of a party engaged in attacking the employer's property. (*McInerney v. United Railroads of San Francisco*, p. 100.) However, exemplary damages would not be allowed unless the act was done with the knowledge and approval of the employer.

SAFE PLACE AND APPLIANCES.

The mining law of Arkansas requires a circulation of 200 cubic feet of air per minute at all working places. A suit for damages, following an explosion of gas, due to insufficient ventilation, was decided in the plaintiff's favor over evidence that it was not practical to comply with the statute. The common-law defenses had been submitted, and disallowed by the jury, while the question of practicability was said to be one for the legislature and not for the court. (*Central Coal & Coke Co. v. Barnes*, p. 123.)

Building operations are regulated by a New York statute which devolves upon the employer the responsibility of supplying an adequate scaffold. The court of appeals of the State held that a temporary flooring upon crossbeams of a coal trestle in process of construction was a scaffold within the purview of the act, reversing the trial court on this point. (*Ross v. Delaware, L. & W. R. Co.*, p. 124.) Inasmuch as the employer has a positive duty with regard to scaffolds, the defense of assumed risk would not be available.

Failure to guard a projecting set screw on a revolving shaft was held by the United States Circuit Court of Appeals to violate the employers' liability law of Alabama with regard to defective conditions of machinery, etc., entitling an injured man to a judgment

for damages for injuries. (*Standard Portland Cement Co. v. Foley*, p. 123.) The employee was said to have a right to a safe place to work, without being required to make an investigation for himself. Factory conditions were also involved in the case, *Naylor v. Holland-St. Louis Sugar Co.* (p. 125), decided by the appellate court of Indiana. In this case a workman was installing a coal conveyor near some boilers on which were defective and unguarded water gauges, of which fact he was ignorant, though it was known to the defendants. An injury resulting from the explosion of one of the water gauges was held to entitle him to sue for damages.

Approximating the situation in which the construction of a scaffold was involved is the case, *George Leary Construction Co. v. Matson* (p. 126), in which the United States Circuit Court of Appeals affirmed a judgment in favor of a workman injured by defective timbers while driving piles. The selection of the timbers was made by a foreman, and the work being done on a scow, the employee was held to be a seaman, entitled to recover under the provisions of the Federal law classifying employees on vessels.

The construction of the employers' liability law in Arizona was involved in *Consolidated Arizona Smelting Co. v. Egich* (p. 98). The liability created by this act is not to be evaded by furnishing a safe place and safe tools or implements, if nevertheless the condition or conditions of the occupation are responsible for an injury. The danger need not be inherent in the occupation, but the conditions may be responsible for the injury, and under the law the only risk the employee assumes is that of his own negligence.

CONTRACTORS.

An independent contractor has no claim on his principal where the control of the mode of work rests in his own hands; but where the method employed by the contractor is changed by the principal and he assumes control and direction thereof the ordinary relation of master and servant follows, with a corresponding liability for any injuries that may occur. (*Gammage v. International Agricultural Corp.*, p. 90.) The rule was also applicable where an employee of the principal was turned over to an independent contractor without any knowledge on his part of the transfer, his act being merely one of obedience to the directions of the person whom he was accustomed to expect instructions from. (*King v. Atchison, T. & S. F. R. R. Co.*, p. 91.)

VOLUNTEERS.

A volunteer, by which is meant a person engaged in employment without the request or assent of the employer, has no claim on the

person for whom he is rendering service, occupying practically the position of a trespasser. However, even a trespasser must not be recklessly imperiled, so that one volunteering to assist the driver of a wagon was held entitled to recover damages for injury caused by a sudden turn of which no warning was given. (*Rook v. Schultz*, p. 106.) The same rule was applied in a Connecticut case (*Kalmich v. White*, p. 92) in which a nine-year-old boy had been requested by the driver of a truck to assist in some work that he was doing. The circumstances of the injury were identical with those in the *Rook* case noted above, and the denial of any remedy by the trial court was said by the supreme court of errors to be unjustified, and a new trial was ordered.

UNLAWFUL EMPLOYMENT OF CHILDREN.

The statute of Arkansas forbidding the employment of children under 14 years of age was held valid and to bar defenses of assumed risk and contributory negligence when a boy was employed in violation of the act. Unlawful employment was said to constitute negligence per se (*Terry Dairy Co. v. Nalley*, p. 93.) However, since the lad had misrepresented his age, and the employer had been denied permission to introduce evidence as to his actual age, a new trial was ordered.

The doctrine that prohibited employment is negligence per se was limited by the Supreme Court of Alabama. (*Birmingham News Co. v. Andrews*, p. 95.) The court held that if the violation merely furnished a causal condition and was not the proximate cause of the injury, it did not entail liability. The injured boy was at work at night in violation of the law, but not in a prohibited place of employment. The injury was received in the course of a playful diversion from employment, and a judgment for damages was reversed and the cause remanded for a determination of the liability without reference to the statute prohibiting night work.

Employment in a coal mine is forbidden by a West Virginia statute for children under 14 years of age. A boy under 14 was injured while switching loaded cars in and about the tippie of the mine, and this was held by the trial court not to be within the prohibition of the law. The supreme court of appeals of this State, however, took the opposite view, and held that the place where he was employed was covered by the statute, so that a verdict rendered by the jury should be made the judgment of the court. (*Mangus v. Proctor-Eagle Coal Co.*, p. 97.) In this case the employer had contributed to the workmen's compensation fund of the State, but this was held to be no bar to a suit for damages, as where employment is unlawful, neither party to the contract is protected by the workmen's compensation act.

ADMIRALTY.

The right of employees in and about vessels to recover damages for injuries is involved in much difficulty. The Supreme Court of the United States had before it recently a case (*Western Fuel Co. v. Garcia*, p. 83) involving a variety of uncertainties, the final outcome being an entire loss of recovery for a fatal accident. A stevedore who worked in the hold of a vessel was killed, and a claim for compensation was allowed by the State industrial commission, but annulled by the supreme court of the State a year and a day after the death. Action for damages was then brought in admiralty, relying on the State law giving the right to sue for fatal accidents. Judgment was in plaintiff's favor in the district court, but the supreme court held that as the statute giving the right to sue contained the limitation of one year, no action could be brought at the time of the beginning of the present suit, and the case was dismissed. It was recognized in the foregoing case that actions for death based upon the statutes of the States could be brought in maritime cases, and the United States Circuit Court of Appeals for the Second Circuit affirmed a judgment made in accordance with this principle in *White v. John W. Cowper Co.* (p. 82). This case arose under the New York law, no recovery for death being provided by maritime law, but the State law is construed to apply when the injury takes place within its territorial waters.

The question of what law applies was involved in a rather conflicting fashion in *The Hanna Nielsen* (p. 77), the injured man being a Norwegian on board a ship of Norwegian nationality. He signed on at Portland, Me., and was injured in British territorial waters at Gibraltar. A judgment allowing for cure and maintenance was reversed by the circuit court of appeals on the ground that the ship had complied with the obligations of the Norwegian law, holding also that the American law had no application, and if any claim was based on British law it should have been proved.

A case that covers an interesting portion of history is one in which suit was brought on account of the death of a longshoreman in 1916. (*Kennedy v. Cunard S. S. Co.*, p. 78.) At the time of this injury the New York compensation law was supposed to cover the accident, and benefits had been awarded. On the finding by the Supreme Court of the United States that this provision of the law was unconstitutional, the payment of compensation was stopped and this action brought. The case was dismissed in the trial court, but the appellate division reversed that decision and ordered a new trial, discussing at considerable length the status of maritime injuries. A point of interest, in view of the finding in *Berry v. M. F. Donovan & Sons* (p. 226) is the statement in the *Kennedy* case that as

the contract was a maritime one the State statute can not be read into it; in the *Berry* case the opposite was held.

The remaining case under this head is one classifying the employment of an employer loading freight on a ship at a dock, the injury being declared to be maritime (*Crane v. Pac. Steamship Co.*, p. 81); however, this was held not sufficient ground for removing the case from the common law to the admiralty docket.

RAILROADS—FEDERAL STATUTE.

Assumption of risk.—Though modifying in a large degree the common-law defenses, the Federal employers' liability act applicable to railroad companies permits the defense of assumption of risk. This was applied by the Supreme Court of the United States, though with a strong dissent, to a case in which a locomotive engineer was held to have assumed the risk of the position of a mail crane by which he was struck while leaning out of a cab to examine the engine while it was running. (*So. Pac. Co. v. Berkshire*, p. 107.) A similar finding was made in *DeBaur v. Lehigh Valley R. Co.* (p. 116). In this case a flagman sent back to give warning of a work train was struck by another train and killed. No recovery was allowed on the failure to prove negligence on the part of the company, the doctrine of assumption of risk being operative.

Damages.—State practice was said to warrant the introduction of evidence as to the prospects of promotion of a fireman killed by accident in Texas. (*Payne v. Allen*, p. 108.) Damages were allowed under the Federal liability law, using as a basis the increased earnings that would have accrued if the anticipated promotion had taken place. This finding was approved by the State court of appeals as permissible under Texas procedure, ruling that the evidence should not be refused simply because a Federal law was being applied.

Waiver.—The Supreme Court of the United States sustained the validity of a contract by an express messenger waiving all rights to sue either his employer or the carrier railroad in case of personal injury. (*Wells Fargo & Co. v. Taylor*, p. 109.) A State court had given damages despite the contract, while a Federal (district) court enjoined the recovery of the judgment. On appeal to the Circuit Court of Appeals, this decision was reversed, leaving the suitor free to collect the judgment, but on further appeal, the Supreme Court made the ruling indicated; i. e., that no recovery could be had.

Place of suit.—An attempt was made in *Chicago, M. & St. P. R. Co. v. McGinley* (p. 117) to compel the bringing of a suit within the State where the injury was received. The action was under the Federal employers' liability act, under which State and Federal

courts have concurrent jurisdiction. The railroad company secured an injunction preventing suit outside of the State of Wisconsin, where the injury occurred, but the supreme court of that State held the injunction granted too broad, saying that it should have been worded so as merely to restrain further action in the county in which the suit was brought.

Interstate commerce.—The difficulties attendant upon determining under which law to bring an action for railroad injuries continue to perplex suitors seeking the determination of their rights in the courts. The Court of Appeals of Kentucky ruled that a locomotive engineer procuring oil for his engine which he was preparing for an interstate trip was engaged in interstate commerce, reversing the court below, which had awarded damage under the State law. (*Hines v. Burns' Admx.*, p. 112.) The Federal law was also held to apply in case of a fatal injury to a locomotive engineer who was on his way to the roundhouse to put up his engine after having completed an interstate run. (*Director General of Railroads v. Bennett*, p. 114.) The statute was also held to apply to a car inspector and repairman whose work was executed on interstate and intrastate cars indiscriminately, and who was killed while passing through the yard in the course of his duty. (*Hines v. Logan*, p. 111.) A step more remote was held not to remove a laborer in a car shop from the scope of the Federal statute. (*Koons v. Phila. & Reading R. Co.*, p. 113.) Suit had been brought under the State law, but judgment was for the company on the ground that the wrong remedy was attempted, death having resulted from a mishap while unloading a portion of a car wrecked in interstate commerce from a gondola on which it was brought into the shop. Since more than two years had elapsed from the date of the injury, the limitation fixed by the Federal law barred recovery under it, so that no relief could be obtained.

Furnishing steam at a heating plant to supply both interstate and intrastate cars was held to be interstate employment so as to bar proceedings under the workmen's compensation law of Connecticut. (*Gruszewsky v. Director General of Railroads*, p. 115.)

Safety appliance acts.—The Supreme Court of the United States denied the right of recovery in the case of the fatal injury of a brakeman whose death resulted from the defective condition of a crippled car standing on a railroad siding, which was not supposed to be touched or moved in the process of the brakeman's work. The majority of the court held that since the defective car had no place in the performance of the work, its condition was not the proximate cause of the accident (*Lang v. N. Y. Central R. Co.*, p. 118); there was

a vigorous dissenting opinion. A switchman injured by reason of defects in cars, in violation of the safety appliance act, was held to be employed in a line of service bringing him within the benefit of the statute. The question of interstate commerce was not involved, and the employer claimed that the workmen's compensation act of the State controlled. The trial court gave judgment under the statutory liability doctrine of the safety appliance act, but the appellate division reversed this decision, sustaining the contention that the workmen's compensation act governed. Further appeals to the court of appeals affirmed the trial court's decision rejecting the State remedy for that provided by the Federal enactment. (*Ward v. Erie R. Co.*, p. 121.)

WORKMEN'S COMPENSATION.

CONSTITUTIONALITY.

The cases arising under the heading "Constitutionality" are not addressed to the general principles of compensation legislation, which are thoroughly established, but rather to specific provisions or incidents of the various laws. The nearest approach to an exception to this statement is the action of the Supreme Court of Arizona declaring unconstitutional the act of 1921, intended to supersede an earlier law. The State constitution secures to injured employees the option to choose a damage suit or compensation under any law that the legislature might enact, which the earlier law allowed. The act of 1921, however, required prior election, which was held to violate the constitution, and being an essential feature of the act, invalidated the whole. (*Industrial Commission v. Crisman*, p. 263.) The act being void ab initio, it did not effect a repeal of the earlier act.

A case coming to the Supreme Court of the United States passed upon an amendment to the Indiana compensation law by which the legislature of 1919 made the act of 1915 compulsory as to employment in and about coal mines, leaving it optional as to other employments. A mining company sought to reject the law, as before the amendment it might, claiming that the amendment was an unreasonable and arbitrary exercise of power. The District Court of the United States had refused to enjoin the State authorities from enforcing the law, and the Supreme Court took the same position, holding that the nature of the work was so distinctive as to warrant the difference in legislative action. (*Lower Vein Coal Co. v. Industrial Board*, p. 247.)

The Supreme Court of Utah held constitutional a provision of the compensation law of that State which authorized the payment of a fixed sum into the State treasury in cases in which the deceased employee, on account of whose death compensation would ordinarily

be due, left no dependents. (*Salt Lake City v. Industrial Commission*, p. 250.) The object of this agreement was to create a special fund to compensate employees suffering a second injury, a similar provision of law having been rejected by the Supreme Court of New Jersey (see *Bul. No. 290*, p. 344), but upheld by the Court of Appeals of New York (*Bul. No. 258*, p. 223).

The action of the New York court as to the second injury fund may be said to indicate the position to be taken with regard to a rehabilitation fund, provided for by an amendment of 1920. This authorized a contribution of \$900 to such a fund in cases where no dependents survived. The act was held constitutional (*Watkinson v. Hotel Pennsylvania*, p. 248). Involved in the discussion was the question of the constitutionality of the act accepting the provisions of the Federal statute providing for State and Federal cooperation in the matter of rehabilitation. The State law on rehabilitation was held to be an independent enactment, but the acceptance of cooperation was held also to be constitutional, so that the legality of the whole system was affirmed.

A provision of the Louisiana law requires employers to file with the district court of the parish of their domicile proof of their ability to make payments under the statute. The duty of passing on this subject was held not to be properly a function of the judges, and the provision was declared invalid. (*In re Southern Cotton Oil Co.*, p. 324.)

The authority of the legislature of Porto Rico to enact a compensation law for the island was upheld in *Camunas v. Porto Rico Ry., Light & Power Co.* (p. 344), over a contention that the Federal statute as to railroads could not be superseded by such action.

INJURIES COMPENSATED.

Compensation laws as a rule are applicable to accidental injuries. Sunstroke is so classed in a Pennsylvania case, the labor inducing it having taken place during employment at farm work but under a contract for work at a coal yard. (*Matis v. Schaeffer*, p. 263.) In *Quick v. Fred E. Illston Ice Co.* (p. 224), the freezing of a workman's hands while harvesting ice on a cold day was held to be such an injury as the New York law would regard as an accident within the meaning of the statute. Quite different was the position taken by the Supreme Court of Michigan in *Savage v. City of Pontiac* (p. 223). Here a city fireman at work for 6 hours on an intensely cold and windy day incurred injuries resulting in his death. The court held, two justices dissenting, that there was no accidental injury, and that an injury received in the course of employment through natural causes involving a common hazard was not compensable under the Michigan statute.

Death from pneumonia gave rise to compensation payments under a decision of the Supreme Court of New York (*Delso v. Crucible Steel Co.*, p. 222) and in Pennsylvania (*Dumbluskey v. Philadelphia & Reading Coal & Iron Co.*, p. 222). In the first case the decedent received a heavy blow on his chest while at work, dying of pneumonia on the fifth day thereafter; while in the second a squeeze or blow by a heavy timber was held to be the occasion of traumatic pleurisy or influenza, a fatal case of pneumonia following.

The foregoing cases of disease are entirely distinct from any classification as occupational diseases, which are compensable under the laws of a few States. Among those commonly so classed is caisson sickness, caused by work under excessive air pressure. However, the Supreme Court of Michigan declined to class the disease as occupational, and permitted an award for accidental death in a case in which the workman was affected with dizziness and partial paralysis as the result of caisson sickness, by reason of which he fell and sustained fatal injuries. (*Williams v. Missouri Bridge & Iron Co.*, p. 291.) A carpenter suffering from "housemaid's knee," usually classed as an occupational disease, was allowed compensation by the Appellate Court of Indiana (*Standard Cabinet Co. v. Landgrave*, p. 292), the court ruling that even if so classed, if it was contracted under conditions constituting accidental injury, it was compensable.

A workman employed in an alfalfa mill where the air was very dusty developed an attack of heart trouble which caused his instant death. He had organic heart trouble, and the industrial commission refused an award, holding that the death had not been the proximate result of an accident. The Supreme Court of Colorado, however, took the view that the dust-laden condition of the air was the proximate cause of the death, the result being unexpected and unintended, therefore accidental. In accordance with this conclusion the commission was directed to enter an award allowing compensation. (*Carroll v. Industrial Commission*, p. 295.) On the same day the same court rendered a decision over a vigorous dissent taking a view so apparently contradictory to the foregoing that it is difficult to account for the conclusion reached. A miner died from blood poisoning, due to the inhalation of foul air and dioxide gas. The industrial commission had denied compensation; and the district and supreme courts adopted the same position, the latter holding that no accident could be charged as a definite time was lacking, nor could it be unexpected since bad air was a continuing condition of which the deceased was aware, so that the element of unexpectedness could not be considered as present. (*Prouse v. Industrial Commission*, p. 293.)

The Appellate Court of Indiana passed upon a case combining elements of both the above Colorado cases in that the injury was the

result of inhaling impure air in a mine, and the person affected died of heart disease, which the autopsy showed to have been serious and chronic. The court held that the fatal culmination was due to accident and approved the award made by the industrial board. (*Utilities Coal Co. v. Herr*, p. 290.)

The aggravation of a preexisting condition was said by the Supreme Court of Maine to warrant the allowance of an award where cerebral hemorrhage followed exertion by a workman suffering from diseased arteries. (*Patrick v. J. B. Ham Co.*, p. 288.) Failure to establish causal connection led to the rejection of a claim where a workman suffering from arteriosclerosis claimed that his being knocked down by a swinging door was the cause of paralysis from which he was suffering. (*Fink v. Sheldon Axle & Spring Co.*, p. 289.)

EMPLOYMENT STATUS.

The rule as to the employment relation is fundamentally not different under workmen's compensation laws and other laws having to do with employer and employee. However, a number of compensation laws established limitations or tests of eligibility for persons claiming to be employees thereunder. Turning on the general doctrine of relationship, the Supreme Court of Louisiana affirmed a decision of the court below denying compensation where a workman was held to be an independent contractor, since he was paid merely for the amount of his product without restriction as to the time and method of performing his work. (*Helton v. Tall Timber Lumber Co.*, p. 268.) The circumstances surrounding the case of *Coppes Bros. & Zook v. Pontius* (p. 268) led the Appellate Court of Indiana to take an opposite view where a workman was paid by the amount of work done and not by days worked, but was subject to such control as the employer saw fit to exercise.

The Illinois law is applicable to public employees, and provides that the principal is liable for the employees of his contractor unless such contractor insures his liabilities under the law. This was held to sustain an award against the city where an employee of a subcontractor was injured and his immediate employer was not insured. (*City of Chicago v. Industrial Commission*, p. 275.)

Authorities differ as to the party responsible where a general employer loans an employee to a third party as special employer for the time. In *Knudson v. Jackson* (p. 267) the Supreme Court of Iowa held that the general employer was the responsible party, the relationship with the employee having been entered into with them, while the employee had made no arrangement of his own with the special employer to whom he had been assigned by his original employer.

An unusual situation is presented in a case passed upon by the Supreme Court of New York, Appellate Division, in which the status of a labor organization as employer was involved. (*Hines v. Henry I. Stetler (Inc.)*, p. 279.) The claimant was a longshoreman, and the docks were distributed by the longshoremen's union among themselves, and a rate for loading and unloading was fixed. Persons desiring service paid the agent of the organization the rate charged, while the latter assigned the workmen and gave them their directions, the result being that the agent of the organization was an independent contractor, and an injured workman could not look to the owner of the truck or the goods for compensation.

A variety of questions were involved in *Rector v. Cherry Valley Timber Co.* (p. 273), a case decided by the Supreme Court of Washington. The claimant was an enlisted soldier, detailed for work at logging with which he was familiar. On the receipt of personal injuries he sued for damages, claiming that as his employment was involuntary the State compensation law did not apply. The court rejected this contention, holding that enlistment could not be classed as involuntary servitude, regardless of the mode of induction thereinto; nor could the present relationship be regarded as other than voluntary employment, even though done under military assignment. The compensation act therefore applied and a judgment for damages recovered in the court below was reversed.

The status of a voluntary worker on a percentage basis was considered in *Rockefeller v. Industrial Commission* (p. 276). The worker drove a taxi at such times as he chose, keeping as compensation a percentage of the charges. It was held that he was not an employee within the meaning of the act but a bailee and excluded from compensation benefits. A somewhat similar case was before the Supreme Court of Colorado, in which it was held that the driver of a tourist automobile, who had been discharged by his employer on the day preceding his fatal injury received while taking a party of tourists in disobedience to orders, was outside the law. (*Burke v. Industrial Commission*, p. 265.)

Statutes defining what employees come under the act usually exclude agricultural labor, but the Supreme Court of Pennsylvania affirmed an award in the case of a laborer hired to work in a coal yard and sent by his employer to assist in the harvest work during a slack time at the coal yard. (*Matis v. Schaeffer*, p. 263.) It was said that the general character of the work for which he was hired determined the status of the employee rather than the nature of the work that he was doing when the fatal injury was received.

Statutory inclusions and exclusions are based on a variety of tests. The law of Tennessee is not applicable unless the employer has at

least 10 persons in his employ. The supreme court held, however, that it was not necessary that these should all be at the same place, but if the aggregate of the employer's servants exceeded 10 in number he was entitled to accept the provisions of the law. (*Vantrease v. Smith*, p. 280.)

The New York statute is applicable to classified employments where four or more "workmen or operatives" are regularly employed. Clerks, salesmen, and stenographers in a stockbroker's office were said by the supreme court of the State not to be classifiable as workmen, so that a fatal injury to a messenger was held to involve no right to a claim for compensation under the law. (*Westbay v. Curtis & Sanger*, p. 281.)

The exclusion of casual employments was held by the Supreme Court of Iowa to bar the claim of a carpenter who was engaged to build a corncrib on the farm of a retired farmer. (*Oliphant v. Hawkinson*, p. 243.) Not only was the employment casual but it was said that if the employer was in any "trade or business" it was that of farming, and assuming that the building of the crib was in line with such business, it would be classed as agricultural work and would be excluded on that account.

Employments not for pecuniary gain are excluded from the New York statute. However, this provision was held not to bar the claim of a gravedigger where profit was made on some graves in the cemetery, such sums as accrued being expended for charity. (*Dillon v. Trustees of St. Patrick's Cathedral*, p. 278.) The employment was hazardous, and it was said to be of no importance to what purpose the pecuniary gain was devoted. Less successful was the case of a cook of a golf club, the same court holding that since the restaurant was operated at a loss, and entirely for the convenience of the members of the club, it was not a business for gain and an award to the widow must be reversed. (*Francisco v. Oakland Golf Club*, p. 277.)

Under the law of Vermont an employee receiving remuneration in excess of \$2,000 per year is not under the law in the absence of special agreement. The fact that a deceased laborer had during the previous year received remuneration slightly above \$2,000 was held not to bar the claim of his dependents, since there was no definite agreement to the effect that he should receive wages in excess of \$2,000. (*Kelley's Dependents v. Hoosac Lumber Co.*, p. 266.)

PUBLIC EMPLOYEES.

A city fireman in New York was held not to be within the provisions of the law of the State, the court holding that the constitution limited the scope of the law to those businesses in which the expenses of the compensation could be met "by a proper charge in

the cost of operating the business of the employer." (*Krug v. City of New York*, p. 264.)

The fact that the services of a school janitor in Nebraska are in a line of employment in which the city was engaged for no pecuniary gain or profit led to the reversal of a determination in favor of the injured man. (*Ray v. School District of Lincoln*, p. 272.) The same principle was held to apply in the case of a policeman. (*Rooney v. City of Omaha*, p. 271.). It was also claimed that there was no responsibility attached because of the exemption as to employees holding office for a regular term, but as their tenure is during good behavior, the court disallowed this ground. Other cases involving the status of policemen were decided in the Supreme Court of Virginia (*Mann v. City of Lynchburg*, p. 269) and the Appellate Court of Indiana (*Shelmadine v. City of Elkhart*, p. 270). The Virginia case turned on the nature of the accidents to which the law was intended to apply, i. e., industrial accidents in which the relationship of master and servant was involved, not extending therefore to the case of a city fireman. The argument in the Indiana case was on the ground that the policeman was a public officer subject to impeachment if he should fail to perform his official duties, and not a servant or employee of the city under the contract of hire.

The Virginia statute is applicable to employees of the State, and a quarry foreman employed by the State highway commission was held to be within the scope of the law. (*Smith v. State Highway Commission*, p. 278.) No fund was available under any existing legislation for the payment of awards, but the court expressed confidence that suitable provision would be made where the industrial commission found the obligation to be due.

HAZARDOUS EMPLOYMENTS.

The nature of the employment as hazardous or nonhazardous is made the criterion in some States as to the application or nonapplication of the law. The Court of Appeals of New York affirmed an award for the death of the director and leader of a band of 65 pieces, with 4 or more workmen regularly accompanying the band. The fact that these workmen were a part of the organization was held to bring the entire band under the law, so that an award in favor of the leader's widow was sustained. (*Europe v. Addison Amusements (Inc.)*, p. 285.) The case of a school janitor before the Supreme Court of Illinois might have been placed under public employments, and brought into direct contrast with the *Ray* case (p. 272). However, the case turned on the nature of the employment as hazardous, the building in which he was employed being heated by a steam boiler which was subject to city and insurance inspection. This is one of the

tests of the Illinois statute, and the existence of the condition indicated was held to bring the employment within the law so that compensation should be allowed. (*East St. Louis Board of Education v. Industrial Commission*, p. 286.)

The Illinois law applies automatically to all enterprises and businesses classed as hazardous, this including the business of printing and publishing. An advertising solicitor using his own automobile in going from place to place was killed by a collision with another car. The supreme court held that the nature of his employment was such as to expose him to the hazard which resulted in his death, and the employment being hazardous he was within the act. (*Illinois Publishing & Printing Co. v. Industrial Commission*, p. 284.)

A determination that the general storage business is extrahazardous was reversed by the Supreme Court of Washington with the finding that the industrial commission of the State had exceeded its powers under the law in classifying it as such. (*State v. Eyres Storage & Distributing Co.*, p. 287.)

EXTRATERRITORIALITY.

The Supreme Court of Michigan construed the compensation law of that State as a part of the contract of employment with a workman whose injury occurred outside the State boundaries (*Crane v. Leonard, Crossette & Riley*, p. 283); so also in Minnesota (*Stansberry v. Monitor Stove Co.*, p. 307). The same view was taken of the Wisconsin statute by the Supreme Court of that State. (*Anderson v. Miller Scrap Iron Co.*, p. 282.) This latter case involved the question of the subrogation of rights where the injury was due to the acts of a third party, the proceeding involving this subrogation having been begun under a Michigan statute allowing suit in case of death by negligence. The court held that the Wisconsin statute could not control the rights arising under the Michigan law, this being a form of extraterritorial control that could not be recognized.

INTERSTATE OR INTRASTATE COMMERCE.

The Pennsylvania courts, from common pleas to supreme, uniformly sustained an award in behalf of the widow of a member of a train crew handling commodities in part of an interstate nature. The case was taken to the Supreme Court of the United States, where it was reversed, the position being taken that presumptions in such cases are in favor of interstate commerce, since if there is an element of such commerce in the employment that fact determines the remedy of the employee. (*Philadelphia & Reading R. Co. v. Polk*, p. 334.) Another case (*Philadelphia & Reading R. Co. v. Di Donato*, p. 335) had a similar history, coming from the same

State. Here a crossing watchman was held by the Supreme Court to have been engaged in interstate commerce, a contrary finding of the Supreme Court of Pennsylvania being reversed. The third case under this head is also a decision of the Pennsylvania Supreme Court, holding that a workman in charge of an oil tank from which oil was taken for both interstate and intrastate commerce was under the Federal law, reversing the finding of the court of common pleas affirming an award by the workmen's compensation board. (*Lindway v. Pennsylvania Co.*, p. 325.)

ADMIRALTY.

The complications affecting maritime employees have been adverted to in the cases reported under employers' liability. Thus far compensation legislation has embarrassed rather than simplified the situation. In *Rorvik v. Northern Pacific Lumber Co.* (p. 225) the Supreme Court of Oregon awarded damages in a suit under the State liability act for the death of a steamship captain in the waters of the State. The employing company was a California corporation, and the widow had secured an award under the California compensation act for the death of her husband. Contests and appeals had delayed payments, so that no money had been received under this award. This award was held not to bar a recovery under the Oregon liability act, though the court assumed that recovery could not be had under both statutes.

The Supreme Court of Maine decided in *Berry v. M. F. Donovan & Sons (Inc.)* (p. 226) that the compensation law of that State, being of an elective nature, formed a part of the contracts of employment made within the State, reaching even to the case of a longshoreman engaged in unloading a vessel. The employer was under the act, and though the work was of a maritime nature it was held to be within the compensation law.

The claim that the driver of a truck transporting freight from a bridge to various points along the shore had suffered a maritime injury was denied in *McBride v. Standard Oil Co.* (p. 224). The circumstance that he was injured by being caught between the back end of his truck and the side of the barge did not change his status as a land employee, and a compensation award was affirmed.

JURISDICTION.

The authority of a court to render a final decision in a compensation case was passed upon by a Texas court in *Employers' Indemnity Corp. v. Woods* (p. 326). An agreement with the insurer to accept a lump-sum settlement had been ratified by the judgment of a justice court. The industrial accident board disapproved and ordered a much larger payment to be made. Over the contention that the jus-

tice court had jurisdiction, the award of the board was affirmed in the court of civil appeals. The original agreement was for a lump sum, while the award was for weekly payments. The court held that the terms of the law controlled both the jurisdiction of the board and the preference for weekly payments.

The powers of the industrial commission of New York were discussed by the court of appeals of that State in *Lorchitsky v. Gotham Folding Box Co.* (p. 333). An award based on alternative findings was held to be insufficiently grounded, the commission not being warranted in conclusions on so general and inadequate a basis as appeared in this case. The action of the appellate division in affirming the award was therefore reversed and a new hearing granted.

The exclusiveness of control of the workmen's compensation act, where applicable, was held in *Hyett v. Northwestern Hospital for Women and Children* (p. 328) to bar the right of an injured workman to sue for additional injuries other than those for which compensation was payable under the act.

NONRESIDENT ALIENS.

A few States bar nonresident alien beneficiaries from any benefits under the compensation laws, while others permit benefits, but in reduced amounts. The law of Kansas is in the latter class, but the supreme court of that State held, in the case of an Italian miner killed in the State, that the treaty of the United States with Italy, calling for equal treatment of the nationals of the two nations made it necessary to disregard this limitation, and pay the full amount that would be due in the case of residents of the United States. The discrimination was said also to conflict with the equal protection clause of the fourteenth amendment, and was therefore unconstitutional. (*Vietti v. George K. Mackie Fuel Co.*, p. 229.)

INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

The common limitation on compensable injuries, that they shall arise out of and in course of employment, is the one most fruitful of dispute and litigation. In the great majority of laws the conjunction "and" is used, though in a few the disjunctive "or" appears; while in a still smaller number the provision is simply that the injury shall be received in the course of employment. Where the word "and" is used, both conditions must be present, the fact that the injury occurred while employed not being conclusive of a right to an award. In *Miller v. Beil* (p. 297) the Appellate Court of Indiana held that the drowning of a man by falling into a tank of water, probably during an epileptic fit, was nevertheless an accident arising out of the employment, so that an award in his depend-

ents' favor was affirmed. Similar reasoning prevailed in a case before the Supreme Court of Illinois (*Rockford Hotel Co. v. Industrial Commission*, p. 316), the case being that of a laborer falling into an ash pit and receiving injuries from which he died. The preexisting condition would not lead to fatality, nor was the fall fatal in itself, but the employment about the pit furnished the setting for the fatal result. An award by the commission, reversed by the circuit court, was therefore affirmed by the supreme court.

Departure from the line of duty in violation of instructions was a basis for reversing the court below and the industrial commission of Wisconsin in a case in which a boy of 14 undertook to use a machine for his own purposes, although strictly instructed against such action. (*Radtke Bros. v. Industrial Commission*, p. 315.) The same principle applied in the case of a laundry worker injured while doing the personal laundry of another employee on a day when such work was forbidden. (*Hinton Laundry Co. v. DeLozier*, p. 311.) The employer's entire lack of interest in the results of her work was said to take it out of the course of her employment.

While the foregoing cases involve violations of employers' regulations, the Supreme Court of Illinois had before it an instance of a violation of the law. (*Union Colliery Co. v. Industrial Commission*, p. 312.) A statute of this State forbids riding on loaded cars in mines, and the injury in this case was due to a violation of the law, the result being fatal. The industrial commission, however, awarded compensation, which the circuit court disallowed but the supreme court affirmed. The injury was said to arise out of and in the course of the employment, and the violation of the law was not a departure from the employment but was at the most contributory negligence, not defeating the right of recovery. The distinguishing mark, of course, is that in the first two cases the claimants were not doing that for which they were employed, while in the last case the injury was received in the line of employer's service even though there was a departure from the established method.

The fact that an injury was received while doing other work than that for which specifically employed will not bar a claim where the new employment is such as any interested workman would engage in on behalf of his employer. Thus a roustabout engaged in pulling rods from an oil well, finding the grass on fire near the well, was not outside the law while attempting to extinguish the fire to prevent damage to his employer's property. (*Associated Employers' Reciprocal v. State Industrial Commission*, p. 302.)

An injury occurring at lunch time by reason of the negligence of the operator of an elevator which the employees were supposed to use was held to be within the compensation law of New York, since the act in which the employee was engaged was incidental to the

employment. (*Martin v. Metropolitan Life Ins. Co.*, p. 309.) This fact barred a suit for damages, and a judgment of the court below awarding damages was reversed.

Going to and from work is also a necessary incident to employment, and where transportation is furnished by the employer as a part of its agreement, an injury arising out of the transportation conditions is compensable. This rule applied in *Fisher v. Tidewater Building Co.* (p. 304) in which the Supreme Court of New Jersey affirmed an award in favor of a workman who was killed while attempting to board a train to go to his home, though off his employer's premises. On the other hand the Court of Appeals of New York found that a flagman permitted to ride to and from work free of charge was not in the course of his employment where the transportation was merely a permissive grant, and not a term of the contract. (*Kowalek v. New York Consolidated R. Co.*, p. 303.)

Where a miner was run down by a train while on his way to work, and had reached his employer's premises, an award for his death was sustained on the ground that his presence was a necessary incident of his employment, even though he had not yet begun his actual work for the day. (*Western Coal & Mining Co. v. Industrial Commission*, p. 305.)

Two factors combined to defeat the claim of a man injured by striking workmen after hours. (*Rourke's case*, p. 308.) The workman knew that he was taking the place of strikers and was promised protection. He was injured while at a lunch room off the premises and after the conclusion of the day's work, the injury being due to an assault by a striker. The Supreme Court of Massachusetts reversed an award of the industrial board on the ground that the employment for the day had ceased. Similarly a foreman who had completed his shift was not in the course of employment when injured while inspecting the operations of machinery for which he was not responsible during the off shift. (*Koubek v. Gerens*, p. 317.)

The course of employment was held to be broken by turning aside on a personal errand where an employee on duty for a number of hours was killed while crossing the street from his work place to get a cup of coffee. This was said to be the custom under the circumstances, and the industrial commission made an award in his favor, which was upheld by the Appellate Division of the Supreme Court of New York, but on further appeal the court of appeals reversed this judgment, saying that going to a restaurant was not an incident of his employment. (*Clark v. Voorhees*, p. 311.)

The continuing liability of an employer in a case in which the nature of the employment controls the entire time of the employee is illustrated in *Stansberry v. Monitor Stove Co.* (p. 307). In this

case a salesman lost his life in a hotel fire, and as his employment required him to be in hotels the injury arose out of and in the course of his employment.

Whether or not recovery will be had for injuries due to what are known as "common hazards" depends upon the circumstances of the individual case. Thus a workman who carried needed tools on his person was struck by lightning while working on an iron bridge, and the Supreme Court of Colorado affirmed an award in his favor on the ground that his exposure was increased over that of the ordinary citizen, so that the injury arose out of the employment (*Hassell Iron Works Co. v. Industrial Commission*, p. 314); so also of a night watchman who was accidentally shot and killed by a policeman in pursuit of burglars, the Court of Appeals of New York holding that while others might be similarly exposed, the nature of his employment multiplied the opportunities for accidental injury of this nature so that his case would come within the law (*Heideman v. American District Telegraph Co.*, p. 310).

Involving elements of uncertainty as to the actual hazards to which the injury was due was a case (*Empire Health & Accident Ins. Co. v. Purcell*, p. 313) in which the Appellate Court of Indiana sustained an award for injury to an insurance solicitor and collector. Whether the injury upon which the claim was based was due to an assault by persons from whom he had sought to make collections, or whether it was for the purpose of robbery, or whether it was a street injury could not be determined, though the circumstances pointed to an assault. The employment was said to expose the claimant to increased hazards above those of the public generally, so that his injury might properly be said to arise out of it, and an award in his behalf was affirmed. Much the same rule applied in *General Accident Fire & Life Assurance Corporation v. Industrial Accident Commission* (p. 298), in a decision by the Supreme Court of California. The proprietor of a garage in resisting an attack by strangers with whom he had a dispute fired a shot which struck an employee. The fact that the injured man was required to be constantly present at the place where the incident occurred exposed him to all the dangers arising in the conduct of such a business, differentiating him from the chance attendant at the place, so that the injury was compensated.

Scuffling, horseplay, and quarreling are not infrequent incidents where numbers of workmen are brought together. An employee injured while passing two other employees engaged in a playful scuffle was held by the Supreme Court of Ohio to be entitled to benefits, on the ground that the injury was received at a time and place governed by his employment, the incident being not unlikely to

occur in such circumstances. The statute is not based on fault or neglect, but applies to the conditions and circumstances of factory life. (*Industrial Commission of Ohio v. Weigandt*, p. 296.) The same rule was applied by the Supreme Court of Nebraska in a fatal injury, due to the constantly recurring criminal stupidity in the alleged playful use of compressed air. (*Socha v. Cudahy Packing Co.*, p. 306.) In contrast with the foregoing is the position taken by the Supreme Court of California in a case in which a workman's eye was injured by being struck by a grape thrown at another employee in a packing house. (*Federal Mutual Liability Insurance Co. v. Industrial Accident Commission*, p. 305.) The fact that such incidents are common and perhaps inevitable is said to be recognized by some courts as sustaining the right to an award, but it is regarded by this court as "an unwarranted extension" of the law.

An intent to injure must be assumed where assaults are committed in anger, but the incident may, nevertheless, be classed as an accident arising out of and in the course of employment. Such is the position taken by the Court of Appeals of New York where a foreman struck a workman, following a short dispute, resulting in serious injury to one eye. The immediate connection between the incidents of discipline and the blow were said to warrant the conclusion that the injury arose out of and in the course of employment, and the employer being responsible for the foreman's acts, an award of compensation would be affirmed. (*Knocks v. Metal Package Corp.*, p. 301.) This doctrine was applied by the Supreme Court of Oklahoma to a similar case where an assistant foreman struck a miner because he resented an insult, the employer being responsible for the assault committed by his representative. (*Stasmos v. State Industrial Commission*, p. 299.) The Appellate Court of Indiana again applied the doctrine of the responsibility of the employer not only for his own acts or those of his representatives but for those of fellow employees in *Payne v. Wall* (p. 301). Here a dispute between workmen led to one of them being injured by the other, and on the ground that such incidents are not unusual, and that the dispute related to the work, the injury was said to have arisen out of the employment.

ELECTION.

Under the provisions of the elective laws, the choice of an action for damages by proceedings in compensation is available, if timely made. Failure to elect is usually penalized by depriving the employer of his common-law defenses. This rule applied in a case in which a coal trimmer was injured while assisting to unload a vessel in Portland, Me. The failure of the employer to elect made possible a suit for damages without the defenses of contributory negligence,

fellow service or assumption of risks. An appeal from a judgment developed claims that the work was in interstate commerce, governed by the Federal statute, and not subject to the provisions of the compensation act. As the coal handled had in no way been designated for use in commerce, either interstate or intrastate, and the work was for one of these purposes, it was held that the Federal statute had no application, and the decision under the terms of the compensation act was affirmed. (*Foley v. Hines*, p. 259.)

The Kentucky statute requires voluntary acceptance expressed in writing. The court of appeals of the State held that the definite termination of employment, during which the employee was under the compensation act, followed by several months of work elsewhere predicated a new contract on return to work for the same employer, so that a new acceptance in the form prescribed by the act was necessary, and a mere oral agreement would not suffice. (*McCune v. Wm. B. Pell & Bro.*, p. 261.)

The law of Texas requires employers to give notice that their industry is to be operated under the compensation act, failing which suits for damages may be brought. In *Poe v. Continental Oil & Cotton Co.* (p. 245) notice had not been given. However, the injured man asked a determination of his rights under the act, but only after the time limit provided for filing the claim had expired. He then brought suit for damages, but failed on the ground that he had made an election to accept compensation. The court of appeals reversed this, holding that an election of an unenforceable right could not be accepted as a waiver of a valid one, and a new trial was ordered. In *Hutton v. Link Oil Co.* (p. 244) the injured workman took the precaution of entering a claim for compensation and at the same time asked for damages under the common law, Kansas being one of the small number of States in which the compensation act is administered by the courts. A judgment for damages was recovered, and the employer appealed, contending that the claimant should have been required to elect one remedy to the exclusion of the other. The court denied this, holding that a joinder of causes of action could properly be made under the State laws.

INJURY DUE TO THIRD PERSONS.

A compromise with a third party without complying with the terms of the compensation law was held by the Supreme Court of Utah to prevent the injured man from asking further benefits from his employer, since the terms of the act must be complied with to give the commission jurisdiction. (*Leva v. Utah Fuel Co.*, p. 318.) A quite similar situation was passed upon by the Supreme Court of Iowa. (*Renner v. Model Laundry, Cleaning & Dyeing Co.*, p. 320.)

Here a laundry employee injured by a collision with a street car made a settlement with the railway company, releasing it from any action for damages by himself. Compensation payments were thereupon stopped, the employer's insurer claiming that the statement released it from further payment. The Supreme Court ruled that the contract with the company not to sue was legitimate, but had no effect on the employer's rights, as no proof of legal liability was involved. Compensation awards were also required to be paid.

The question of the employer's rights where a third party caused the injury was involved in a Kentucky case. (*Henderson Telephone & Telegraph Co. (Inc.) v. Owensboro Home Telephone & Telegraph Co.*, p. 322.) The statute gives an employer paying compensation the right to recover in his own name from the third party responsible for the injury. Here the employer was insured, and it was held that since payments had been made by the insurance company the employer had no right to sue, nor did the statute give an insurance company such a right. The third party was therefore released from any obligation.

A question of waiver was raised in a New York case (*Bennett v. Page Bros.*, p. 319), involving the action of different parties. The injury was fatal, and the parents first filed notice with the State industrial commission that they would sue the third party involved, for damages on a negligence basis. After a time this suit was discontinued, and the mother secured an award of compensation. The employer contested this on the ground that an election to sue had relieved the employer of his compensation liability, which contention the court rejected, and affirmed the award.

AWARDS.

The question of the computation of earnings of a miner was involved in the case, *Centralia Coal Co. v. Industrial Commission* (p. 233), decided by the Supreme Court of Illinois. A rate per ton had produced low average earnings on account of the large amount of labor involved in removing slate. An award for an injury was based, not on the actual earnings of the individual, but, on account of the circumstances, on the average earnings of other miners in the company's employ—a procedure which the court approved.

The effect on the child's rights of the remarriage of a widow was considered in an Indiana case. (*Riggs v. Lehigh Portland Cement Co.*, p. 239.) As the law stood at the time of the fatal injury to the husband and father, compensation payments were terminated by the remarriage of the widow. The law was changed in 1919 so as to permit a continuance of payments to a dependent child, and subse-

quent to the enactment of this amendment the widow remarried. It was held that the status at the time of the death determined the situation, the law operating only to benefit subsequent happenings, so that the child got nothing.

An award on a weekly basis was made in a Texas case (*Texas Employers' Insurance Association v. Bourdreaux*, p. 230), in which a widow and two minor children were the beneficiaries. The award was contested, and a lump-sum commutation was determined on by the court, one-third to the attorneys and two-thirds to the beneficiaries. Of the latter, one-half was to go to the widow and the remainder to the two children in equal parts. On appeal, the court of appeals held that it had no power to inquire into the propriety of a lump-sum award, which, however, the supreme court overruled, and remanded the case as to the determination of the appropriateness of a lump-sum settlement in the circumstances of the case. The propriety of the apportionment depended upon the nature of the fund, which was said to be comparable to wages and so distributed as community property, which would be in accord with the distribution above indicated.

In a Kansas case (*Strong v. Sonken-Galamba Iron & Metal Co.*, p. 242), the trial court modified the award made by an arbitrator, and directed that the claimant submit to an operation. If he refused, the term of payment should be limited to 25 weeks instead of the 8 years which the arbitrator allowed. This finding was affirmed by the supreme court, which held that the employee was bound to do whatever was necessary and reasonably possible to restore himself to a condition of physical ability.

The effect of changing conditions was considered in *Lambert v. Powers* (p. 240), the insurer claiming that changes warranted such action; they also stopped payments. Review can be had under the law within a year after compensation was fixed by the original award. This provision had been disregarded and the arbitrary cessation of payments led the court not only to affirm the award as originally named, but also to add a penalty for the default, according to the terms of the law.

Voluntary payments of full wages do not entitle the employer to a right to withhold an equal sum from subsequent benefit payments made under an award by the industrial commission, where there is no agreement or finding in regard thereto. (*Mercury Aviation Co. v. Industrial Accident Commission of California*, p. 234.)

A Texas court permitted a discount in the total amount of benefits to be paid under an award where the weekly payments were increased in amount, and the term thereof decreased, the court holding that such discount was proper in analogy with the discount allowed in lump sum settlements. (*Western Indemnity Co. v. Milam*, p.

241.) A contention in this case that refusal to submit to a surgical operation should bar payment was disallowed, as it was shown that skillful physicians in attendance had advised the injured man against the operation, so that he could not be said to have refused to accept or receive medical treatment.

A review of an award with a request for release from further payments was made in a Michigan case (*Ward v. Heth Bros.*, p. 242), the ground being that the beneficiary had become insane and was committed to an asylum. The accident board refused to accept this as a ground for terminating payments—a position which the court affirmed.

A claim for fatal injuries in a case in which an award for disability involved a surgical operation at the employer's expense was denied in a case in which the injured man requested that at the time of the operation he be operated on for an additional and independent cause. (*Dulac v. Proctor & Bowie Co.*, p. 238.) Following the double and necessarily prolonged operation death ensued from postoperative shock. The evidence was held inadequate to sustain a claim for death benefits, since it was impossible to determine the effect of the one operation as distinct from the other.

The computation of an award for the loss of three fingers was contested before the Supreme Court of Utah. (*North Beck Mining Co. v. Industrial Commission*, p. 236.) The employer insisted on the mere addition of the award for individual fingers, while the industrial commission awarded as for the aggregate disability entailed. The court sustained this view, since the question was not of the loss of individual fingers but of the usability of the hand in its mutilated condition.

The date from which an award for permanent partial disability should run was involved in *Wrenn v. Connecticut Brass Co.* (p. 237). Surgeons made protracted efforts to preserve a fractured arm by means of a bone graft, but failed, finally leaving the arm in a useless condition. The Connecticut statute makes specific compensation for the loss of use of an arm, but the compensation commissioner held that this began at the date of final determination of disability, and that compensation during the period of treatment should not be deducted therefrom, a position which was approved by the supreme court over the employer's contention to the contrary. The Minnesota Supreme Court considered the period of healing as a part of the compensation period in a case involving an award for impaired vision of one eye. (*Chiovitte v. Zenith Furnace Co.*, p. 235.) The schedule benefit is a payment of the percentage of the wages for 100 weeks, and a 68 per cent loss was held to call for 68 weeks' payments. An award of benefits for 60 weeks after returning to work following 8 weeks' disability was approved, the court sustaining the

determination to this effect, and disregarding the fact that the injured man was employed at higher wages than before the injury.

The factors to be considered in determining the amount of an award for permanent partial disability were discussed in *Capone's* case (p. 232), the Supreme Court of Massachusetts recommitting the case to the board for further consideration because it was not clear to what extent the award was based on depressed business conditions and how far on the disability resulting from the injury.

DEPENDENCY.

A child living with its mother, who had obtained a divorce from her husband some years before his accidental death, was held not to be a dependent upon the father where it was shown that for 5 years he gave nothing for the child's support and for the next 5 years not more than \$50 per year. (*Stephens v. Stephens*, p. 251.) The converse is also true, that parents are not dependent on a son who had lived away from home for 10 years and had sent them only occasional and irregular gifts of money and provisions (*Hancock v. Industrial Commission*, p. 254); but where a sister has been receiving regular contributions in partial support, which were relied upon, an award in her behalf is warranted in the case of the death of the contributing brother (*Driscoll v. Jewell Belting Co.*, p. 255).

A California statute provides not only for relatives as such, but for "a person or persons wholly dependent" on the decedent. In *Moore Shipbuilding Corp. v. Industrial Accident Commission* (p. 252), it was held that the child of a woman deserted by her husband, the father of the child, who was living with a man in illegal relationship, was entitled to benefits as a member of his household, such child being totally dependent on the man who was the practical head of the establishment.

A Louisiana case involves a determination of the method of measurement of dependency, the case being one of the death of a minor. The son's contributions to the family were substantial, but were not equal to the entire cost of living of the family. An award of the full amount for the statutory period was affirmed by the supreme court, as the fact of dependency was the test, and not its extent. (*Harris v. Calcasieu Long Leaf Lumber Co.*, p. 253.) Another case involved the question of when the dependency is determined. Some months after the father's accidental death one of the children was adopted by a third party, and the insurance company contended that as the adopted child was not now a dependent he should be excluded from any benefits. The Supreme Court of Colorado, however, took the view that the status of dependency existing at the time of

the father's death controlled the award, and that the possibility of two benefits in case the adopted father should be killed by accident was not a matter for the court to consider. (*Employers' Mut. Ins. Co. v. Industrial Commission*, p. 254.)

DISABILITY.

An injury apparently involving the loss of use of both hands was made the subject of an award as for the complete and total loss of both hands, or permanent total disability, under the Illinois statute. The employer contended that the reading of the law, a "loss of both hands," did not warrant such an award where there was no amputation, and the supreme court of the State adopted this position, remanding the case for further consideration. (*Ballou v. Industrial Commission*, p. 256.)

A loss of 95 per cent of the vision of an eye was compensated by the industrial accident board of Michigan as for the loss of sight of an eye. The claimant was receiving the same wages at the same employment as before the injury, but the supreme court ruled that the award as for the loss of the eye was in accordance with the law, and it was affirmed (*Stammers v. Banner Coal Co.*, p. 258); weekly payments made between the accident and the resultant definite stage of blindness were not allowed to be deducted from the award for the loss of an eye. The fact that vision might be partially restored by the use of properly fitted glasses was held not to bar recovery in a case in which the eye was practically useless without the glasses, the law contemplating actual results and not a partial remedy by the use of artificial means (*Butch v. Shaver*, p. 259).

Inability to return to the former employment was made the basis of an award where an employer gave the injured man other employment at an increased wage, the fact remaining that the injured man was entirely unable to resume the occupation in which he was engaged at the time of the accident. (*Geis v. Packard Motor Car Co.*, p. 257.)

Lameness caused by adhesion of tendons following the fracture of an arm near the wrist was found by the Supreme Court of Illinois to be the cause of permanent disability, the accident being chargeable only with a temporary disability. (*Mount Olive Coal Co. v. Industrial Commission*, p. 342.) An award as for permanent partial disability was therefore disallowed, and the claimant barred from further benefits unless he would consent to a simple operation "under a mild and entirely safe anæsthetic."

Another case before the same court as the above involved claims for disability and for disfigurement arising out of the same injury. The law of Illinois allows compensation for disfigurement, but not

where a compensable disability is suffered at the same time. An award for both results of the accident was therefore modified by eliminating the amount provided for disfigurement. (*Chicago Home for the Friendless v. Industrial Commission*, p. 332.)

An agreement signed by the injured man that his disability had ceased, leading to termination of weekly benefits, was held by the Appellate Court of Indiana not to be effective where it was shown that facts were contrary thereto. (*Fort Branch Coal Co. v. Farley*, p. 345.) A reopening of the case was contested by the employer on the ground that a year had elapsed since the end of the prior compensation period, but since the period had not actually elapsed, the contention was rejected and the new award approved.

The Supreme Court of Washington had before it the case of a workman who had lost an eye for which he received compensation on the schedule basis. While at work afterwards he suffered the loss of an arm. The commission undertook to deduct the amount allowed for the eye from the schedule benefit for the arm, or rather from the maximum award for unscheduled injuries, so that the second injury would be compensated at only about 40 per cent of the schedule rate. The court reversed this, holding that the loss of the arm should receive the schedule award regardless of any previous awards for other injuries. (*Klippert v. Industrial Insurance Dept.*, p. 336.) A second injury case was also passed upon by the Court of Errors and Appeals of New Jersey, though the first injury involved no question of compensation. An employee blind in one eye suffered the loss of the second eye. Blindness is under the State law a permanent total disability, and an award was made on this basis. The employer contended that as the accident while in its employment caused the loss of but one eye it was not responsible for the total disability, but an award was affirmed on the ground that there had been a total loss of function as a result of the accident. (*Combination Rubber Mfg. Co. v. Court of Common Pleas*, p. 337.)

MEDICAL AND SURGICAL TREATMENT.

The employer was held not responsible for the expense of treatment of an injured arm in addition to that prescribed by the physician in a Massachusetts case decided by the Supreme Court of that State. The treatment consisted of massaging the arm, which was done at the employee's request, without being prescribed by the physician, and was said not to be medical services within the statute. (Golden's case, p. 327.) The effect of refusing an operation has already been noted in disability cases. (*Mount Olive Coal Co. v. Industrial Commission*, *Strong v. Sonken-Galamba Iron & Metal Co.*,

and *Western Indemnity Co. v. Milam.*) In *Myers v. Wadsworth Mfg. Co.* (p. 341) the Supreme Court of Michigan directed the termination of payments until an injured man should accept an operation of a minor character with reasonable prospect of restoration of ability to work. On the other hand is a finding by a jury that there was a risk of inducing a serious condition without sufficient probability of improvement, so that a refusal to submit to the operation proposed was held to be reasonable. (*Grant v. State Industrial Accident Commission*, p. 340.) A hernia operation of a "comparatively superficial nature," as indicated by the testimony of physicians, was directed by the Illinois commission as a condition to further payments in the case, *O. W. Rosenthal & Co. v. Industrial Commission* (p. 339), a position which the Supreme Court affirmed.

INSURANCE.

The law of New York provides penalties for employers under the act who fail properly to secure the payment of compensation that may become due. In attempting to enforce this penalty the Supreme Court of New York, Appellate Division, ruled against the contention of the commission as to the construction of the statute. The declaration that the failure to secure compensation shall constitute a misdemeanor is coupled with the abrogation of defenses in a suit for damages, and the court took the position that there was no fine or imprisonment contemplated, the penalty being simply the loss of the defenses. (*People v. Donnelly*, p. 328.)

NOTICE AND CLAIM.

The fact that an injured man had received first aid treatment was not acceptable as notice of an accident where the employer had no knowledge of any disability following from the apparently slight injury. (*Conley v. Upson Co.*, p. 380.) There was in this case a progressive eye trouble resulting in the blindness of one eye, and the claim was made that disability was not incurred until the loss of vision was an established fact, which was 8 months after the accident. The court held, however, that the employer was entitled to know of the condition of the injury in time to secure proper treatment, and that no sufficient notice had been given. Similarly the payment of medical expenses during the first fourteen days of disability is not to be construed as a voluntary case of compensation under the Vermont statute. The law requires claims in six months in the absence of voluntary payments, and the failure to make a claim within the specified time was under the circumstances held to cut off any possibility of benefits. (*Petraska v. National Acme Co.*, p. 246.)

MINORS ILLEGALLY EMPLOYED.

The laws of various States contain different provisions with regard to the status of minors at work in contravention of the laws. In some States they are regarded as employees within the provisions of the compensation acts; by others such acts are said to apply only to persons who are eligible under the laws governing employment. Thus in Pennsylvania a minor operating a hoisting machine was held entitled to a suit for damages over the employer's contention that the compensation act governed the situation. (*Lincoln v. National Tube Co.*, p. 329.) The same (Pennsylvania Supreme) court considered the case of an insured employer against whom a judgment for damages had been brought for the unlawful employment of a minor at dangerous machinery. (*Edward Stern & Co. v. Liberty Mutual Ins. Co.*, p. 327.) The court found that the insurer must reimburse the employer because the policy covered his liability in general, and was not limited to claims arising under the compensation act.

The New York doctrine on the status of the minor unlawfully employed is that in any case he is an employee, and that the determination of his rights depends upon the law governing that status. The trial and appellate courts had taken the view that a damage suit was the proper remedy, but the court of appeals reversed these decisions on the ground that the workmen's compensation act was exclusive as determining the relief available to an injured employee, and a suit by one claiming that status could not be brought. (*Noreen v. Vogel & Bros. (Inc.)*, p. 329.)

LABOR ORGANIZATIONS.

While there is a considerable variety of incidents in the cases involving the activities of labor organizations, and differences on account of general or local legislation involved in some cases, the very general recourse to the strike, with the customary picketing, tends to give an appearance of similarity to the great majority of cases coming before the courts. The struggle to retain the closed shop on the one hand and to secure independence thereof on the other is reflected in many cases, from which only a selection can be made use of.

STRIKES.

In the clothing industry in New York a case was decided by the appellate division of the supreme court involving the nature of the Amalgamated Clothing Workers of America. (*Marks Arnheim (Inc.) v. Hillman*, p. 187.) An injunction was sought against Hillman individually and as president of the organization, and also a dissolution of the association as mischievous and disloyal. The evidence

did not sustain the contention as to the last point, and an injunction was granted pending final adjudication on a showing that picketing accompanied by violence and intimidation was maintained under circumstances that indicated the complicity of the organization. A rival union in the same industry was found to be implicated in a strike with similar picketing for the purpose of compelling a collective agreement in the face of known individual contracts binding the employees not to join the union, the situation being held to warrant the issue of an injunction. (*Floersheimer v. Schlesinger*, p. 178.) Quite similar conditions existed in a case involving restaurant workers, passed upon by the Court of Civil Appeals of Texas. (*Cooks', Waiters' and Waitresses' Local Union v. Papageorge*, p. 197.) A closed-shop agreement had expired, and a renewal was demanded, but the court held that no coercion could be legally brought, and further that the antitrust law of the State was a bar to the purposes of the union.

The United States District Court for South Carolina considered the propriety of an injunction as restraining unlawful acts. (*Charleston Dry Dock & Machinery Co. v. O'Rourke*, p. 164.) The fact that acts of interference with an employment might be themselves an offense against the criminal laws was said not to be a reason against the issue of an injunction on a proper showing. Quite similar was the position taken by the Supreme Court of New York in continuing a temporary injunction where it appeared that the disorders and interference with the operation of street and interurban cars by violence had practically ceased since the issue of the injunction. (*United Traction Co. v. Droogan*, p. 198.)

That intimidation resulting in coercion may be unlawfully present without actual deeds of violence was held by the Supreme Court of California in *Southern California Iron & Steel Co. v. Amalgamated Association* (p. 180). An injunction was therefore issued on a showing of combination and conspiracy leading to unlawful restraint of freedom of action by the placing of pickets in numbers about the employer's plant.

Attempts to secure the reinstatement of a discharged employee were considered in New York and Massachusetts cases. In the latter (*Mechanics' Foundry & Machine Co. v. Lynch*, p. 199) a strike concerning shop conditions had been adjusted and work resumed, but one employee who had been particularly offensive during the strike was not reemployed, and a strike to secure his reemployment was held to be for an unlawful purpose and subject to an injunction, since to hold otherwise would be to interfere with the freedom of employers and employees in making their contracts with each other. In contrast with this was the decision in *Walter A. Wood Mowing & Reaping Ma-*

chine Co. v. Toohey. (p. 188), in which the Supreme Court of New York annulled an injunction against a strike to compel the reinstatement of a discharged member. There was picketing, but no acts of violence or threats were indulged in, and the court held that under the law as construed in that State a union may rightfully strike to secure the reemployment of a member whom they regard as having been improperly discharged. It may be noted that in this case the court emphasizes the supposed protection of the right of picketing by the Clayton Act, a position that is not borne out by the construction of that act by Chief Justice Taft in *American Steel Foundries v. Tri-City Central Trades Council* (p. 181). A third case based on reinstatement was also passed upon by the Supreme Court of New York, involving the right of workmen to demand the reinstatement of their entire force, when the employer required the services of but a minor fraction. (*Benito Rovira Co. (Inc.) v. Yampolsky*, p. 190.) The attempt to interfere with the general conduct of business in this manner was held to be illegal, and an injunction was awarded. No right exists on the part of employees or former employees, or of an association with which they may be affiliated to compel the continuance of a business against the proprietor's wish. (*Welinsky v. Hillman*, p. 196.)

Conflicting interpretations of the Clayton Act led to the refusal and subsequent issue of an injunction by a United States district court and a circuit court of appeals, respectively. Telephone companies operating under a contract with their employees which established an open-shop basis were called upon during the life of the contract to adopt the check-off system, by which the dues of their employees who were members of unions should be turned over to the union by the employer. The district court regarded the resultant strike as properly subject to an injunction, except for the presumed prohibitions of the Clayton Act. Upon appeal, however, the circuit court of appeals found the dispute not one between the employees proper and the companies, and directed the issue of an injunction, basing its action on decisions of the Supreme Court. (*Kinloch Telephone Co. v. Local Union*, p. 171.)

Perhaps the most important decision in this field for some years is one by the Supreme Court of the United States construing the so-called Clayton Act in its application to the issue of injunctions. (*American Steel Foundries v. Tri-City Central Trades Council*, p. 181.) The case was one of long standing, the difficulty dating from April, 1914, when, owing to depressed business conditions, the mill resumed employment after a shutdown with a reduced working force and reduced wages. Violence characterized the acts of picketers who undertook to make effective the strike that ensued, and an injunction was issued by the district court. The circuit court of appeals modi-

fied this in certain respects, and the case was taken to the Supreme Court. Here the modification was again modified, and picketing was restricted to a form that would permit only the securing of information and acts of persuasion by a single representative at each point of ingress or egress, without abuse or threats or the following of any unwilling listener. It was pointed out in this case that Congress had "carefully refrained" from the use of the term "picketing" in the Clayton Act.

The right of employees under individual contracts, and of their employers, to be free from interference in their relations and a continuance of their employment was affirmed by the Supreme Court of Massachusetts. (*United Shoe Machinery Corp. v. Fitzgerald*, p. 177.) There was no dispute as to the general conditions of labor, including wages and hours, but a demand for a "collective bargain." The court pointed out that a coerced bargain was not a bargain at law, and that mass picketing and the use of intimidating language were illegal, as was the strike itself, so that the State statute allowing peaceful persuasion had no application, and the issue of an injunction was affirmed.

Emphasizing the doctrine that the right to continue his business is a property right under the Clayton Act, the United States Circuit Court of Appeals sustained a permanent injunction forbidding all picketing in a case of long-standing interference by unlawful means with the business of the plaintiff. (*Quinlivan v. Dial-Overland Co.*, p. 176.) It was pointed out that the strike proper had long ceased to exist, the places of strikers having been filled, and the disturbers being without status entitling them to consideration as in any way related to the industry. This latter point was held to be decisive in a case before the United States District Court, in which railroad employees had broken the employment relation, and subsequently claimed the right to be held as employees. The court ruled that this could not be done, as when the contract was abandoned all rights under it were likewise abandoned. (*Birmingham Trust & Savings Co. v. Atlanta, B. & A. R. Co.*, p. 166.) The strike was orderly, and without bitterness, but the right of reemployment was held to be nonexistent so far as any demand or preference over employees taken in to fill the deserted places was concerned.

Involving the same principles as the foregoing is a case decided by the Supreme Court of Georgia (*McMichael v. Atlanta Envelope Co.*, p. 173) in which striking employees had been superseded by non-union workers who had made individual contracts to the effect that their employment would cease if they became members of the union. An injunction issued by the court below was affirmed, the court holding that the persuasion attempted had gone beyond the proper limits,

and further that there was an attempt to interfere with existing contracts. In *Densten Hair Co. v. United Leather Workers' International Union* (p. 174), it was found that a substantial working force had come into existence at the termination of a brief shutdown which anticipated a strike that had been decided upon by the former employees. Under the circumstances all picketing was held enjoined, the evidence showing that acts of violence and intimidation had been indulged in following the resumption of work.

In view of the foregoing decisions it would follow as a matter of course that where strikers employed outside agents to conduct a campaign of violence they would be subject to liability. Thus in *People v. Raymond* (p. 147), the Supreme Court of Illinois affirmed a conviction for conspiracy where officers and members of a barbers' union were found to have employed bomb throwers and window smashers in an endeavor to compel the renewal of a working agreement with the employers' union.

Likewise going outside the field of employment relation was the situation that arose in the case of *City of Duquesne v. Fincke* (p. 201), decided by the Supreme Court of Pennsylvania. The point in issue was the right of strikers to assemble in street meetings for a discussion of their grievances. An ordinance of the city of Duquesne directed that a permit be procured before any street meeting could be held, and on the failure of the mayor to respond to a request, a meeting was held, the leaders claiming a right so to act as a constitutional privilege. The supreme court rejected this contention.

MONOPOLY.

The prolonged struggle to secure the unionization of West Virginia mines gave rise to a case passed upon by the United States Circuit Court of Appeals, in which charges of conspiracy and monopoly were brought. (*Gasaway v. Border Line Coal Corp.*, p. 141.) The case involved the legality of a check-off system, so called, by which funds were procured for the maintenance of the campaign for unionizing the coal-mine area of West Virginia. A broad injunction was issued by the district court, but on appeal this was recast so as to limit the effect of the injunction to the actual parties to the proceeding and to the immediate acts set forth in the bill and affidavits. A request that the United Mine Workers be dissolved as a seditious organization was rejected by both the district and circuit courts.

Two cases under this head relate to an association of bill posters. In one of these the District Court of the United States for the Southern District of New York found that the plaintiffs had no cause of action in the circumstances set forth because there was no clear showing of injury to them, though the plan of the association

was such as would constitute a violation of the Federal antitrust law. (*Sullivan v. Associated Bill Posters and Distributors*, p. 146.) Likewise unsuccessful was the plaintiff in *Chas. A. Ramsey Co. v. Associated Bill Posters* (p. 144) in a case before the Circuit Court of Appeals. It was shown that the association was not itself engaged in business, but was made up of members who conduct their business according to the rules adopted. There was no direct effect upon interstate commerce in violation of the Sherman Act, and no combination alleged that would be unlawful at common law.

The situation is otherwise when interstate commerce is directly affected by the refusal of unions to handle nonunion goods. A combination of longshoremen and steamship companies interfering with the transportation of export lumber was held to violate both the shipping act and the Criminal Code of the United States. (*Burgess Bros. Co. (Inc.) v. Stewart*, p. 139.)

Another case involving interstate commerce, but in another aspect, was one in which it was held that the prevention of the manufacture of goods customarily shipped, for the most part, in interstate commerce, was a restraint of trade condemned by the Federal antitrust law. (*Herket & Meisel Trunk Co. v. United Leather Workers*, p. 154.)

A local monopoly was condemned in *Brescia Construction Co. v. Stone Masons' Contractors' Association* (p. 138), the Supreme Court of New York, Appellate Division, granting an injunction where a contractor has been cut off from his labor supply as a result of an agreement between the unions and an employers' association.

RULES OF UNIONS.

As a general proposition the rights of members are determined by the rules adopted by the unions. However, in *Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers* (p. 160), the United States District Court for Maryland granted a mandatory injunction restoring to membership the plaintiff who had been expelled for the exercise of a constitutional right. A similar result followed the appeal to the courts of Pennsylvania for reinstatement where the expulsion of a member followed his exercise of the right of petition with regard to legislation. (*Spayd v. Ringing Rock Lodge No. 665*, p. 162.) It was claimed that the right to petition was controlled by the union of which Spayd was a member, but the court disallowed this contention. It was also pointed out that the plaintiff had substantial property rights which they could not compel him to forfeit without due procedure and substantial grounds of action.

The relation of a local union and a federation of unions was considered by the Supreme Court of New York, Appellate Division, in

Kunze v. Weber (p. 152). In this case a local union preferred charges against its president and suspended him, giving notice of a hearing. He then appealed to the president of the federation, who undertook to take charge of the situation, forbidding the local officials to act. The local officials then sought and obtained an injunction against such interference on the ground that the local had acted in accordance with its by-laws, and that no arbitrary interference by the officers of the federation could supersede the procedure provided for by the constitution and by-laws of the union.

The protection of the rights of members of unions by statute has been attempted in a number of States, by laws proposing to secure members of unions against discharge by reason of their membership. These laws have with great uniformity been declared unconstitutional, and such was the finding of the Supreme Court of Colorado in *People v. Western Union Telegraph Co.* (p. 160) in passing upon the so-called anticoercion act of the State (ch. 5, Laws of 1911).

PICKETING.

Many of the cases above noted discuss picketing as a feature of strike activities. In the two cases here noted there was no strike, but picketing was engaged in for the purpose of interfering with the conduct of business by nonunion employees. In *Cyrus Currier & Sons v. International Molders* (p. 156) there had been a strike in 1917, but an injunction had stopped picketing, and work had been resumed on the open-shop plan, employees being under contract not to join the union. The Court of Chancery of New Jersey granted an injunction to prevent picketing engaged in for the purpose of securing the defection of workers and violation of their contracts, threats of violence and actual violence being indulged in. The court in this case pointed out the reciprocal rights and privileges of employers and employees, and although granting the injunction, suggested that the employers' movement against organized labor was extending an invitation to the unions to ask for legal protection such as the employers themselves were seeking in the present case.

The Supreme Court of Appeals of West Virginia had before it a case involving much the same principles, with the additional feature of a secondary boycott. (*Parker Paint & Wall Paper Co. v. Local Union No. 813*, p. 158.) The company named had been a member of an employers' association, which had formerly been in contract relations with the union. This had been disrupted and nonunion workers had been employed. Picketing establishments employing the master painters, and boycotting their business, were held to be enjoinable on two counts, one an attempt to procure a breach of contract, and the other a secondary boycott.

ADJUSTMENT OF DISPUTES.

A board of conciliation and arbitration formed under the provisions of the law of Massachusetts was defendant in a suit in *Moore Drop Forging Co. v. Fisher* (p. 165), the object being to prevent the board from taking any action in the case of a strike against the plaintiff company. It was claimed that the statute purporting to authorize the intervention of the board was unconstitutional, but the supreme court of the State ruled that the public had a just interest in labor disputes, so that the law should be sustained.

An attack on constitutionality was also the form of procedure in a Colorado case. (*People v. United Mine Workers of America*, p. 200.) The law of that State makes strikes and lockouts unlawful prior to or during an investigation by the industrial commission of the State. Claims of unconstitutionality were rejected, the proper freedom of action being unhindered by the law, which was based on the public interest with which the business in hand (coal mining) was said to be affected.

Similar to the Colorado law, but going beyond it in its restrictions, is the industrial relations law of Kansas, creating a so-called court with powers of supervision over industries affected with a public interest. An injunction by the district court forbidding certain activities of union officials in violation of this law was disregarded, and a sentence for contempt followed. This was affirmed on appeal to the supreme court, the law being sustained as constitutional. (*State v. Howat*, p. 168.) This and another case involving the nature and validity of the industrial court law were taken to the Supreme Court of the United States on writs of error, where they were heard together and the cases dismissed in an opinion delivered March 13, 1922, no Federal question being found involved in the cases as disposed of by the Kansas courts. (*Howat v. Kansas*, p. 170.)

RESTRAINT OF INJUNCTIONS.

Reference has been made in various cases in which the issue of injunctions was involved to the amendment to the Federal antitrust law known as the Clayton Act. The legislature of Arizona some years ago enacted a law in practically identical language in so far as the provisions relating to the issue of injunctions is concerned, and the constitutionality of this statute, as construed by the Supreme Court of Arizona, was before the Supreme Court of United States in *Truax v. Corrigan* (p. 191). Picketing, boycotting, and secondary boycotts had been engaged in, and the Arizona courts had refused an injunction under their construction of the law in question. Recognizing the identity in language, the opinion of the Supreme Court

was to the effect that the statute was unconstitutional by reason of its meaning as interpreted by the Arizona courts, as it would legalize acts of interference, and a denial of rights which the Constitution of the United States guarantees.

INDUSTRIAL WORKERS OF THE WORLD.

The Supreme Court of Washington sustained a conviction under the provisions of an act of that State which makes criminal syndicalism a felony. Membership in the Industrial Workers of the World was held to be an offense on account of its purposes, which are condemned by the law in question, which was held to be constitutional and not a restriction on the right of labor organizations to discuss industrial questions. (*State v. Hennessey*, p. 149.)

Involving both industrial and political questions was the case of *Haywood v. United States* (p. 150), decided by the United States Circuit Court of Appeals. Of the four counts on which conviction had been adjudged in the court below, two involved labor features, while the third and fourth were political. The interference with industry claimed as the basis of the convictions under the first two counts was held not to be a proper subject for action by the court in view of the interrelation of the offenses charged, the court holding that Congress did not intend to inflict punishment twice for the same offense; while if any local law had been violated, that was a matter for State and not for Federal cognizance. The political offenses charged were found to have been committed, and sentence therefor was affirmed.

DECISIONS OF COURTS AFFECTING LABOR: 1921.

ALIENS — CONTRACT LABOR — ENCOURAGEMENT OF MIGRATION —
United States v. International Silver Co., United States Circuit Court of Appeals, Second Circuit (March 21, 1921), 271 Federal Reporter, page 925.—Mrs. Pearson, a citizen of Great Britain, living in Nova Scotia, wrote to the defendant company seeking employment. What followed is thus stated by the court:

March 9, 1916, the defendant answered this letter as follows:

"DEAR MADAM: Referring to yours of the 29th ult., we are in need of hand burnishers that have had experience on the general line of hollow ware, such as tea ware, waiters, meat dishes, cake baskets, sandwich trays, nut bowls, etc., made of German or nickel silver, also white enamel. We are also looking for unskilled men. Our female help in the burnishing line average from 12½¢ per hour to 20¢ per hour; unskilled labor 17½¢ to 25¢ per hour. The girl's minimum wages is 12½¢ per hour. If you were in the States, and applied to us for a position, we could place you."

March 15 George C. Pearson answered the defendant's letter to the effect that his wife was unable to accept employment, but that he and his son were ready to start at once, if assured of employment by the defendant. March 20, 1916, the defendant replied as follows:

"DEAR SIR: Referring to yours of the 15th, will say the conditions stated in your letter are satisfactory and we will keep a place open for Mrs. Pearson. Kindly advise when you will report for duty."

Pearson and his son came in April, and a complaint was made of a violation of the immigration laws. The law makes it an offense to induce or solicit immigration by offers or promises of employment, or to knowingly encourage or solicit immigration "in any way." The District Court gave judgment for the defendant on a demurrer on the ground that the complaint did not allege that Pearson was a contract laborer or that defendant knew that he was a contract laborer. (255 Fed. 694; see Bul. No. 290, p. 71.) The Circuit Court of Appeals, speaking through Judge Ward, reversed the lower court, and held the law violated, saying in part:

It seems to us quite plain that the defendant's answer of March 9, 1916, to Mrs. Pearson's letter of February 29 was an implied offer of employment to both Mrs. Pearson and her husband and son and a solicitation to them to migrate to this country to perform labor here.

They were consequently contract laborers within section 2 of the act. Furthermore, the defendant's reply of March 20, 1916, to George C. Pearson's letter of March 15 was an encouragement to both Pearson and his son to migrate to the United States within section 4 of the act. That section extends to encouragement "in any way." Asking contract laborers, who said they were ready to start at once if assured of employment by the defendant, when they will report for duty is a manifest encouragement. Both these contract laborers did migrate to the United States after receiving the letter.

ALIENS—TAXATION—CONSTITUTIONALITY OF STATUTE—*Ex parte Kotta, Supreme Court of California (September 12, 1921), 200 Pacific Reporter, page 957.*—Pursuant to the provisions of section 12 of article 13 of the State constitution, added at the regular election of November 2, 1920, chapter 424 of the Statutes of California for 1921 was passed and was approved May 25, 1921. It provided that certain alien inhabitants of the State of California must annually pay a poll tax of \$10, and on failure to do so prior to the date fixed, "such delinquency shall, ipso facto, render all debts owing to such delinquent, including wages due or to become due for personal service, subject to garnishment and seizure in payment of such taxes and penalties, together with any interest which may have accrued thereon." It is further provided that on failure to pay the tax the assessor shall notify the employer of such person, who must withhold money due for personal service or otherwise to an amount sufficient to pay such delinquent tax and penalties. The petitioner, an alien male inhabitant of the State of California and a citizen of Mexico, was held by the chief of police of the city of San Francisco under a complaint charging him with failure to register as required by the terms of the alien poll-tax law of 1921. Kotta sued out a writ of habeas corpus, claiming that the act was null and void as to all alien inhabitants of the State in that it denied to persons within the jurisdiction of the State the equal protection of the laws, in violation of a provision of section 1 of Article 14, amendments to the Constitution of the United States. The supreme court of the State, speaking by Chief Justice Angellotti, upheld this view and declared the law unconstitutional. In his opinion he said:

The law was enacted solely in the exercise of the power of taxation for the purpose of raising revenue for State purposes, containing no provision whatever attributable to the exercise of the police power of regulation, and it imposes on alien inhabitants of the State between certain ages, solely because of their alien character, a tax different in kind from and additional to the taxes required to be paid by all inhabitants, citizens, and aliens, alike. No such tax or its equivalent is imposed by our laws on any except alien inhabitants. The law thus imposes an additional burden in the matter

of taxation upon such aliens solely because of their alien character, and in this way discriminates against them.

This being the situation, in view of the decisions of the Supreme Court of the United States, there is no escape from the conclusion that the alien poll tax law can not be enforced, for the reason that by its enforcement the State of California would deny to persons within its jurisdiction the equal protection of its laws, in violation of the provision of section 1 of the fourteenth amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

It is settled that the word "person" as used in this amendment includes aliens.

COMPULSORY LABOR—VAGRANCY—ORDINANCE FORBIDDING IDLENESS, SABOTAGE, ETC.—CONSTITUTIONALITY—*Ex parte Taft, Supreme Court of Missouri (November 20, 1920), 225 Southwestern Reporter, page 457.*—Philip Taft was convicted for the violation of an ordinance (No. 33205) of Kansas City and fined \$500. In default of the fine he was imprisoned at the municipal farm. The ordinance for the violation of which he was fined defines vagrancy and declares that all able-bodied persons not working and without any visible means of support, all persons opposing the United States in the prosecution of the war, all persons who hinder the United States in the exercise of its war powers, all persons who utter seditious sentiments against the United States, and all persons promoting sabotage, incendiarism, etc., shall be regarded as vagrants and punished. Taft was convicted of idleness, refusal to work, and of membership in an organization opposed to the war, and brought proceedings for a writ of habeas corpus, on the ground that the ordinance was invalid as being unconstitutional. In holding that the ordinance was unconstitutional and invalid the court said in part:

There can be no question as to the right of the State, or the municipality as the agency of the State, under the police power, to punish vagrancy or a person guilty of vagrancy. Counsel are not apart upon this general question. Counsel do differ as to what constitutes vagrancy and as to the power of either the State or the municipality to make some of the things in this ordinance named acts of vagrancy. To get a thorough view of this matter the ordinance before us must be separated into its component parts. When we do this it will be seen that there are five distinct classes of commission or omissions, considered sufficient to constitute a person a vagrant, and thereby under the ban of the ordinance. These classes we have indicated by the figures in the parentheses which follow below:

"(1) Any person who, in this city, lives idly, has no visible means of support, who is physically able to perform mental or manual labor, and who has no regular employment, and is not able to show reasonable effort and in good faith to secure some lawful employment, and who neglects or refuses to accept and engage in some law-

ful trade or occupation to support himself; (2) or who shall become a member of any organization or association of individuals who are opposed to the United States prosecuting the present war; (3) or who shall circulate or aid and abet in circulating literature directly intended to hinder the United States Government in the exercise of its war powers; (4) or who utters seditious sentiments against the United States Government; (5) or who aids or abets any person in the circulation of any writing, posters, or circulars of any kind, intended to promote sedition, disloyalty to the Government, or sabotage, or incendiarism."

Now of these in their order. The first clause makes a vagrant out of a person when he lives idly, having no visible means of support, and has no regular employment, when such person is physically able to perform mental or manual labor, and neglects to engage in some lawful trade or occupation to support himself, and is not able to show reasonable effort in good faith, to secure some lawful employment.

We should, before discussing the several portions of this ordinance, further say that when the different provisions of an ordinance are severable, and not dependent upon each other, as is clearly the case here, in the five provisions of this ordinance, a part may be upheld and other parts declared invalid.

Defining and punishing vagrancy is the exercise of the police power of the State, which is a very broad power, but not an unlimited one. By this we mean that there is a limit to things which may be done in the name of the police power. This portion of this ordinance makes one a vagrant who lives idly and has no visible means of support, and who is without regular employment, and has failed to make any reasonable effort to secure employment.

This does not strictly comport to our measure of the common-law definition of "vagrant."

Ordinances may be bad for vagueness and indefiniteness. It is urged that the terms "visible means of support" and "reasonable effort" as used in the ordinance make it bad. There is no substance in the objection to the first clause quoted, *supra*. "Visible means of support" is a term well understood, and has a definite and fixed meaning. The term "reasonable effort" is more objectionable. Statutes and ordinances which fix crimes, or quasi crimes, should so fix them that there could be no uncertainty. They should be so worded that one could read them, and know whether or not he was violating law. They should not be so worded as to leave their substantive elements to the caprices of either judge or jury. In other words, the law should be complete and definite. What would be "reasonable effort" under this law is left a question for the court or jury. What in the minds of one court or jury might be "reasonable effort" might not be so considered by another court or jury. Each trial tribunal would be making its own ordinance. This will not do for a law or ordinance criminal in character. In the instant case the petitioner might have in good faith thought that his efforts amounted to "reasonable effort," but the trial tribunal thought otherwise. The whole fabric of this clause turns, or might turn, upon the words "reasonable effort" and in our judgment they are too indefinite to make a good ordinance of the character here involved.

We are forced to the conclusion that this first clause of the ordinance before us is bad for the reasons above suggested.

By section 4789, R. S. 1909, the State has defined "vagrants." No municipality in the State can lessen or broaden that definition. The definition of "vagrant" as found in the first clause of the ordinance fails to measure up to the definition of the statute. These differences make conflicts between the ordinance and the statute, and for this further reason the first clause of the ordinance under consideration is void.

The second, third, fourth and fifth clauses of the ordinance are clearly void, and for two substantial reasons: First, they cover matters of Federal rather than State cognizance. In the second place, these definitions of a vagrant conflict with section 4789, R. S. 1909, mentioned and discussed in a previous portion of this opinion. The only clause in this statute which would furnish even an excuse for the second, third, fourth and fifth clauses of this ordinance is the clause which says, "or shall be engaged in any unlawful calling whatever." The unlawful callings in the statute has reference to such under State laws, and not under Federal laws. So these clauses of the ordinance must likewise fall. We therefore rule that the whole of the ordinance is void. In such case it becomes our duty to discharge the petitioner from his illegal and unlawful confinement. The petitioner is discharged.

CONSPIRACY—MOB VIOLENCE—ATTACK ON MINSTREL SHOW TO PREVENT ATTRACTION OF LABORERS.—*Calcutt et al v. Gerig, United States Circuit Court of Appeals, Sixth Circuit (February 18, 1921), 271 Federal Reporter, page 220.*—Gerig was the operator and manager of a minstrel show known as the "Old Kentucky Minstrels." The show was billed some weeks in advance to appear in the city of Dyersburg, Tenn., on the night of June 21, 1918. When this date arrived Gerig set up his tent, sold his tickets, and made all preparations for presenting the performance. It seems that labor conditions were such in and around Dyersburg that the presentation of this show would attract many of the farm laborers in the vicinity and this would seriously disturb the harvesting of the crop. Whereupon Calcutt and the other defendants entered into a conspiracy to drive Gerig and his show from the town. He and the others went to the show place and forcibly seized Gerig and his ticket seller, who was his wife, and after scattering their money and tickets took them to the mayor's office. Here under threats of death by hanging, Gerig was forced to receive back the money he had paid for city, county, and State license fees and later his tent was torn down and he was prevented from giving his performance in Dyersburg. He brought suit for \$50,000 damages for conspiracy and recovered a judgment for \$5,000. The

defendants appealed but the judgment was affirmed. A part of the decision of the circuit court of appeals is as follows:

While perhaps there is no proof in this record of any preliminary meeting of these plaintiffs in error, or of a definite plan or agreement entered into by them to injure plaintiff in his person or property or deprive him of his lawful rights as an American citizen, yet such proof is not essential to the establishing of a conspiracy, and indeed would be wholly impossible in the great majority of cases of this character for the evident reason that conspirators do not, as a rule, invite the public into their confidence or advise the contemplated victim or victims in reference to such preliminary matters. (*Alaska S. S. Co. v. International Longshoremen's Assn. (D. C.)*, 236 Fed. 964.) It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention, and purpose of the alleged conspirators to commit the same. (*Farmer v. U. S.*, 223 Fed. 903-907, 139 C. C. A. 341.)

It is further insisted upon the part of the plaintiff in error that the court erred in refusing to permit the witnesses Green and Calcutt to explain to the jury the labor conditions in and around Dyersburg which caused the farmers to object to Gerig's show on the grounds that it disturbed the harvesting of the crop. Such a defense can not be permitted. It could in no way justify or excuse acts of violence of the kind and character charged in the amended declaration and which the evidence offered by plaintiff tended to establish. If this plaintiff was violating any legal rights of the farmers, or of any other class of citizens, they had a remedy at law or in equity; but the law does not tolerate mob violence, no matter how offensive the show might have been to some or all of the citizens of Dyersburg.

CONTRACT OF EMPLOYMENT—AGREEMENT FOR LIFE—NOT TERMINABLE AS INDEFINITE HIRING—DAMAGES FOR BREACH.—*Southern Cotton Oil Co. v. Yarborough, Court of Appeals of Georgia (May 2, 1821)*, 107 *Southeastern Reporter*, page 366.—This was an action by James Yarborough on a contract of employment for the remainder of his natural life, to act as salesman for a stipulated commission payable monthly, so long as he obtained the minimum amount of business specified. This wage amounted to \$210 including his expenses. He had a life expectancy of 23 years. The company at the end of 5 years discharged him from its employment without legal right to do so. He asked damages on the basis of life expectancy. The lower court sustained a demurrer to his pleadings, requiring him to reduce his claim to the amount due from the date of discharge to the date of filing suit. Yarborough amended his petition and judgment was rendered in his favor. The defendant appealed to this court, which affirmed the lower court on condition

that the traveling expenses, which amounted to \$110 a month, be deducted from the amount awarded. Judge Hill in giving the opinion of the court said in part:

The defendant claimed the right to discharge the plaintiff on the ground that the contract, being for an indefinite time, to wit, for the life of the plaintiff, was terminable at the will of either party. Whether a contract for life is an indefinite contract under the law, in view of the amendments to the pleadings in this case, need not be determined.

In passing, however, we do not agree with the contention that a contract for life is such an indefinite contract as to be terminated at the option of either party, and we do not think that the code section relied upon (Civil Code of 1910, sec. 3133), which states that "an indefinite hiring may be terminated at the will of either party," is applicable to a contract for life. The amendment in effect substituted for a contract for life a lawful contract for the period between the discharge and the filing of the suit; and we think there can be no doubt, under the evidence, that the plaintiff did have a valid, enforceable contract.

The judgment was therefore affirmed, conditioned on the remittitur of the amount of the plaintiff's expenses included therein in the court below.

CONTRACT OF EMPLOYMENT—AGREEMENT NOT TO ENGAGE IN SIMILAR BUSINESS—TRADE SECRETS—INJUNCTION—*Kaumagraph Co. v. Stampagraph Co. (Inc.) et al., Supreme Court of New York, Appellate Division (May 27, 1921), 188 New York Supplement, page 678.*—The Kaumagraph Co. had been granted a decree, perpetually enjoining and restraining the defendants from engaging in a business similar to that of the plaintiff. The reasons given for the decision granting the decree were twofold: First, that two of the defendants had made contracts of employment with the Kaumagraph Co. in which there were negative covenants against engaging in a similar occupation; and, second, that the plaintiff was engaged in manufacturing under a secret process and that defendants, former employees of the plaintiff company, had organized and incorporated for the purpose of manufacturing and selling some of the same articles made by the same process as that used by the plaintiff. The appellate division reversed the decision of the lower court, holding that the plaintiff did not prove the use of any secret process or that it had acquired exclusive rights in the process. The opinion of the court was written by Judge Page, from which the following is quoted:

There remains the question of the plaintiff's right to enjoin the defendants George Chadwick and Arthur Turner by virtue of the negative covenants in their contracts. The first agreement with George Chadwick contained a covenant that under no circumstances

nor at any time would Chadwick "engage in any business similar to or conflicting with the business of the Kaumagraph Co., or produce dies, trade-mark stamps, embroidery designs, or indelible letters, by said Kaumagraph process or any similar process, except as hereinbefore provided, without the written consent of the" plaintiff. On February 1, 1909, six years before this contract expired, the plaintiff insisted on a new contract for a term of ten years from that date. To this Chadwick objected, and a new contract was prepared for the unexpired term of the first, which Chadwick signed. This provided for payment of a salary of \$35 per week for the first year and \$40 per week thereafter, and further provided:

"In consideration of the foregoing the party of the second part agrees that he will remain in the employ of the party of the first part for a period of six years from the date hereof and in consideration of the agreements hereinbefore set forth, party of the second part agrees that he will not at any time engage in any business similar to or conflicting with the business of the said Kaumagraph Co., or produce dies, trade-mark stamps, embroidery designs, or indelible letters by any one or more of the processes employed by the said Kaumagraph Co. or by any similar processes or manufacture or produce such articles or engage in such processes in any way, by sale or otherwise, connected with the trade within the territory of the United States east of the Mississippi River, or in the Dominion of Canada, without first securing the written consent of the party of the first part."

The contract further provided that it should "continue in full force as to all its stipulations for an indefinite period after the date of its expiration, until terminated by notice in writing by either party one year in advance."

In the latter part of the year 1918 George Chadwick was reduced from the position of superintendent and a man with no previous experience in the business was put over him, and on January 13, 1919, he gave the plaintiff one year's notice in writing of the termination of the contract. He did no act in violation of his agreement, nor, so far as the proof shows, was he disloyal to his employer. The sole justification for enjoining him was his statement that when he left the plaintiff's employ he should go into a similar business. It must be borne in mind that Chadwick, for 13 or 14 years before he entered into the plaintiff's employ, had worked for the William Briggs & Co. (Ltd.). It was because of his knowledge of and skill in the business that plaintiff employed him. He worked for the plaintiff for about 16 years. Thus 30 years of his life had been spent in this one employment. While he worked for plaintiff his salary ranged from \$15 to \$40 per week. The judgment goes beyond even the terms of the negative covenant; it is unlimited as to time or space. George Chadwick by the decree is perpetually enjoined from ever again in any place working at the only trade he knows. Under this decree he could not return to England and engage again with William Briggs & Co. (Ltd.). He must work hereafter for the plaintiff, or not work at all at the only trade he knows. The books will be searched in vain for a precedent for so unjust and oppressive a decree. As has been well said:

"Such a restraint savors of servitude, unrelieved by an obligation of support on the part of the master."

Covenants ancillary to a contract of employment restricting the employees' right to labor along the same line, either for themselves or others, upon the termination of their employment, are not favored by the law, and will not be enforced, unless there are special circumstances that render the restriction a reasonable protection to the employer's business, to prevent the employee from using knowledge that he has acquired in the course of his employment, of the secrets of the trade, methods, or processes of the employer.

Where, however, the employee brings to the employment skill previously acquired, and does not obtain, in the course of his employment, knowledge of methods and processes which are exclusively within his employer's control and right to use, it can not be said that such a restraint is reasonably necessary to the employer's protection.

Contracts by employees, unreasonably limiting their right to pursue their trade or occupation in the future, are held to violate public policy, because the employees' means for procuring a livelihood for themselves and family are thereby diminished. They are deprived of the power of usefulness, and the public is deprived of the benefit of the exercise by them of their knowledge and skill.

The judgment and findings inconsistent with this opinion should be reversed.

CONTRACT OF EMPLOYMENT—AGREEMENT TO TREAT WITH TRADE-UNION—ABANDONMENT OF EMPLOYMENT.—*In re Division 132 of Amalgamated Association of Street and Electric Railway Employees of America, et al., Supreme Court of New York, Appellate Division (May 17, 1921), 188 New York Supplement, page 353.*—The petitioners above sought an order directing the United Traction Co. to proceed to arbitration in accordance with the terms of a certain contract. This contract set forth that the officers of the company would treat with the officers of the union on all grievances and in consideration the members of the union would continue their labor. The contract ran from July 1, 1920, to June 30, 1921, with a provision that the scale of wages would continue in force after November, 1920, if the company was permitted to charge increased fares. The privilege of such increase was not allowed, and the company gave notice of a decrease in wages in January, 1921, which resulted in members of the association leaving their employment.

The petition on appeal was dismissed by the appellate court, holding that the contract was not an agreement to arbitrate and that if there had been a valid agreement to arbitrate, the traction company had been relieved of their obligation by the action of the members of the association. The following extracts are taken from the decision:

Assuming for the purposes of this discussion that the petitioners have a standing in court as the representatives of the members of

their respective unincorporated associations as though the latter were incorporated, which is obviously as far as any assumptions may fairly go in the premises, we find that on the 1st day of July, 1920, the petitioners and the United Traction Co. entered into an agreement by the terms of which the traction company agreed "through its properly accredited officers to treat with the properly accredited officers and committee of the association on all grievances that may arise," which is clearly not an agreement to arbitrate.

The consideration for this agreement is lacking the moment the employees abandon their work, and the corporation is no longer bound to accept a determination of arbitrators.

The former employees, represented by the petitioners, have abandoned the contract; they have committed an anticipatory breach of the provision for arbitration, by destroying its consideration before it had an opportunity to come into operation, and they have no ground for complaint, because they are no longer employees, and because the time fixed by the contract for its operation in any event has not yet arrived.

CONTRACT OF EMPLOYMENT—BREACH—EVIDENCE—BURDEN OF PROOF—*Crayton v. State, Court of Appeals of Georgia, Division No. 1 (March 8, 1921), 106 Southeastern Reporter, page 919.*—Mack Crayton was charged with violation of the labor contract act of 1903 and was convicted. It seems that he received \$3 advance money and entered into a contract to perform certain services, which were not rendered. He moved for a new trial on the ground of improper instructions to the jury, but his motion was overruled and he appealed. In reversing the decision of the trial court, the court of appeals said in part:

In a prosecution for violation of the "labor contract act" of 1903 (Penal Code 1910, sec. 715), the burden of proving that the accused did not have good cause for his failure to carry out his contract is upon the State; and this burden is not carried by the testimony of the hirer that the accused had no good and sufficient reason for not performing the services agreed upon, or for not returning the articles of value advanced by the hirer upon the strength of the contract. Such testimony amounts to a mere opinion or conclusion of the witness, and is worthless, unless supported by proof of sufficient facts to give it probative value. (*Ashley v. State*, 22 Ga. App. 626, 97 S. E. 82.) Under this ruling, and the facts of the instant case, the verdict was not authorized by the evidence, and the court erred in overruling the motion for a new trial.

Judgment reversed.

CONTRACT OF EMPLOYMENT—BREACH—INTENT TO DEFRAUD—*Smith v. State, Court of Appeals of Georgia (July 26, 1921), 108 Southeastern Reporter, page 130.*—Ben Smith was convicted of a viola-

tion of the "labor contract act" of 1903 (Penal Code 1910, sec. 715), which reads as follows:

Sec. 715. *Procuring money on contract for services fraudulently.*—If any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as for a misdemeanor.

The defendant appealed to the court of appeals, which reversed the decision of the lower court. The court held that to authorize a conviction it was not sufficient to prove that Smith had formed a fraudulent intent after advances were made. It must be proved that the accused had formed the intent to defraud at the time of the execution of the contract.

CONTRACT OF EMPLOYMENT—BREACH—RIGHT TO DISCHARGE—DAMAGES—*Golden Rod Mills v. Green, Court of Civil Appeals of Texas (April 13, 1921), 230 Southwestern Reporter, page 1089.*—A. H. Green had a contract to work for the plaintiff in error for five years. He worked for one year and was discharged. He found other employment, but brought this action because of his wrongful discharge, the issue being whether or not the claim that his service had been unsatisfactory was made in good faith. Judgment was rendered in his favor, and the defendant appealed to the civil court of appeals, in which the judgment was affirmed. The court spoke in part as follows:

Where the master, contractor, or employer retains no absolute right to discharge an employee for unsatisfactory work to him, but the employee merely contracts to give satisfaction in his work, and no absolute right of discharge is reserved, under the very nature of the contract such right can be made an issue of fact. Indeed, whenever, in the exercise of the right to discharge, the employer acts fraudulently, or so arbitrarily as to amount to a fraud, the employee is entitled to have the good faith of such act determined through the intervention of the courts.

CONTRACT OF EMPLOYMENT—BREACH—SETTLEMENT—SATISFACTORY SERVICE—*American Trading Co. v. Steele, United States Circuit Court of Appeals, Ninth Circuit (August 1, 1921), 274 Federal Reporter, page 774.*—A. T. Steele brought an action in the United States Court for China against the American Trading Co. because of the breach of a contract of employment. Steele agreed to work for three years in

Shanghai under certain conditions, one of which was that Steele would have to do his work in an efficient and satisfactory way. The contract was made in California. Before reaching his destination a new supplementary agreement was entered into, the place of work being Tokyo instead of Shanghai, with a little higher compensation. At the expiration of a year Steele was notified that his services were no longer required. There was a sort of arbitration, but Steele later brought an action for damages. Judgment was granted in his favor, and the defendant appealed to the circuit court of appeals, where the judgment was affirmed. The court in a decision rendered by Judge Wolverton said:

There seems to be a practical concurrence of opinion that, in contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party sole judge of such satisfaction, without regard to the justice or reasonableness of his decision, and a court or jury can not say that the party should have been satisfied where he asserts that he is not.

In the case at bar the employment was conditioned upon the work being done "in an efficient and satisfactory way"—not to the satisfaction of the employer. The services to be performed were those of an accountant. They were not of a character personal to the employer, unless made so by apt stipulation; nor were they addressed to the judgment of a particular person or to the employer solely. They were such, considering the end to be accomplished, that others could as well judge of the character of performance as the employer. The expression "efficient and satisfactory way" is by no means the equivalent of "satisfactory to the employer," and, if the parties had desired that the latter meaning should be incorporated in the contract, it would have taken but a stroke of the pen so to express it. That not having been done, we must take it that the plain meaning of the expression used was the one intended. The trial court was therefore not in error in its construction of this clause in the contract. Its finding that plaintiff has not breached the contract in the light of this clause is one of fact, which it is not in the province of this court to disturb; the evidence being such as tends to support it.

The next question presented relates to the alleged arbitration. Is it a bar to plaintiff's recovery? The agreement for submission is singularly brief. It is:

"We, the undersigned, agree to the arbitration of our differences by the honorable Mr. Potter."

This makes it necessary that we examine the negotiations of the parties looking to the arbitration, to ascertain what their differences were, and what was to be submitted for adjustment.

The controversy submitted thereon was the amount of compensation to be paid plaintiff in full settlement of all his claims against the company under the two agreements between the parties. Each party submitted to the arbitrator a statement of the case. The arbitrator by his decision found:

First, "that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement," and, second,

"that Mr. Blake should pay Mr. Steele in full, until such time as Mr. Steele can secure first-class passage back to San Francisco, less any indebtedness that may be proved that Mr. Steele owes Mr. Blake."

There is nothing definite in either finding; nor is there any adjustment or settlement of the matters referred for arbitration. In other words, the award settles practically nothing of the controversy submitted by the parties for adjustment. The disposition under the award must be sufficiently definite and exact that nothing further remains to fix the rights and obligations of the parties under the submission, and that the party against whom it is made can perform or pay it without further ascertainment of rights or duties; otherwise, it is void. The award of the arbitrator is therefore not a bar to the present action.

CONTRACT OF EMPLOYMENT—DISCHARGE—EFFECT ON TENANCY—SHARE CROPPER.—*Woodson et ux. v. McLaughlin et al.*, *Supreme Court of Arkansas (October 31, 1921)*, 234 *Southwestern Reporter*, page 185.—J. F. Woodson in 1919 was a share cropper on the farm of one McLaughlin. McLaughlin furnished Woodson the land and a tenant house to live in while he cultivated and gathered the crop, and Woodson was to receive one-half of the crop in payment for his services in cultivating and gathering it. Because of excessive rains in the fall of the year Woodson was delayed in gathering his cotton. Woodson was discharged from his employment and was requested to move out of the house so that McLaughlin could move it to another part of the farm. He refused. McLaughlin hired M. W. Davis to move the house. Under McLaughlin's directions he tore the kitchen away from the main part of the house and rolled it some distance away. It rained and snowed after this had been done, and by reason of the opening the rain and snow beat into the main dwelling house, causing Woodson's wife to become ill. They then moved out and brought an action for damages, stating that they had wrongfully been compelled to move. In the circuit court judgment was in favor of the defendants and Woodson appealed. In the supreme court the judgment was affirmed. It was held that the relationship was landlord and laborer, not that of landlord and tenant. The title of the crop was in McLaughlin until he divided it. Woodson's occupation of the house was ancillary to his employment and was part payment for his services. When his employment was terminated his right to occupy the premises ceased. Judge Hart speaking for the court said:

The complaint does not allege a violation of the contract of hiring on the part of McLaughlin, but it alleges a trespass. Hence in this case it does not make any difference whether the discharge of Woodson by McLaughlin was lawful or not. It is sufficient that McLaughlin discharged him.

If Woodson was wrongfully discharged, his remedy was to sue McLaughlin for a breach of contract. Where one, having contracted with another to allow him to cultivate his farm on the shares for a year, orders him off the farm before the end of the year, and refuses to let him gather the crop, the cropper may maintain an action at once against the landowner, and recover as damages the value of such cropping contract. (*Jewett v. Brooks*, 134 Mass. 505, and *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881.) In such cases the damages like the contract of hiring are entire and accrue on the day when the contract is repudiated. They are measured by the value of the contract on which the cropper is deprived and not by any injury done his person or that of his wife.

It follows that the judgment must be affirmed.

CONTRACT OF EMPLOYMENT—EMPLOYEE'S INVENTION—RIGHTS OF EMPLOYER—*Ingle v. Landis Tool Co. et al.*, *United States Circuit Court of Appeals, Third Circuit* (March 8, 1921), *272 Federal Reporter*, page 464.—William R. Carey was an inventor in the employ of the Ingle Machine Co., at a salary of \$35 per week. His work consisted of making drawings for machines built by that company, but he was under no contract to assign to his employer any invention he might make. He made the invention that was subsequently embodied in the patent in suit. The Ingle Machine Co. went into bankruptcy and its assets were sold by the trustee to the Landis Tool Co. The Landis Tool Co. entered into an agreement with the Gurney Electric Elevator Co. to have machines embodying the alleged invention built for the Landis Tool Co. Ingle brought suit upon the Carey patent, which had been transferred to him, charging said companies with infringement. The court below ordered that Ingle execute an assignment of the patent to the Landis Tool Co. The circuit court of appeals held that as between Carey and the Ingle Machine Co. the invention never became the property of the machine company and therefore no title passed. The court quoted from the case of *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, as follows:

But a manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect.

CONTRACT OF EMPLOYMENT—ENFORCEMENT BY INJUNCTION—SUNDAY LABOR—*Shubert Theatrical Co. v. Rath et al.*, *United States Circuit Court of Appeals, Second Circuit* (February 16, 1921), *271 Federal Reporter*, page 827.—George and Richard Rath agreed to

work for the plaintiff for one year, with an option on their services for the following year. The company exercised its rights under the option and so notified the Rath brothers. Defendants refused to perform under the agreement and made a new contract with a rival manager. Action was brought to restrain the brothers from appearing under the new contract, which resulted in an injunction, and they appealed. The district court was affirmed by the circuit court of appeals in its decision that the contract was binding and would be enforced by injunction. The court, speaking through Judge Rogers, said in part:

These services were to be given to the plaintiffs exclusively, and the contract contains an express negative covenant that they would not be given under any other management during the period named. By a negative covenant the covenantor promises that something shall not be done. The relief appropriate to a breach of such a contract is an injunction.

The basis upon which the decisions rest in all such cases is that the damages for the breach of such contracts can not be estimated with any certainty, and the employer can not by means of any damages purchase the same services from others. The injury in such cases is irreparable. Damages which can be estimated in cases of this class only by conjecture, and not by any accurate standard, constitute such an irreparable injury as courts of equity will restrain by injunction.

It was further contended that the contract in question was illegal, in that it called for the performance of acrobatic feats on Sunday, in violation of the law of the State. As to this the court said:

We assume that, in the absence of a statute, participation in innocent amusements on Sunday is lawful. We also assume that contracts to perform on Sunday something prohibited by statute are void. It has been held that, where a contract provides for the performance on Sunday of acts prohibited by the statute, the entire contract is void, and no recovery can be had for the part performed on a secular day.

In *Zenatello v. Hammerstein*, 231 Pa. 56, 79 Atl. 922, the plaintiff had bound himself to sing certain operas "each day of the week" in New York and elsewhere in the United States. The court said the law would not presume that the parties intended an unlawful thing. The presumption was that the plaintiff would not be required to sing on Sundays, except in places where such singing was permitted; and in the instant case it can not be said that the contract in any way violates the Sunday observance law of the State of New York.

Decree affirmed.

CONTRACT OF EMPLOYMENT—ENTICING EMPLOYEES—BREACHED CONTRACT—*Beale v. Yazoo Yarn Mill, Supreme Court of Mississippi (May 23, 1921), 88 Southern Reporter, page 411.*—The Yazoo Yarn Mill was awarded a judgment against R. M. Beale in the circuit court

of Yazoo County for knowingly employing, willfully interfering with, and enticing away employees of the plaintiff. It appears that J. S. Porter, a laborer, agreed for himself and family to work for the plaintiff company until May, 1919, at current wages. His son was subsequently discharged. Porter told Beale that he had notified the foreman of the mill that he could not work unless his family was employed, and that the foreman had replied that the son would not be taken back at the mill. Beale accepted this as indicating a breach of the contract at the mill, and employed Porter.

Beale appealed from his conviction, securing a reversal and new trial.

The court, speaking through Judge Ethridge, said in part:

The statute is criminal and highly penal, and its terms are not to be extended by construction.

Giving the statute a reasonable interpretation, it must be held that if the employer breached the contract himself he could not hold Beale for employing a laborer during the time which the contract would have to run had it not been breached.

The Supreme Court of the United States, in the Bailey case, 219 U. S. 219, 31 Sup. Ct. 145, placed such construction upon the thirteenth and fourteenth amendments, as gives to a laborer the right to terminate a contract for personal service, subject only to damages for its breach. Under the decision of this court, if Porter was justified in abandoning his contract for any default on the part of the mill, the employer, such would exonerate appellant in thereafter hiring Porter, though the original term or period of the contract had not expired. In interpreting and administering a statute the court should not construe the law or administer it so as to endanger its constitutionality.

Reversed and remanded.

CONTRACT OF EMPLOYMENT—ENTICING EMPLOYEES—INDICTMENT—*Holt v. State, Supreme Court of Georgia (March 16, 1921), 106 South-eastern Reporter, page 548.*—M. H. Holt was convicted of the violation of Penal Code, section 125, of Georgia, which prohibited the enticing away and employment by an employer of the servant of another employer working under a contract. The defendant appealed, and the decision was reversed. The decision is as follows:

Penal Code, section 125, declares:

"If any person shall, by offering higher wages or in any other way, entice, persuade, or decoy, or attempt to entice, persuade, or decoy any servant, cropper, or farm laborer, whether under a written or parol contract, after he shall have actually entered the service of his employer, to leave his employer during the term of service, knowing that said servant, cropper, or farm laborer was so employed, he shall be guilty of a misdemeanor."

An indictment for a violation of this section, which omitted the essential part thereof, viz, "to leave his employer during the term of

service," failed to charge any penal offense, and the court erred in overruling the general demurrer attacking the indictment on that ground.

In view of this ruling, the grounds of the demurrer urging the unconstitutionality of the statute upon which the indictment was founded will not be considered.

CONTRACT OF EMPLOYMENT—INTERFERENCE—ACT OF INSURANCE AGENT—DAMAGES—*United States Fidelity and Guaranty Co. v. Millonas, Supreme Court of Alabama (May 12, 1921), 89 Southern Reporter, page 732.*—John Millonas was in the employ of Diniaco & Bro., a construction firm, as a sheeter, earning \$11 a day. While at work during July, 1918, in Birmingham, Ala., he suffered an injury to his eye. Because of this injury he was incapacitated for 30 days. The employer was insured in the defendant company. One Smith was the claim adjuster for the casualty company in Alabama. Millonas applied to him for compensation for his injury, but without result. Millonas then consulted an attorney named Charlton. Smith had a conference with Charlton for the purpose of adjusting the claim if possible. During the conversation Charlton mentioned the fact that Millonas was still in the employ of the firm. Smith expressed surprise when this fact was mentioned, and in substance told Charlton that Millonas could not work for Diniaco and sue the insurance company at the same time, and that he would be discharged. Millonas was discharged that day. He was a specially trained man, and could not find work for two months. He brought suit against the insurance company for damages for willfully, maliciously, and wrongfully procuring his discharge from employment. Judgment was rendered for \$25,000. On appeal judgment was reversed, but would be affirmed on condition that Millonas would accept a judgment for \$6,000 with interest. The court said that the company is liable "because of the conduct of the agent acting within the line and scope of his employment," but "neither justice nor the public welfare call for the infliction of so heavy a penalty."

CONTRACT OF EMPLOYMENT—RESCISSION—NEW CONTRACT BEFORE OLD ONE HAD EXPIRED—*Schwartzreich v. Bauman-Basch (Inc.), Court of Appeals of New York (May 10, 1921), 131 Northeastern Reporter, page 887.*—Louis Schwartzreich brought an action for damages on a contract of employment dated October 17, 1917. The facts are that plaintiff on August 31, 1917, made a contract with the defendant company to work for one year, commencing November 22,

1917, at a salary of \$90 per week; that in October plaintiff was offered \$115 by another concern; that plaintiff notified the defendant company of the offer and as a result the defendant company drew up a new contract in identical terms, but at a salary of \$100 per week. Louis Schwartzreich remained in the employ of the defendant company until the following December, when he was discharged. The court permitted the jury to find that the prior contract may have been canceled simultaneously with the execution of the new agreement. The jury rendered a verdict for the plaintiff on the view that the former contract was rescinded, and a new one made: but the trial justice set it aside and dismissed the complaint on the ground that there was not sufficient evidence that the first contract was canceled to warrant the jury's findings. Upon appeal to the appellate term the judgment was reversed and verdict and judgment in plaintiff's favor reinstated. The appellate division affirmed this judgment and the court of appeals also affirmed it. Judge Crane, speaking for the court of appeals, said:

Any change in an existing contract, such as a modification of the rate of compensation or a supplemental agreement, must have a new consideration to support it. In such a case the contract is continued, not ended. Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration. Very little difference may appear in a mere change of compensation in an existing and continuing contract and a termination of one contract and the making of a new one for the same time and work, but at an increased compensation. There is, however, a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract. (*Triangle Waist Co. (Inc.) v. Todd*, 223 N. Y. 27, 119 N. E. 85.)

If this which we are now holding were not the rule, parties having once made a contract would be prevented from changing it no matter how willing and desirous they might be to do so, unless the terms conferred an additional benefit to the promisee.

The decisions are numerous and divergent where one of the parties to a contract refuses to perform unless paid an additional amount. Some States hold the new promise to pay the demand binding though there be no rescission. It is said that the new promise is given to secure performance in place of an action for damages for not performing (*Parrot v. Mexican Central Railway*, 207 Mass. 184, 93 N. E. 590), or that the new contract is evidence of the rescission of the old one and it is the same as if no previous contract had been made (*Coyner v. Lynde*, 10 Ind. 282; *Connelly v. Devos*, 87 Conn. 570; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284); or that unforeseen difficulties and hardships modify the rule (*King v. Duluth etc. Ry. Co.*, 61 Minn. 482, 63 N. W. 1105), or that the new contract is an attempt to mitigate the damages which may flow from the breach of the first (*Endriss v. Belle Isle Ice Co.*, 49 Mich. 279, 13 N. W. 590).

The contrary has been held in such cases as *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53; *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S. E. 732, *Alaska Packers' Association v. Domenico*, 117 Fed. 99; 54 C. C. A. 485 (etc.). In none of these cases, however, was there a full and complete rescission of the old contract and it is this with which we are dealing in this case. Rescission is not presumed; it is expressed; the old contract is not continued with modifications; it is ended and a new one made.

The efforts of the courts to give a legal reason for holding good a promise to pay an additional compensation for the fulfillment of a preexisting contract is commented upon in note upon *Abbott v. Doane* (163 Mass. 433, 40 N. E. 197) in 34 L. R. A. 33, 39, and the result reached is stated as follows:

"The almost universal rule is that without any express rescission of the old contract the promise is made simply for additional compensation, making the new promise a mere nudum pactum."

As before stated, in this case we have an express rescission and a new contract.

Judgment affirmed.

CONTRACT OF EMPLOYMENT—SEAMEN—CONTRACT TERM—*Shanley et al. v. United States, United States District Court, Eastern District of New York (June 27, 1921), 274 Federal Reporter, page 691.*—Joseph S. Shanley and others, libelants in this suit, were members of the crew of the *Liberty Land* (a boat owned by the United States Emergency Fleet Corporation), who shipped at Philadelphia for a voyage to an African port and return to the United States. The articles signed by the crew were for six months, but because of delay the ship was on the African coast at the expiration of the six months. The captain desired the crew to continue under the old articles. The crew insisted on new articles and demanded double pay for the balance of the voyage. The captain agreed under protest, with claim of duress and illegal demand. The captain had obtained authority to extend the ship's articles. On return to the United States the crew demanded wages under the new agreement, which was refused and they brought this suit. Judgment was given in favor of the plaintiffs on the ground that "if the voyage can not be completed, or is ended by mutual agreement, the former articles are of no effect upon the future status of the crew who are free to make a new agreement with the captain if he has the authority to do so." In the course of the decision Judge Chatfield said:

In the case at bar the captain evidently anticipated delay. He cabled for instructions and authority and received directions to do that which he had the power to do without express direction. If the crew had been willing to sign new articles, extending the period of the voyage on the same terms, no question could have arisen. If they were not willing to do this and insisted upon a termination of the voyage, they were bound to stand by their vessel until it reached a

point where the voyage could properly be considered at an end, and where they could be properly released from their obligations.

This court has no power to make a new contract if the original contract was invalid. It is impossible to determine what solution the parties would have worked out as a basis of agreement, but, inasmuch as the crew were bound to stick to their contract and to their vessel, at least as far as Gibraltar, and as upon reaching that port, they could have insisted upon making a contract like that forced on the captain at Accra; in other words, inasmuch as the element of duress depends upon the exercise of compulsion prematurely, and inasmuch as the captain of the *Liberty Land* agreed to pay wages at the rate demanded, rather than to lose his crew, and then proceeded to New York instead of to a port like Gibraltar, where the matter could have been terminated, it would seem that the new contract was invalid only in part or during that period wherein the crew mistakenly assumed that the new contract could be put in force. The captain of the *Liberty Land* did not have the right to demand that his crew continue to sail with him, according to his wishes and until he should reach the United States, no matter how long the voyage might take.

The testimony of the shipping commissioner is that at the time of the discharge, when a great majority of the crew were present, they were informed by the shipping commissioner that "by signing clear, if they could show cause in the future, they could collect their wages if the court rules so," and the understanding was that they were signing under protest.

Under these circumstances the release can not be used as a receipt in full, under section 4552, R. S.

CONTRACT OF EMPLOYMENT—SEAMEN—DISCHARGE—TRANSPORTATION TO HOME PORT—*Jenkins et al. v. United States Emergency Fleet Corporation*, United States District Court, Western District of Washington (June 29, 1920), 268 Federal Reporter, page 870.—I. W. Jenkins and his coplaintiffs were seamen. In the port of New York they signed shipping articles with the master of the ship *Lake Flynus* in which the voyage was declared to be:

From the port of New York to one or more ports in South America, via coastwise ports and such other ports or places in any parts of the world as the master may direct, and back to a final port of discharge in the United States, north of Cape Hatteras.

The vessel sailed to South American ports and then to Tacoma, Wash., where it discharged the entire cargo and was laid up for repairs. When the vessel was ready to sail again the men were requested to sign for a voyage to Cuba. This they refused to do and were thereupon instructed to report to the shipping commissioner's office to receive their wages. They reported at the office but refused to accept their wages unless transportation was furnished

them to New York. In awarding a decree for libelants (the plaintiff seamen) the court said in part:

It is contended on the part of the libelants that the port of Tacoma, where the entire cargo was discharged, was the final port of discharge, or at any rate the discharging of the entire cargo, and the taking of the new cargo for the port of Cuba was such a deviation from the voyage as abrogated the shipping articles and relieved the seamen from further service. The respondent contends that under the articles the ship had the right to call at the port of Tacoma or Seattle, to discharge or take cargo as it saw fit, inasmuch as the shipping articles provided that the ship may go to any port in the world, and the port of final discharge was definitely stated in the articles as north of Cape Hatteras, which all of the evidence shows means on the Atlantic coast, and that while the respondents agreed to the discharge of the libelants who so desired, it is not willing to pay transportation to New York.

It is shown that the libelants were requested to sign "new articles" and refused. The shipping commissioner, on request of the agent of the respondent for a decision found that the seamen were entitled to transportation to New York. This fact, though, is not material here, except to show what the relation of the seamen to the voyage was considered to be by all parties. The vessel considered the voyage ended, or it would not have required the signing of the shipping articles as testified to by libelants, and not denied. The master, who, it is said, made this request, was not called, nor was his absence explained. The men were discharged through no act of commission or omission which would warrant such discharge. This was not the port of final discharge, and the men were not requested to continue on the voyage under the articles, but were requested to sign new articles for a new voyage. The vessel by its own conduct fixed the status of the men with relation to this proceeding, and they were entitled to their wages and board during detention, and transportation to New York, to such as desire to go to New York.

CONTRACT OF EMPLOYMENT—SEAMEN—WRONGFUL DISCHARGE—PENALTY—*The Inland, United States District Court, Eastern District of New York (March 10, 1921), 271 Federal Reporter, page 1008.*—This was an action in admiralty, a libel of the ship *Inland*, to recover a penalty for the wrongful discharge of several seamen. The men had signed up for a voyage. It was found necessary, after starting the trip, to go into dry dock. The chief engineer in order to economize attempted to lay off the men until the ship was ready to go to sea. The men refused to sign off and demanded extra pay for one month in accordance with the Revised Statutes of the United States, section 4527. The matter was taken up with the shipping commissioner who held that the men should go back to work and that the vessel must retain them for the voyage. The following day the men left the ship, and the captain, acting upon advice from the

commissioner, marked them off as deserters. The libel was dismissed by the court, Judge Chatfield saying in part:

The captain has authority under section 4511 (Comp. St. sec. 8300) to hire and to discharge his men. If there could be no discharge of any kind except before a shipping commissioner, then a seaman, wrongfully discharged and left stranded in a foreign port, might upon his return to the United States be confronted with the proposition that he had not been discharged and had deserted, inasmuch as the shipping commissioner had not passed upon his case.

In the present case, the matter which was taken before the shipping commissioner was whether, upon a proposed discharge, admittedly irregular in procedure, the men had become entitled to a penalty. The shipping commissioner evidently determined that the situation was not one where any penalty should be inflicted, and attempted to work out a compromise, by having the captain retain the men with full pay. This the men refused to accept, and thereby lost any right, except to receive the wages due, if they consented to discharge before the commissioner.

COST OF LIVING—FOOD CONTROL—LEVER ACT—CONSTITUTIONALITY—*United States v. L. Cohen Grocery Co., United States Supreme Court (February 28, 1921), 41 Supreme Court Reporter, page 298.*—The L. Cohen Grocery Co. was prosecuted by the United States for the violation of section 4 of the Lever Act as reenacted in 1919 (41 Stat. 297, tit. 1, ch. 80, Oct. 22, 1919), which reads in part as follows:

That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, to conspire, combine, agree, or arrange with any other person * * * (e) to exact excessive prices for any necessities * * *. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$5,000 or be imprisoned for not more than two years or both * * *."

The Cohen Co. was charged with selling in one instance 50 pounds of sugar for \$10.07 and in another instance 100 pounds for \$19.50. The company demurred to the bill on the grounds, first, that it was too vague to inform it of the accusation; second, that the act on which the accusation was based was so vague and uncertain as to be unconstitutional; and third, that as the country was no longer at war, Congress had no power to legislate on the subject dealt with in the law. The district court quashed the indictment and sustained defendant's demurrer and the United States appealed. In affirming the decision of the district court Mr. Chief Justice White in rendering the opinion of the court declared the law to be unconstitutional. The opinion is in part as follows:

In cases submitted at about the same time with the one before us, and involving identical questions with those here in issue, it is contended that the section does not embrace the matters charged. We come, therefore, on our own motion in this case to dispose of that subject, since, if well founded, the contention would render a consideration of the constitutional questions unnecessary. The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as reenacted, are broad enough to embrace the price for which a commodity is sold; and, second, because as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section before its reenactment contained no penalty is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided.

We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the fifth and sixth amendments as to questions such as we are here passing upon.

It follows that in testing the operation of the Constitution upon the subject here involved the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view.

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words "that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question.

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment

quashing the indictment on that ground must be, and it is, hereby affirmed.

Mr. Justice Pitney concurred in the decision and rendered a separate opinion. His reason, briefly stated, was as follows:

I am convinced that the exacting of excessive prices upon the sale of merchandise is not within the meaning of that provision of the act which is cited as denouncing it; that the act does not make it a criminal offense; that for this reason the demurrer to the indictment was properly sustained; and that whether the provision is in conflict with the fifth or sixth amendment is a question not necessarily raised, and which ought not to be passed upon.

COST OF LIVING—PRODUCTION AND DISTRIBUTION OF COAL—PRICES—STATE CONTROL—CONSTITUTIONALITY—*American Coal Mining Co. v. Special Coal and Food Commission of Indiana, United States District Court, District of Indiana (October 2, 1920), 268 Federal Reporter, page 563.*—The Legislature of Indiana at its special session of 1920 passed a law (ch. 44) creating a commission with power to fix the price of coal at the mine, the charges of jobbers and wholesalers, and to procure the production and distribution of coal for intrastate shipment and consumption. The American Coal Mining Co., on September 6, 1920, sought an injunction restraining the commission from putting the act into effect, anticipating that existing contracts might be interfered with, that interstate commerce might be interrupted, and that the orders of the commission might deprive the company of its rights as a business corporation. The court held that there was no reason to anticipate that the acts of the commission would be either illegal or oppressive, so that no emergency calling for the issue of an injunction existed for these reasons. The payment of the license tax provided for by the act could be recovered if on trial it was shown to be levied in violation of the Constitution, so that this, too, did not call for an injunction.

The "foundational question" was as to "the right of the State to touch at all the coal-mining business." Judge Baker, who spoke for the court, said that the legislature exercised the power of the people of the State as an absolute sovereignty, which the State possessed except in so far as surrendered to the Federal Government. Control of affairs within the State having never been surrendered, the police power of the State, exercised by its legislature, is without other limitation than that imposed by the Federal Constitution. The only Federal question was that arising as to the effect of the fourteenth amendment, adopted in 1868. Various laws were noted which had affected freedom of contract, enacted subsequent to the adoption of the

amendment, and the conclusion was reached that there was in the act in question no apparent conflict with its provisions.

The bill will be dismissed without prejudice, and the record may show affirmatively that there is absolutely nothing decided, except the one question that the State, under its police power, can lay its hand upon the coal-mining industry.

COST OF LIVING—PRODUCTION AND DISTRIBUTION OF COAL—SHIPMENTS—STATE CONTROL—CONSTITUTIONALITY—*Vandalia Coal Co. et al. v. Special Coal and Food Commission of Indiana, United States District Court, District of Indiana (November 27, 1920), 268 Federal Reporter, page 572.*—Arising under the same statute as the case of the American Coal Mining Co., above, this case was before the court to secure an injunction against the defendant commission, to restrain it from undertaking to regulate the complainants' business under the terms of the act. The court granted an interlocutory injunction, Judge Baker speaking for the court. His opening statement was:

Conceding to the State the general power to take control, from time to time, of businesses which, prior to such times, have been purely private, by reason of change of circumstances, by reason of the existence of facts showing that such a state of wrong has arisen in that business that the safety and welfare of the people of the State demand intervention by way of regulation, and granting also to the State the benefit of the presumption that a statute is valid until the contrary is shown, we will pass to the final hearing any considerations that may be advanced by the complainants to show that no facts existed which justified the finding of necessity of intervention on the part of the State; the State being free, of course, to meet and combat such a showing.

On the question whether the remedy prescribed by the legislature has any proper bearing on the supposed evil, we will grant to the State the benefit of assuming that on the face of the statute the remedy proposed has the necessary connection with the supposed evil.

As to the real facts of the operation of such remedy, whether it is workable, we will pass that matter, also, until the full facts can be developed on final hearing.

On the showing that has been made to-day we are all of the opinion that an interlocutory injunction should be issued, for the following reasons.

The reasons given are five in number: First, that coal severed from the ground is an article of commerce, which the owner may dispose of without regard to State lines, so that control of its sale is an interference with interstate commerce. In the case in hand, the output of three of the five mines of the company was contracted for by an interstate carrier. The second ground was the impairment of preexisting contracts; the third, the practical compulsion

involved in the plan, forcing the owner to sever the coal from his soil, thus infringing upon a purely private title to property. The fourth reason is the nature of the coal, requiring prompt and efficient handling and prompt consumption by the users, on account of its tendency to deteriorate. The commission gave orders for shipment, but supplied no cars therefor; furthermore, the parties to whom shipments might be directed were of unknown credit, interfering with the ordinary methods of collections and the transaction of business generally. The fifth ground was the threats of the commission to enforce penalties without awaiting final adjudication by appeals to higher courts. This appeared from the reading of the law rather than from the interpretation put upon it by the commission, but the court found the statute lacking in what it regarded a proper protection of the operator's rights, and allowed this as an added reason for the granting of an injunction. A temporary restraining order was therefore issued.

EMPLOYER AND EMPLOYEE—BRIBERY OF OFFICER OF THE UNITED STATES—BAGGAGE PORTER—*Krichman v. United States, Supreme Court of the United States (May 16, 1921), 41 Supreme Court Reporter, page 514.*—Harry Krichman, petitioner, was convicted upon an indictment which charged that while the Pennsylvania Railroad was under the control of and being operated by the United States, he offered to bribe a baggage porter to do an act in violation of his duty and contrary to section 39 of the Criminal Code which makes it an offense to bribe an officer to influence his action. The Supreme Court reversed the decision of the district court, affirmed by the circuit court of appeals. Speaking through Justice Day the court said in part:

The point to be decided depends upon whether, when the bribe was offered to the porter, he was acting for the United States in an official function.

We are constrained to the conclusion that the construction given in the courts below, and insisted upon by the Government, practically recasts the statute from one embracing officials, and those discharging official functions, into one including every person discharging any sort of duty while the Government is in control of the work.

The Government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law.

EMPLOYER AND EMPLOYEE—CLEARANCE CARDS—BLACKLISTING—PROOF OF DAMAGE—*Cleary v. Great Northern Ry. Co., Supreme Court of Minnesota (December 24, 1920), 180 Northwestern Reporter,*

page 545.—Frank Cleary had been employed by the Great Northern Railway Co. as assistant roadmaster until April 12, 1916, when he was discharged. The reason for his dismissal as entered on the records of the employment bureau was: "Relieved, on account unable to properly handle work assigned and men." He was given a clearance card which bore this same information. He wrote a number of letters to other railroads requesting employment but received no reply. Alleging that this entry was false and that because of it he could not secure a position from other railroad companies he brought suit for \$15,000 damages. A verdict was directed for defendant and Cleary appealed. In affirming the decision the court said in part:

It is very doubtful whether the evidence would sustain a finding that Sesser was not warranted in causing defendant's employment bureau to make the record that was made as to plaintiff. But, assuming it would, plaintiff failed to adduce any proof to carry other essential issues to the jury. There was no testimony that any other railroad had received information in respect to the record mentioned from this defendant. It must be conceded that defendant had the right to discharge plaintiff, even if no cause therefor existed. It could also make a record for its own use as to the reason for the discharge. So long as this record was not furnished to others, or made use of to prevent plaintiff from securing work, it could not injure or damage plaintiff, though false. There is an entire absence of proof that plaintiff was denied any work or place whatever, on account of the record made by defendant's employment bureau, or because of defendant's interference or statements. It would be working inferences beyond reason to hold that from the general knowledge of the scarcity of labor at that time, and the proof that plaintiff received no response to his letters for work, the jury could rightfully infer that the railroad companies addressed had at their disposal such a position as plaintiff applied for, which was not given him because of what he wrote concerning his clearance.

There was no violation of section 8890, G. S. [penalizing blacklisting], shown. Merely placing upon its own records the cause of such a discharge, as was here done, can not come within any definition of "blacklisting" contemplated by that statute. And no testimony was offered tending to prove that defendant made any attempt whatever to prevent or hinder plaintiff from obtaining employment elsewhere. There was no publication of any list by defendant; so far as the evidence goes, the publication, if made, was by plaintiff. Nor, as before stated, was there proof that plaintiff had been placed on any list which contained names of persons who might be objectionable railroad employees, either in defendant's employment bureau, or through defendant's procurement or connivance, in the employment bureau of any other railroad.

EMPLOYERS' LIABILITY—ADMIRALTY—JURISDICTION—FOREIGN CONTRACTS—*The Hanna Nielsen*, United States Circuit Court of Appeals,

Second Circuit (April 13, 1921), 273 Federal Reporter, page 171.—Ole Tolo, a Norwegian, brought this action in admiralty. The ship libeled was of Norwegian nationality. The libelant signed as an oiler on the ship at Portland, Maine. He was injured by the explosion of a steam gauge at Gibraltar. The libel alleged that the injury occurred in British territorial waters, that the action was based on British and American maritime laws, and that the Norwegian law did not apply. The district court allowed libelant an allowance for cure and maintenance. The libelant appealed, and the circuit court of appeals modified the decree so as to dismiss the libel. The court held that the right to the award for cure and maintenance grows out of the nature of the seaman's contract, and that the ship had complied with all the obligations of the Norwegian law which governed the contract. It also held that claimant should have proved the nature and extent of his right under British law if he deemed that law applicable. In reference to jurisdiction, the court, through Judge Hough, said:

If the claim advanced herein be regarded as in contract, the breach being the shipowner's failure properly and reasonably to provide for the safety of libelant, Norwegian law, and that alone, governs the right of recovery; for "whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which the ship belongs." (The *Belgenland*, 114 U. S. 365, 5 Sup. Ct. 860.) The seaman's contract in this instance was a Norwegian contract, and so remained throughout. The place where libelant shipped or reshipped is of no moment whatever.

If the suit be regarded as sounding in tort, then the trial court had no jurisdiction, unless the tort were maritime, and the *lex loci delicti* applies. Whether the locus is to be regarded as on a Norwegian ship, and therefore Norwegian, or in Gibraltar Harbor, and therefore British, is a question into which it is not necessary to go, further than to note that under no circumstances shown here can the law of the United States apply. The sole function of our courts is to furnish a remedy while enforcing by comity the substantially applicable law. As pointed out above, libelant repudiates Norwegian law as furnishing any ground for recovery; that he was right in so doing the evidence conclusively proved.

EMPLOYERS' LIABILITY—ADMIRALTY—JURISDICTION—LONGSHOREMAN INJURED ON BOARD SHIP—*Kennedy v. Cunard S. S. Co. (Ltd.)*, Supreme Court of New York, Appellate Division (July 1, 1921), 189 New York Supplement, page 402.—Richard Kennedy, a longshoreman, brought an action for damages because of injuries received by him while in the employ of the defendant company. On September 23, 1916, after finishing his day's work in the hold of the steamship *Andania*, lying in New York Harbor, he was proceed-

ing to the upper deck intending to leave the ship. Before reaching the bulkhead door through which it was necessary to pass to get on deck, the hatches were unexpectedly closed, shutting out all light. He continued cautiously towards the door, but fell into an open hatch and received injuries for which this action is brought.

From a judgment dismissing the complaint at the trial term the claimant appealed. The appellate division of the supreme court reversed that decision and ordered a new trial. Judge Page in the course of his opinion made the following statements:

The danger of injury to a man, left in utter darkness in the ship with its open hatchway, was obvious. It was a duty that the master owed to the employees to take reasonable precautions to see that all the men had come up from the hold, and not to close down the hatches until all the men had a reasonable opportunity to reach the upper deck. This was a duty that the master could discharge through another; but it was the master's duty that the other was performing and for a failure to discharge it the master was liable.

Whether the plaintiff, placed in the situation that he was by the closing of the hatch, and failing to get any response to his outcries, was chargeable with contributory negligence in going forward in the manner he did, was clearly a question of fact for the jury. The plaintiff did not assume the risk.

Involved in this case are questions of great importance, which have not been determined by our court of appeals, and are presented for the first time to this court on this appeal. They were suggested in the opening of counsel at the trial; but as the case was tried on the theory of common-law liability, and so disposed of by the trial justice, we have not considered these questions in disposing of the case before us. As, however, we have ordered a new trial, and these questions have been presented by the counsel for the plaintiff, we feel it incumbent on us to give them careful consideration in advance of that trial, for the assistance of the trial court.

The plaintiff was a longshoreman, employed in stowing a cargo upon a vessel engaged in foreign commerce, and sustained injuries upon the vessel, when it was tied to a dock in the Harbor of New York City. The workmen's compensation law (Consol. Laws, c. 67; Laws 1914, c. 41) classified longshore work, including the loading and unloading of cargoes or parts of cargoes, as among the hazardous employments covered by the act.

The defendants had complied with the requirements of the workmen's compensation law of this State, and the commission made an award of compensation for the plaintiff's injuries, which was being paid. The Supreme Court of the United States reversed *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 109 N. E. 600 [Bul. 189, p. 221], holding that:

"The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction * * *. The legislature clearly exceeded its authority in attempting to extend the statute under con-

sideration to conditions like those here disclosed. So applied, it conflicts with the Constitution, and to that extent is invalid." (*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, 37 Sup. Ct. 524, 529 [Bul. 246, p. 203].)

The payment of the compensation by the defendant was stopped, and this action was brought. After the decision in the *Jensen* case, Congress amended section 9 of the judiciary act of 1789, which had been continued by Judicial Code, sec. 24, 256 (U. S. Comp. St., sec. 991, 1233), which vested in the Federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," by adding thereto, "and to claimants the rights and remedies under the workmen's compensation law of any State." The court of appeals assumed that Congress acted within its powers, and had confided to the States the power to enact and enforce workmen's compensation acts in respect of injuries received in the course of maritime employment. (*Matter of Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302, 123 N. E. 382.) But on writ of error the United States Supreme Court reversed this case, holding the attempted amendment unconstitutional, as a delegation of the legislative power of Congress, and as defeating the purposes of the Constitution respecting the harmony and uniformity of the maritime law. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438 [Bul. 290, p. 302].) Therefore, although both of these cases were decided by a closely divided court, five to four, it may be accepted as settled that this plaintiff is not entitled to compensation under the workmen's compensation law (*Matter of Doey v. Howland Co.*, 224 N. Y. 30, 120 N. E. 53), and is entitled to enforce whatever other remedy he has for the injuries sustained.

An award under the workmen's compensation law is not made on the theory of a tort committed; compensation is given whether the injury was sustained with or without negligence; it is given upon the theory that the statute providing for the award is read into and becomes a part of the contract. (*Matter of Doey v. Howland Co.*, *supra*.) The test, therefore, applied in the above cases, was whether the contract of employment was of a maritime nature; the true test being the subject matter of the contract, the nature and character of the work to be done. But, as the maritime contracts relate to a subject of exclusive Federal jurisdiction, a State statute can not be read into the contract.

Article 3, sec. 2, of the Constitution of the United States, extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Article 1, sec. 8, subd. 18, gives Congress the power to make all laws necessary for the execution of the powers granted. By section 9 of the judiciary act of 1789 the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." This grant was continued by Judicial Code, secs. 24 and 256. There have been numerous decisions construing this section. [Cases cited.]

These cases settle the law to be that actions in rem, whether arising under the general maritime law or to enforce liens given by the United

States, or local State statutes, must be prosecuted in admiralty in the United States courts; while actions in personam, arising out of maritime contracts or torts, may be brought in admiralty or on the law side of the United States court, or in a State court having an appropriate common-law remedy. It is the right sanctioned by the maritime law that may be enforced by any court having jurisdiction of the parties or the res by the common-law remedies appropriate thereto.

This clause gives a right of election of a forum for the enforcement of the maritime right or to remedy the maritime wrong, and thereby allows election of the procedure, whereby the matter may be decided. But the complaining party has no right of election to determine whether the defendant's liability shall be measured by common-law standards rather than by those of the maritime law. (*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383 Sup. Ct. 501 [Bul. No. 258, p. 139.]) The maritime law as fixed and determined by the acts of Congress, and the general maritime law as accepted by the Federal courts, constitutes part of the national law applicable to matters within the admiralty and maritime jurisdiction. The rights and liabilities arising out of maritime contracts or maritime torts as recognized and declared by the maritime law can not be changed by State statute, nor by substitution of a common-law right or liability.

The instant case is an action for damage for personal injuries, for which there exists in this State a common-law remedy. Therefore the action may be brought in our supreme court, the rules of practice, pleading, and evidence of our courts apply, and the cause will be tried in conformity therewith; but the rules relating to contributory negligence, acts of fellow servants, and the measure of recovery must be determined by the maritime law, and not by the common law.

In maritime law contributory negligence of the injured party does not defeat a recovery, but goes to a reduction, or, more appropriately, an apportionment of the damage. The general rule of the common law exempting the master from liability for injury to a servant by a fellow servant is not fully applied by the maritime law; and the rules applicable to the recovery, whether of full indemnity, or wages, maintenance, and cure, must be taken into consideration, and the relief given according to the rules of maritime rather than common law. If the case is retried, it should be tried with reference to the rules of maritime law applicable to maritime torts.

Judgment reversed and a new trial ordered.

EMPLOYERS' LIABILITY — ADMIRALTY — JURISDICTION — REMEDY—
Crane v. Pacific Steamship Co., United States District Court, District of Oregon (March 14, 1921), 272 Federal Reporter, page 204.—Harry Crane was an employee of the defendant company. He was injured while loading freight on the steamship *City of Topeka*, berthed at one of the docks in the city of Portland, Oreg., on the navigable waters of the State. Crane brought an action in personam against his employer. The company moved to have the action put on the admiralty docket. The court, deciding on this motion, held that the work in which the plaintiff was engaged at the time of his injury was mari-

time in its nature, and his injury was likewise maritime, but denied the motion on the following grounds:

The statute conferring jurisdiction on the district court of all civil causes of admiralty and maritime jurisdiction saves "to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Section 24, subd. 3, Judicial Code (Comp. St. sec. 991 [3]). And Judge Holmes, speaking for the court in *The Hamilton*, 207 U. S. 404, 28 Sup. Ct. 133, says that the saving clause "leaves open the common-law jurisdiction of the State courts over torts committed at sea. This, we believe, has always been admitted"—citing authorities. It is a remedy in the common-law courts which is saved to suitors, but not a common-law remedy (*The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397), and hence it was held in *Chelentis v. Luckenbach*, 247 U. S. 372, 38 Sup. Ct. 501 [Bul. No. 258, p. 139], that, in an action by a seaman to recover damages for an injury caused by the negligence of a member of the crew in a common-law court, the defendant's liability should be measured by the standards of the maritime law rather than by those of the common law.

EMPLOYERS' LIABILITY — ADMIRALTY — JURISDICTION — REMEDY — *White v. John W. Cowper Co.*, Circuit Court of Appeals, Second Circuit (February 9, 1921), 271 Federal Reporter, page 423.—Calogero Falzone on May 24, 1916, was a laborer in the employ of the defendant company. On the day in question he was engaged in hauling sand by means of a wheelbarrow from a scow on the Erie Canal in the city of Buffalo. The evidence showed: That there was no landing, so that it was necessary to go from the sand scow over another scow and then by a plank to the shore; that on the morning of the accident the two scows were level but during the day as the outside scow was being unloaded it became lighter and rose out of the water; that during the afternoon heavy pile-driving machinery was loaded on the inside scow which then made a difference in the level of the boats of about four or five feet; that the gang plank was very springy with a movement up and down when the men pushed their wheelbarrows over it. Falzone in rolling a wheelbarrow of sand down the steep incline of this springy gangplank, lost control of the wheelbarrow and fell into the water, and was drowned. Charles A. White, administrator of the estate of Falzone, brought suit in admiralty for damages. He obtained a decree and the defendant appealed. The circuit court affirmed the decision, Judge Rogers saying in part:

In cases of tort, the jurisdiction in admiralty depends entirely on locality, and it is now settled that the admiralty has jurisdiction of a suit to recover damages for a maritime tort that occurs on the high seas or public navigable water, whether it be a wrongful act or a wrongful omission.

In the present case the libel is filed to recover for the death of one who was at the time of his death engaged in unloading a boat under the control of the respondent while lying in the navigable waters of the Erie Canal.

In the absence of a Federal or a State statute giving a right of action therefor, a suit in admiralty can not be maintained to recover damages for death caused by wrongful act or negligence on the high seas or navigable waters.

But such a statute exists in the State of New York, and a right of action so given is enforceable in the admiralty courts of the United States, if the facts are such as would bring the case within the maritime jurisdiction if death had not resulted.

The employer's duty as to safe place and appliances was discussed, with a conclusion that he had "failed to exercise the degree of care which the circumstances required."

As to the claim that the risk had been assumed, the court said:

When he [Falzone] accepted his employment to unload the boat, he assumed all the ordinary and usual risks and perils incident to such work. But the danger to which he was subsequently exposed was not one of the ordinary and usual risks incident to such work, but was due to the exceptional conditions which subsequently developed, and to the negligence of the master in the improper construction of the gangplank.

In view of the foregoing the decree in favor of the administrator was affirmed.

EMPLOYERS' LIABILITY—ADMIRALTY—JURISDICTION—WORKMEN'S COMPENSATION—INJURY CAUSING DEATH—*Western Fuel Co. v. Garcia, United States Supreme Court (December 5, 1921), 42 Supreme Court Reporter, page 89.*—Manuel Sousa, a citizen and resident of California, was instantly killed, August 5, 1916, while employed as a stevedore by the petitioner and at work in the hold of the *Tancred*, a Norwegian vessel, under charter to it. At the time of the accident the vessel was anchored in San Francisco Bay discharging her cargo. The industrial accident commission granted an award in favor of the widow and children, which the Supreme Court of California annulled August 6, 1917, a year and a day subsequent to the death. On August 21, 1917, the widow and children began an admiralty suit for damages against the Western Fuel Co., the employer, in the United States District Court, Northern District of California, under the State statute allowing recovery for injuries causing death. Later one Garcia, having been appointed administrator, filed an amended libel. The employer denied liability, and relied upon section 340, subsection 3, of the California Code of Civil Procedure, which requires that an action for damages consequent upon death caused by wrongful act, or negligence shall be brought

within one year. The district court awarded damages to the plaintiff, holding that the State law gave the right, but could not limit an admiralty court in applying it. The case was appealed to the circuit court of appeals, which sent the whole cause to the Supreme Court under direction. The judgment of the district court was reversed upon the grounds that the defense of the employer was valid. Mr. Justice McReynolds delivered the opinion of the court, in which he said:

It is established doctrine that no suit to recover damages for the death of a human being caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law. At the common law no civil action lies for an injury resulting from death. The maritime law as generally accepted by maritime nations leaves the matter untouched and in practice each of them has applied the same rule for the sea which it maintains on land.

In *Cooley v. Board of Wardens*, 12 How. 299, 18 L. Ed. 996. and *Ex parte McNeil*, 13 Wall, 236, 20 L. Ed. 624, the power of a State to legislate concerning subjects maritime in their nature was under discussion, and it was pointed out that as to certain local matters a State statute may grant rights which will be enforced in an admiralty court.

The inferior Federal courts on the admiralty side have enforced rights of action based upon death statutes holding they had jurisdiction as the claims grew out of torts on navigable waters and were maritime in their nature.

We have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the States to change its general features so as to defeat uniformity, but the power of a State to make some modifications or supplements was affirmed. And we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted.

As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

The California Code of Civil Procedure, section 340, prescribes one year as the period within which an action for death caused by wrongful action or negligence shall be brought. It is admitted that under the circumstances here presented suit against petitioner if instituted in a court of that State would have been barred, and we

are of opinion that the same limitation must be enforced in respect of the admiralty proceeding.

An act relating to the maintenance of actions for death on the high seas and other navigable waters, approved March 30, 1920 (ch. 111, 41 Stat. 537), gives a right of action for damages resulting from death caused by wrongful act, neglect or default occurring on the high seas beyond one marine league from the shore. It expressly directs:

"That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act. Nor shall this act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." (Sec. 7.)

In the present cause the district court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the State statute of limitation. Accordingly, its judgment must be reversed and the cause remanded there, with instructions to dismiss the libel.

EMPLOYERS' LIABILITY—ASSAULT BY EMPLOYER'S REPRESENTATIVE—EXEMPLARY DAMAGES—*Schmidt v. Minor et al.*, *Supreme Court of Minnesota (November 4, 1921)*, 184 *Northwestern Reporter*, page 964.—C. J. Minor was the owner and proprietor of the Aberdeen Hotel in the city of St. Paul. Reid Minor was the son of the owner and was employed by him in the hotel to look after his father's interests generally. His duties included the supervision of employees, and he occasionally hired and discharged help. On August 26, 1919, Emil H. Schmidt began work at the hotel as a second cook, supposing that he was to receive \$4 and work eight hours a day. The chief cook told him he was to work on a split shift of nine hours a day. He was dissatisfied and gave notice that he would not stay after the second day. Reid Minor, having learned that Schmidt was going to leave, went to the kitchen to persuade him to stay until after the State fair, which was to be held a week later. He was unsuccessful. An exchange of abusive language followed, and Schmidt was ordered to leave the premises. Schmidt left for the dressing room to change his clothes and while there Reid Minor assaulted him. Schmidt brought an action for damages against the father and son and received a judgment of \$550. Defendants appealed from an order denying a new trial, contending that C. J. Minor was not answerable for the acts charged to his son; that the instruction to the jury that they might award exemplary damages was error; and that the damages are excessive and were given under the influence of passion and prejudice.

The judgment of the district court was affirmed in the following language:

The facts outlined bring the case within the rule that a master is responsible for the torts of his servant in the course and within the

scope of his employment with a view to the furtherance of the master's business and not for a purpose personal to himself.

The rule is that if the agent or servant is liable for exemplary damages such damages may be recovered from the principal or master, even though the acts of the agent or servant were not authorized or ratified, provided of course they were done by the agent or servant in the course of the performance of the duties of his employment and were within its scope. The alignment of the States on opposite sides of the question is given in *Voves v. G. N. Ry. Co.*, 26 N. D. 110, 143 N. W. 760. It was remarked in that case that the rule permitting the award of exemplary damages in any case is an anomaly in the law with no sound reason behind it—"a hybrid between a display of ethical indignation and the imposition of a fine." Be that as it may, the doctrine is too deeply implanted in the law to be uprooted for no better reason than that it is illogical. The master selects his servants and ought to know what sort of persons he is investing with authority to act for him. A business of any considerable proportions is for the most part conducted through agents and servants, and if the principal or master can not be held for exemplary damages, in many instances it would be equivalent to abolishing that character of damages, for a judgment against an employee is often uncollectible and no punishment to the wrongdoer.

EMPLOYERS' LIABILITY—ASSAULT BY FOREMAN—WILLFUL INJURY—*Nash v. Longville Lumber Co.*, *Supreme Court of Louisiana* (April 4, 1921), 88 *Southern Reporter*, page 226.—Simm Nash acted as "top loader" in a crew loading a train with logs. His duty was to be on the top of the car being loaded and see that the logs were properly placed on the car. The foreman, on the day of the injury, was operating the loading apparatus in a careless manner, endangering the plaintiff's life. Nash complained several times. When the car was almost completely loaded plaintiff signaled to send in a big log to fill in a space left for the top log. The foreman swung a small log, that was liable to slip from the tongs, so swiftly to the top of the car that plaintiff had to jump from the car to escape being hit. Plaintiff then walked away from the car, putting on his coat and intending to look for employment elsewhere. The foreman picked up an ax and demanded that Nash return to work, which he refused to do. The foreman then struck at Nash, cutting the back of his hand, for which he sued. The trial court denied that Nash had any right of action on the ground that the foreman was acting outside the scope of his employment, but this was reversed by the supreme court (83 So. 771), and a new trial was had. On this trial the company claimed that the workmen's compensation act governed the case, but this exception was overruled and a judgment for \$4,500 damages was given the plaintiff. Defendants ap-

pealed to the supreme court, where the judgment was affirmed, the court saying in part:

The ruling [on the former appeal] was that, according to the allegations of the petition, the foreman was acting within the scope of his employment, in this sense, that he was performing in an imprudent, violent, and unlawful manner a service which he was employed to perform in a prudent, careful, and lawful manner, and that the employer was responsible for the injury inflicted by the foreman in doing unlawfully that which he was employed to do lawfully; that is, to employ laborers and persuade them to remain at their work, or to return to it if they quit. But the ruling that defendant was responsible for the injury inflicted by the foreman under the doctrine respondeat superior had nothing to do with the question whether the party injured was acting within the scope of his employment, or was performing a service arising out of or incidental to his employment, at the time he was injured. The responsibility of an employer for an injury committed by his employee while acting within the scope of his employment, under the doctrine respondeat superior, extends to injuries inflicted upon strangers as well as employees.

This was said to give a right of action under article 2315 of the Civil Code, which fixes responsibility for torts, and the action being based on this, the compensation law had no application.

EMPLOYERS' LIABILITY—ASSAULT BY SUBFOREMAN—FELLOW SERVANTS—COURSE OF EMPLOYMENT—*Petroleum Iron Works v. Bailey, Supreme Court of Mississippi, Division A (January 3, 1921), 86 Southern Reporter, page 644.*—The general foreman of the Petroleum Iron Works was one Dougherty, who had a brother also working for the iron works as a sort of subforeman. The latter and Bailey were fitting some pipes on the roof of a building. Bailey left his work momentarily and when he returned he declared that some one had moved his pipe line. Dougherty, the subforeman, said nobody had moved his pipe line, and that he, Bailey, did not know his business. An altercation resulted between the two men, and Dougherty, the general foreman, separated them. Bailey sued his employer for damages for assault and battery, recovering a verdict of \$500. The employer appealed and the decision was reversed. The opinion of the supreme court is as follows:

Under this testimony the peremptory instruction requested by the defendant in the court below should have been given. In this case the fellow-servant rule applies, and these two men were fellow servants.

Another reason why the peremptory instruction should have been given is that in this quarrel which resulted in the difficulty neither employee was acting within the course of his employment with a view to the master's business. (*Hines v. Cole*, 85 So. 199.)

Reversed, and judgment here for appellant.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—SAFE PLACE—EXPERIENCED EMPLOYEE—CONTRIBUTORY NEGLIGENCE—*Addington v. Guests River Coal Co., Supreme Court of Appeals of Virginia (September 22, 1921), 108 Southeastern Reporter, page 695.*—Some time during the year 1918, John M. Sparks secured employment as a miner with the defendant company. He was 35 years of age and in complete possession of his faculties. He was assigned to dig and load coal in the mine, and while engaged in this work in August, 1918, a large piece of rock fell upon him, inflicting injuries which caused his death. W. B. Addington, administrator, brought this action to recover damages for personal injuries to Sparks. The evidence showed that Sparks had acquired experience as a miner by working about coal mines for several years. At the time of his death he was working in a place where, as his work progressed, he constantly changed the character of the place for safety. It was his duty to place his own props. He had been supplied on his request with props necessary to support the very rock that fell and killed him. Weeks, the superintendent of the mine, and Hinton, a colored man who was hauling coal for Sparks, had warned him of the danger of the rock. Judgment was rendered in favor of the coal company, and the plaintiff appealed to the supreme court of appeals. That court affirmed the judgment of the lower court, stating that the rules concerning contributory negligence, assumption of risk, and safe place to work were applicable. The decision of the court is in part as follows:

A servant must "provide for his own safety from such dangers as are known to him, or which are discernible by ordinary care on his part, and * * * this duty is as obligatory upon him as the duty of the master is upon the master to provide for him."

"The rule that it is the master's duty to inform his servant of dangers ordinarily incident to the service * * * only applies where there is a danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he can not reasonably be expected to discover by the exercise of ordinary care."

Ordinary prudence and natural good sense brought to bear upon such a situation imperatively indicate that the miner should have removed, or propped, the rock, or withdrawn himself from danger. It may be that the superintendent did not think that the rock would fall at once, it may be that decedent concurred in that view, but he did think that it was likely that it would fall that night. With that thought in mind, he took the risk of its falling sooner, and of the danger to his life when he continued to work under a loose and unpropped slab of draw slate. He can not be relieved from the charge of contributory negligence proximately contributing to his death.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—SAFE PLACE—IN-EXPERIENCED EMPLOYEE—CONTRIBUTORY NEGLIGENCE—*Clinchfield Coal Corp. v. Hawkins, Supreme Court of Appeals of Virginia (September 22, 1921), 108 Southeastern Reporter, page 704.*—Edgar Hawkins, a young man under 21 years of age, had worked on a farm, on a railroad grade, and cutting timber previous to his employment by the appellant corporation. His employer put him under the direction of an experienced miner named Dickenson, as he had no knowledge of mine work. Dickenson assigned his work to him, which consisted of loading coal into the mine cars. About two weeks after he had been employed he was injured. On the morning of the accident he went to a place in the mine known as room 15 with Dickenson who "shot the coal" for him by placing a charge of dynamite in holes drilled on top of the coal seam next to the roof of the mine so as to spring the coal loose from the top. Hawkins stood by and saw Dickenson prepare the shot, and they both withdrew to a place of safety until the shot went off. Dickenson did not go back to investigate the result of the explosion, but assigned Hawkins to load the coal into the mine cars. Hawkins returned without instructions and had been working an hour or two when a piece of "draw slate" fell from the roof and injured him. He brought the present suit for damages and received a judgment in his favor. An appeal was taken to the supreme court, which affirmed the judgment. The basis of the decision was that Hawkins did not assume the risk because of the breach of a statutory duty on the part of the employer to notify him of the ordinary dangers incident to the work by giving him immediate personal direction. He was not guilty of contributory negligence if he had not had reasonable opportunity to understand when and how to render his place safe by the use of props. The company can not defend on the ground that it had published a rule forbidding work after a shot had been fired until the roof was safe. Employees must obey all reasonable rules, but the employee must have adequate opportunity to understand the purpose and meaning of the rules before he is bound by them.

EMPLOYERS' LIABILITY—ASSUMPTION OF RISK—VOLUNTARY OVER-EXERTION—*Hines, Agent v. Ross, Court of Civil Appeals of Texas (May 9, 1921), 230 Southwestern Reporter, page 1066.*—Seaborn J. Ross was employed as a "fire knocker." It was his duty to open and close the ash pans on locomotives while they were standing in the railroad yards. This was done by moving a lever that extended out from under the fire box of the engine. On February 21, 1919, in trying to close the ash pan he injured his back by reason of the

twisted position it was necessary for him to take. The task is a heavy one, and the fire knockers usually worked in pairs. Evidence showed that Ross knew it required the strength of two men to move the ash pan, and that he could have secured assistance on request. Ross obtained a judgment for damages in the district court of Hunt County, and the employer sued out a writ of error. The court of civil appeals reversed the decision of the lower court, stating that in its opinion it was evident that the injury to defendant in error resulted, not from any negligence on the part of the railway company, but from the voluntary overexertion of his own strength.

EMPLOYERS' LIABILITY—EMPLOYEE—INDEPENDENT CONTRACTORS—*Gammage v. International Agricultural Corporation, United States Circuit Court of Appeals, Fifth Circuit (October 18, 1920), 268 Federal Reporter, page 246.*—C. R. Gammage contracted with the defendant to paint the latter's building in the State of Georgia, and agreed to furnish the necessary tackle and equipment. Gammage and his men painted one side of the building by using a platform suspended by ropes from hooks attached to the roof of the building. When they proceeded to attach the hooks to the roof on the other side of the building, one Parker, the superintendent of the defendant, objected and required Gammage to support his platform on one end from a beam extending out from the building and on the other end from a rope extending into the building. Gammage had no rope suitable for this purpose and was provided with a rope by Parker. While using the platform rigged up in this fashion the rope supplied by Parker, which had been exposed to acid fumes, parted and Gammage and his workmen were thrown 80 feet to the ground. The contract between plaintiff and defendant contained a paragraph as follows:

Party of the second part [plaintiff] agrees to assume all liability for injury to himself, or damage to property.

Plaintiff sued for damages, and judgment was rendered in favor of the defendant. The plaintiff brought a writ of error and the decision of the lower court was reversed on the ground that Parker in changing plaintiff's mode of doing the work had become plaintiff's employer and the relation of independent contractor ceased.

The decision is in part as follows:

The argument of defendant in error is to the effect that the release from liability is valid, except as against criminal negligence, unless it is prohibited by statute. It is then asserted that criminal negligence is not alleged, and that in Georgia there is no statutory prohibition against the release relied upon. These contentions need not be denied. However, it is our opinion that the petition alleges

facts which changed the relation of owner and independent contractor to that of master and servant. Doubtless the defendant could have objected to the particular method adopted by plaintiff, without effecting a change in the contract between them; but when it assumed to require the adoption of a particular method, to the exclusion of all others, that liberty of action which the independent contractor is entitled to assert ceased to exist, and the ordinary relation of master and servant was created.

The effect of this interference, as to Gammage's employee, Slappey, who was killed in the same accident in which Gammage was injured, was before this court in the case of *International Agricultural Corporation v. Slappey*, 261 Fed. 279, where the right of recovery was upheld. Of course, Gammage's case was not then before the court; but now that it is we quote with approval the following from the opinion by Judge Grubb in the Slappey case:

"If the jury believed the plaintiff's evidence, they were authorized to find from it that Parker interfered with the means and method of doing the painting in a way that would establish the relation of employer and employees between the defendant and Gammage and his men, at least to the extent of the interference, and notwithstanding the terms of the written contract, and that to this interference the accident that killed decedent was traceable."

The judgment is therefore reversed.

EMPLOYERS' LIABILITY—EMPLOYEE—LOANED EMPLOYEE—*King v. Atchison, T. & S. F. Ry. Co.*, *Supreme Court of Kansas* (February 12, 1921), 195 *Pacific Reporter*, page 622.—C. E. King was employed by the defendant railway company and was injured while at work at a place where some new car sheds were being constructed by an independent contractor. King was a member of a crane crew which was loaned along with the crane to the independent contractor. The railway's superintendent told the crane crew to report to the contractor's superintendent and do what he instructed them to do. The latter told them to hoist a large beam or "bent" upon which several large washers weighing about 4 or 5 pounds had negligently been left. One of these washers fell off and struck King upon the head fracturing his skull and seriously and permanently injuring him. He sued the defendant railway company for damages and recovered a verdict. The railway company appealed on the ground that it had loaned King to the independent contractor and therefore at the time of the injury he was not in its employ but in that of the contractor, and that the railway company was not liable. The court held, however, that a servant who is loaned without being informed of the change of employers remains the employee of the loaning employer. In affirming the judgment in favor of plaintiff the court said in part:

An elaborate brief, virtually a treatise, is presented for defendant showing—if this court had any doubt on the subject—that a master

is not liable for an injury to his servant when the servant is loaned to another master, and that the injured servant must look to his special employer for the time being for his damages. (Note in 37 L. R. A. 83 et seq.; 1 Labatt's Master and Servant, sec. 52 et seq.)

But here we have to consider a case where the plaintiff did not know that his services were being loaned to an independent contractor. He was in the defendant's service. The defendant's superintendent, his superior, told him to go with the crane and the other men of the crane crew to the new railway sheds under construction and that a man named Swanson would tell him what to do. Like a dutiful servant, he obeyed. He obeyed his master, the only master he knew anything about. What were the relations of Swanson or Swanson Bros. to his master meant nothing to him. Whoever plaintiff's superintendent directed him to report to and obey—Swanson or another—was his properly constituted boss or overseer, and plaintiff's obedience and service was to the defendant so far as plaintiff was concerned. No intimation was given to plaintiff that he was about to change his employer, nor was anything disclosed which would have put him on inquiry. The railway company and Swanson Bros. were all one employer under the circumstances. A workman certainly does not change his employer without being aware of it. Termination of employment, like its inception, is a matter of agreement, understanding, or notice, express or implied.

By the authorities and by sound reasoning also, the complementary rule of law to the one contended for by defendant is that where a master loans his employee to an independent contractor, but the employee is not informed of that arrangement, and works for the independent contractor in obedience to his master's orders, and upon the understanding that he is still in his master's service, an act of negligence of the independent contractor causing such injury to the workman while so employed is attributable to his own master and his own master is liable in damages therefor. If the enforcement of this rule works any hardship, that is a matter of adjustment between the two masters.

EMPLOYERS' LIABILITY — EMPLOYEE — VOLUNTEER — RIGHT TO RECOVER—*Kalmich v. White*, *Supreme Court of Errors of Connecticut* (December 22, 1920), 111 *Atlantic Reporter*, page 845.—Michael Kalmich, a boy 9 years of age, while playing in the New York, New Haven and Hartford Railway freight yards, was requested by the driver of defendant White's motor truck to assist in unloading the scrap iron the truck contained. After the truck had been unloaded Kalmich rode on the truck back to White's place of business, and there the truck was reloaded. When the second load was finally unloaded Kalmich again proceeded to ride on the truck. He was sitting in the front seat between the driver and another employee, when, because his presence interfered with the steering gear, he was asked to get down and ride on the running board. While so riding the truck was driven around a corner at such a high rate of speed that Kalmich was thrown off, sustaining the injuries for which he brought this action for dam-

ages. The superior court rendered a judgment of nonsuit against plaintiff on the ground that he was a "volunteer" and not an employee of defendant. Kalmich appealed, and the decision was reversed, and a new trial ordered, although the court upheld the decision of the lower court that plaintiff was a mere volunteer. The opinion of the court on this point is as follows:

At the time of the accident the driver of the truck was on his master's business and in the ordinary course of his employment, and since there was some evidence from which the jury might have found that the minor plaintiff's injuries were caused by lack of ordinary care in turning a sharp corner at so high a rate of speed while the boy was riding on the running board, the defendants' contention is and must be that the respondeat superior rule does not apply, because the defendant owed no duty to the minor plaintiff. This claim of immunity is put on the ground that the plaintiff was a mere volunteer. A "volunteer," in this sense, is one who, without the assent of the master and without justification arising from a legitimate personal interest, unnecessarily assists a servant in the performance of the master's business. In England such a volunteer is held to be, in some respects, in the position of a servant. But the general American doctrine is that a volunteer is not at all in the position of a servant because the master has not assented to his employment. The American rule rests on the sound premise that a servant has no authority as such to change existing legal relations between the master and third persons. This being so, the minor plaintiff while riding on the truck was a mere trespasser because the driver had no authority to take on passengers.

Independently of authority, the duty to avoid injuring one whose presence and peril are known is so imperative that it must apply to trespassers; and in the performance of so elemental a duty it is hard to draw any distinctions between the degree of care which ought to be exercised toward trespassers and that which is owing to other persons. Of course, the duty to a trespasser lies within comparatively narrow limits, because the owner of property is not ordinarily bound to anticipate and provide for the presence of trespassers.

Applying these conclusions to the case at bar without expressing any opinion on the issues of fact involved, we think there was some evidence from which the jury might have found that the driver's act in directing the minor to ride on the running board placed him in a position of peril known to the driver, that the driver in afterward operating the car on his master's business did not use ordinary care to avoid injuring the minor plaintiff, and that the minor plaintiff himself was in the exercise of such care as might reasonably be expected from a boy of his age and experience.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—CONSTITUTIONALITY OF STATUTE—NEGLIGENCE PER SE—DEFENSES—MISREPRESENTATION OF AGE—*Terry Dairy Co. v. Nalley*, Supreme Court of Arkansas (December 13, 1920), 225 Southwestern Reporter, page 887.—Charles Nalley, a boy under 14 years of age, was employed by

the Terry Dairy Co. to drive a delivery wagon drawn by a mule. While engaged at this work he was thrown from the wagon by a sudden lunge forward of the mule and his right foot and leg caught in the spokes of a wheel, causing his leg to be broken. He sued for damages and recovered a verdict of \$1,000. The employer appealed, declaring that the child labor law forbidding the employment of children under 14 years of age was unconstitutional, that the unlawful employment of a minor child under 14 years is not negligence per se, that it was wrongfully denied the defenses of contributory negligence and assumption of risk; that when it employed Nalley he represented his age as being over 16 years. The court, after considering each of these arguments in order resolved them all against the employer, but reversed the decision of the lower court and ordered a new trial on the ground that the employer was improperly refused permission to introduce evidence as to the boy's age. The opinion is in part as follows:

It is first contended by counsel for the defendant that the judgment should be reversed because the act under which the suit was brought is unconstitutional. Child labor laws have been enacted in most of the States and in Canada. They have been uniformly upheld as being within the police power of the State, and it has been said that the legislative judgment in regard to such regulations will not be interfered with by the court. It is specially insisted that the present act is unconstitutional because it prohibits children under 14 years of age from engaging in any occupation, except that during the school vacation children under 14 years may be employed by their parents or guardians in occupations owned or controlled by them. The constitutional guaranty of the liberty of contract does not apply to children of tender years, nor prevent legislation for their protection. Therefore we are of the opinion that the statute is not unconstitutional.

It is next contended that the trial court erred in holding that the employment of a minor under 14 years of age is contrary to the provisions of section 1 of the act and constituted negligence per se. The authorities on this point are in decided conflict. It has been said that the violation of a statute forbidding the employment of children under a certain age, or their employment at certain kinds of work or without complying with certain conditions, is held by the weight of authority to be negligence as a matter of law, in an action by the child for injuries received during the course of the employment.

We think that the view that the unlawful employment is negligence per se is in accord with the better reasoning on the subject, and we adopt it.

Again, it is insisted that the judgment should be reversed because the defenses of assumption of risk and of contributory negligence are still open to the defendant, and that on this account the court erred in directing a verdict for the plaintiff. There is great conflict in the authorities on these points, but we are inclined to the view that the defenses of assumption of risk and of contributory negligence are not available to the defendant.

As we have already seen, the evident purpose of the statute is to protect the lives and limbs of children by prohibiting their employment altogether under a certain age and by prohibiting their employment in certain occupations under another prescribed age and in regulating their employment in other occupations under a designated age. If the defenses of assumed risk and contributory negligence were still available to the defendant, the purpose of the statute would be in large measure defeated.

It is next contended by counsel for the defendant that it offered to prove that the plaintiff misrepresented his age to the defendant at the time he was employed and that such testimony was competent. They contend that the representation of the plaintiff that he was over the prescribed age would absolve the defendant from liability while the child was at work for it.

We take the view that the right of the child to maintain an action for injuries under the statute is not affected by the fact that he obtained employment by misrepresenting his age. Section 1 of the act under which the case at bar was brought contains an absolute prohibition against the employment of children under 14 years of age. They were considered by the legislature as being too young and inexperienced to work for anyone except their parents and guardians during the vacation. The prohibition extends to all children within the prescribed age. The good faith of the employer or his knowledge of the age of the child is not material. The defendant was by the statute permitted to employ only children above the age of 14 years. It must ascertain at its peril that the boys that it employs are of the class that it may lawfully employ.

For another reason, however, the judgment must be reversed and the cause remanded for a new trial. The defendant offered to prove that the plaintiff represented to it that he was 16 years of age at the time he was employed and that it would not have employed him unless it had thought he was over 14 years of age. This testimony was competent. The plaintiff's right to recover depended upon the fact that he was under 14 years of age. His father testified as to his age, and it was competent for the defendant to introduce in evidence his declaration as to his age.

Therefore, we are of the opinion that the excluded evidence would have tended to contradict the evidence adduced by the plaintiff at the trial as to his age. The age of the plaintiff was material, and the exclusion of testimony which tended to contradict the evidence adduced by him on that point was necessarily prejudicial.

For the error in excluding the evidence offered by the defendant as to the plaintiff's age, the judgment must be reversed, and the cause will be remanded for a new trial.

EMPLOYER'S LIABILITY—EMPLOYMENT OF CHILDREN—HOURS OF LABOR—FORBIDDEN EMPLOYMENTS—PROXIMATE CAUSE—*Birmingham News Co. v. Andrews*, Supreme Court of Alabama (October 14, 1920), 87 Southern Reporter, page 168.—Herman Andrews, a boy under 16 years of age, was employed by the Birmingham News Co. in

its publishing and printing plant. His duty was to pull papers from the press or from the packer. After being engaged in play with several boys he went to his work at 2 o'clock in the morning on the day in question. A Mr. Mongol, another employee, continuing the play, attempted to seize him. Andrews avoided him but in so doing he stumbled over a bench and fell through a delivery chute severely injuring his ankle. He brought suit for damages for personal injuries, setting up the child labor law as negligence on the part of the defendant company. Judgment was rendered in favor of the plaintiff and the defendant appealed. In reversing the decision and sending the case back for a new trial, the court through Judge Somerville said in part as follows:

The complaint charges a violation by the defendant company of a provision of section 2, as italicized below, of the child labor act (Gen. Acts 1915, p. 193), which is as follows:

"No child under sixteen years of age shall be employed, permitted or suffered to work in any gainful occupation except agriculture, or domestic service for more than six days in any one week, or more than sixty hours in any one week, or more than eleven hours in any one day, or *before the hour of six o'clock in the morning, or after the hour of six o'clock in the evening.*"

These several inhibitions are obviously intended to protect the physical health of children against the evils of excessive and unseasonable hours of work at an age when they are unfit to bear such burdens, and the prevention of physical injuries in occupations and at places not inherently dangerous to children within the prohibited age was not within the apparent purpose of the enactment.

Other provisions of the act inhibit absolutely the employment of children under 16 years of age in occupations and at places which are regarded as inherently dangerous or hurtful to them. Their presence at such places being forbidden and unlawful, an employer is held liable for any injury suffered by a child in the course of its employment, whether such injury is the result of performing the service, or of contact with some agency associated with the employer's business, or inherent in its environment.

Injuries from such sources it is the purpose of the statute to prevent, and they are regarded as the proximate result of the wrongful employment whether suffered at work or in irrelevant and forbidden play. Many authorities are cited in brief of counsel which support and establish this view.

Several cases involving similar legislation were then discussed, and Judge Somerville continued:

We have thus reviewed at some length the scope and application of those statutory provisions which forbid the employment of young children in certain pursuits and at certain places which are regarded as inherently dangerous to them, in order to emphasize the distinction which we think must be recognized as between such pursuits and places and those in and at which such children *may be lawfully em-*

ployed, with regulations and restraints only as to the periods and hours of their employment.

If a newspaper mailing or circulation department were a forbidden place for the employment of children, we think it would at least be a question for the jury to determine, upon the several aspects of the evidence here exhibited, and under the authorities noted, whether or not the unlawful employment of plaintiff was the proximate cause of his injury.

But defendant's newspaper plant, so far as it is here involved, was not a place of danger, and was not a forbidden place under the provisions of the child labor act.

Although the employment of a child in violation of the statute is negligence per se, the authorities all hold, and correctly so, that civil liability does not follow unless the child suffers some injury which is, in a legal sense, the proximate result of the violation of the statute, and therefore within its protective purposes. If the violation of the law, whether statutory or common, furnishes merely the causal condition attendant upon the injury suffered, and is not an indispensable agent cooperating directly in its production, it is not the proximate cause of the injury, and there is no liability. This distinction was carefully stated in the case of *Garrett v. L. & N. R. R. Co.*, 196 Ala. 52, 71 So. 685.

If, as plaintiff's testimony tends to show, defendant's servant Mongol was playing with plaintiff, and slipped up on him and grabbed him, just as he was going to work, causing him to stumble backward into the chute in the effort to escape; or if, as defendant's testimony tends to show, plaintiff in play intentionally jumped into the chute, in either case that act and the resulting injury can not, upon sound principle or sound logic, be referred to defendant's breach of the statute as their proximate cause.

Judgment was reversed and the cause remanded.

EMPLOYERS' LIABILITY—EMPLOYMENT OF CHILDREN—WORKMEN'S COMPENSATION—"MINE"—*Mangus v. Proctor-Eagle Coal Co.*, Supreme Court of Appeals of West Virginia (February 15, 1921), 105 Southeastern Reporter, page 909.—Mangus was a minor under 14 years of age and was injured while engaged in switching loaded coal cars in defendant's coal mine. His work required him to work on and about the tippie of the mine. The law of West Virginia prohibits the employment of any boy under 14 years of age in any coal mine. He brought suit for damages and recovered a verdict of \$3,000, which the court set aside on the ground that the case was covered by the workmen's compensation law. The workmen's compensation law expressly excludes from its provisions minors who are unlawfully employed, but the court held that in working on and about the tippie of the mine Mangus was not working in the mine, and therefore the law prohibiting his employment in a coal mine did not apply. Mangus appealed and the decision was reversed and

a judgment was rendered on the verdict in his favor. The opinion, in part, is as follows:

In scope, the statutory definition of "mine" clearly includes the incline on which the plaintiff was working when hurt. In express terms it embraces the "drifts or incline planes connected with excavations." Drift and incline plane are used in the same general sense. Each is the way provided for bringing the coal from the mouth of the mine to the tippie. The cars may drift by gravity or they may be drawn up an incline plane, or they may reach the tippie partly by drift and partly by draft. Ordinarily, the cars go down grade from the mouth of the mine to the tippie.

This interpretation of the statute results in the conclusion that the ground upon which the court set aside the verdict is untenable. As the employment of the plaintiff was unlawful, the defendant's subscription to the workmen's compensation fund afforded it no immunity from liability for injury to him by its negligence. In the case of an unlawful employment, neither party to the contract is protected by the workmen's compensation act. (Code, c. 15P, sec. 9.)

The unlawfulness of the employment and injury of the employee in the course thereof make out a prima facie case of injury by negligence of the employer. There is no claim in argument that such case was overcome or repelled by proof, and we perceive nothing in the evidence that precludes right of recovery on the ground of such negligence.

Upon these principles and conclusions, the judgment complained of will be reversed, the verdict reinstated, and judgment for the plaintiff rendered thereon.

EMPLOYERS' LIABILITY—HAZARDOUS OCCUPATIONS—INHERENT RISKS—CONDITIONS OF EMPLOYMENT—*Consolidated Arizona Smelting Co. v. Egich, Supreme Court of Arizona (May 3, 1920), 199 Pacific Reporter, page 132.*—John Egich was employed as a miner by the defendant company. He was working in defendant's mine on February 8, 1918. While standing on a grizzly breaking rocks with a hammer, as instructed, the head of the hammer flew off the handle and struck his right foot, breaking a toe. The grizzly consisted of railroad rails placed parallel to each other and about 6 inches apart. The sudden shock caused his foot to slip, and he fell between the rails, wrenching and twisting the muscles, ligaments, and bones of his foot and ankle. Egich brought an action against the defendant and was awarded judgment. The defendant appeals from the order overruling a motion for a new trial. The supreme court reversed the decision, with directions to grant a new trial because of the erroneous instructions given to the jury on the question of damages. The supreme court overruled many of its former decisions in holding that liability arises when injury or death is caused by an accident due to a condition or conditions of the occupation, and that

the accident need not necessarily happen by reason of an inherent risk or danger, but that it may arise from the manner in which the business is carried on. As stated by Judge Ross, who delivered the opinion of the court, the company's proposition was understood to be:

The proximate cause of the accident being the negligence of defendant in furnishing plaintiff with a defective hammer to do his work, the injury arose from an ordinary risk and not an inherent or hazardous risk, it being the contention that the employers' liability law covers only the latter kind of risk; that is, risks that are inherent in the occupation.

Judge Ross also quoted from the defendant's brief, as follows:

Before an injured workman can recover under the employers' liability act it must affirmatively appear that the accident causing the injury was due to an inherent risk or hazard of the occupation, and was unavoidable by the workman. This excludes accidents due to the employer's negligence.

He then said:

Section 7, article 18, of the Constitution is the fountainhead and source of the employers' liability law. It creates and defines a new liability of the employer to the employee. It names and points out the circumstances and conditions under which the liability may arise. It defines the rights that may accrue to an injured or killed employee, and directs the legislature to enact a law providing a method of procedure for the enforcement of those rights.

If the relation of employer and employee exists, if the latter suffers injury or death in a named hazardous occupation caused by an accident due to a condition or conditions of the occupation, and not the negligence of the employee, all of the constitutional facts are present, and constitute a right of action in favor of the employee against the employer.

The legislative statement that in the occupation named the means used and provided for doing the work are dangerous and hazardous, and the risks and hazards therein inherent and unavoidable, may be taken for granted, but at that it is not a declaration that the accident causing the injury or death must have occurred from an inherent danger, or have been unavoidable, before a recovery could be had. The definition of the right is that the injury or death must have been "caused by an accident due to a condition or conditions of the occupation." The legislature had no power to add to or take from this definition.

We are of the opinion that the rights of the employer and employee under this law, when submitted to a court for adjudication, must be determined and settled in accordance with the constitutional definition; that is, the injury or death must have been "caused by an accident due to a condition or conditions of the occupation" and "shall not have been caused by the negligence of the employee killed or injured."

It follows, therefore, that the negligence of the employer in failing to furnish the employee a safe place to work, or safe tools and implements with which to work, is not the ground upon which his liability is based, inasmuch as he is liable even though he may furnish the employee a safe place to work and safe tools and implements with which to work, if, notwithstanding, the employee is injured or killed by an accident due to a condition or conditions of the occupation. In the former case accidents will be more frequent; more employees will be killed or injured, and the business will have to bear a greater burden because of the negligence, but that does not change the principle upon which the right of action is based.

The condition or conditions that cause the accident resulting in injury or death may be inherent in the occupation, or they may arise from the manner in which the business is carried on. The conditions of the occupation in which the employee does his work involves, not only the place he works, but the tools with which he works, the one as much as the other. He can not perform his work without tools, nor without being in the place assigned to him.

The employer can not negligently create nor permit a condition, and, when an accident results therefrom, plead it as a bar to the action, any more than he can claim exemption because the conditions were perfect. We conclude that the contention of defendant that the injury must have been caused by a risk or hazard inherent in the occupation before a recovery could be had is without merit. And it is equally clear the defendant can not avail itself of its own negligence to defeat the action.

The only thing that will defeat the action and absolve the employer from liability is the negligence of the employee. If the injury or death be not caused by an accident due to a condition or conditions of the occupation, but is caused by the negligence of the employee, he can not recover, nor can his personal representative or beneficiary. The only risk or hazard the employee assumes is his own negligence.

EMPLOYERS' LIABILITY—INJURY TO THIRD PERSON—ACTS OF STRIKE GUARDS—SCOPE OF EMPLOYMENT—*McInerney v. United Railroads of San Francisco et al.*, District Court of Appeal of California (December 29, 1920), 195 Pacific Reporter, page 958.—The employees of the United Railroads of San Francisco went on a strike. The company refused to accede to the demands of the trade-unions and hired other workmen to operate the cars. Much violence was indulged in, and persons were assaulted on both sides. Often cars would be attacked and stones and bricks tossed through the windows, smashing the glass, injuring passengers and employees, and otherwise doing damage. To protect itself the company engaged patrolmen and guards, who either rode on the cars or moved along the street in their vicinity for the purpose of protecting the property of the company and the crews who were running the cars. These men were all under the direction of a Mr. Fitch, who was foreman of

the stables and garages of the company. Acting under instructions of Mr. Ewing, his immediate supervisor, who was superintendent of construction and equipment, Mr. Fitch sent out an automobile load of guards and patrolmen to a place on Haight Street where an assault had been made on one of the company's cars. His instructions to these men were that they were "to do patrol work on the street, to try and protect the property in any way they could." They proceeded to Haight Street, where McInerney was walking with several friends on their way to the rooms of some of their number for a social evening. They drew up to the curb opposite McInerney and assaulted him by striking him over the head. He was put into the automobile and taken to the stables, where he succeeded in calling to some policemen. He had been severely battered up and injured on the way to the stables. The men who brought him to the stable accused him of throwing a brick through the window of a car, and at Mr. Fitch's request he was put in jail after having been treated at a hospital. When his case came up it was found that no complaint had been lodged against him, and the company's attorney who was present in court said he was not ready with his proofs and asked for a continuance of one week, which was granted, and when the case came up again another continuance was granted. Later the case was dropped because of no complaint and McInerney proceeded to sue for damages of assault and battery and false arrest by defendant's employees. He was awarded a verdict of \$2,000 damages and \$500 exemplary damages and the company appealed. In affirming the decision with a modified judgment the court of appeal spoke in part as follows:

The first contention urged by the appellant is that the evidence is insufficient to show that the United Railroads ever authorized the occupants of the machine or any of them to assault or imprison the plaintiff. We are unable to sustain this contention. The time of the duration of the railroad strike, which had been in progress for some 11 days prior to the date of the plaintiff's injuries, was, as we have said, a time of violence, during which the employees of the railroad were being frequently attacked, and its cars were being fired upon and struck with stones and other missiles, to their great damage, in some cases well-nigh destruction. In resisting a strike attended with violent acts of this character it became necessary for the railroad to employ many persons to act as patrolmen and guards for the protection of their nonstriking employees and such of the traveling public as might have the hardihood to become its passengers, and of their cars and other property from destruction. It may be said incidentally that the employment of these persons for the above express purposes had also as its more or less essential purpose that of discouraging and rendering ineffectual the strike itself. Under these conditions and with these objects in view the president of the corporation issued the general order to his subordinates above set forth. The object of thus dispatching this body of men to the scene of existing or impending turmoil is a matter of easy inference. They were

sent there by Mr. Fitch, under the most favorable statement of his instructions as testified to by himself, "to do anything they reasonably could to stop windows from being broken, crews pulled off; to help them out." It can not be conceived that under these instructions those men arriving at the scene of disorderly action would be expected by their superior to confine themselves to merely remonstrating with the strikers or their sympathizers, to the use of moral suasion as the most reasonable means of preventing violent attacks upon the railroad's employees or property. The objects of their engagement and presence at the point of disturbance could not thus have been attained. * * * They proceeded, therefore, to take him [McInerney] into custody. It is true that they were utterly mistaken in regarding him as one of the strikers or as one of their sympathizers or allies in the attack. It is true also that their methods of achievement of their object and their method of arrest were ruffianly and inexcusable, but they were, nevertheless, acting within the scope of their authority regardless of the fact that they were mistaken as to the identity and guilt of their victim.

So in the case at bar we think that if these employees of the railroad had come upon the plaintiff while in the act of stoning their employer's cars, or immediately thereafter, they would have been authorized by the nature of their employment to put a stop by force, if necessary, to his pernicious activity, and take him into custody for the purpose of turning him over to the authorities; and, this being so, the fact that they were mistaken in his identity as a wrongdoer does not affect their employer's liability for their acts.

What we have said above applies also to the appellant's next two contentions, since we are satisfied that the evidence sufficiently shows that the arrest and detention of the plaintiff by his captors at Scott Street, and by the police officers within the appellant's quarters on Turk Street, were authorized and ratified by the action and direction of the appellant's foreman, Mr. Fitch, under the belief that the plaintiff had been guilty of stoning the cars of his employer.

It is to be remembered that this appellant is a corporation, and while it is undoubtedly the law that a corporation may become liable in exemplary damages where an act of one of its employees, done in ill will or in actual malice or under circumstances of fraud or oppression, is done with the knowledge or under the express direction of its superior officials, having power to bind the corporation, or, if done without such knowledge or direction, is thereafter ratified by such officials, with full knowledge as to the willful and malicious quality of such acts, no such conditions are presented by the evidence in the case at bar.

It follows that the judgment must be modified by striking therefrom the specific portion thereof which awards exemplary damages to the respondent.

This brings us to the final contention urged by the appellant, which is that, since the jury by its verdict in favor of the appellant's codefendant Fitch exonerated the latter from liability for the injuries of which the plaintiff complains, it must necessarily be held to have also exonerated the appellant as the employer of Fitch from liability for his acts as its employee. The defendant Fitch, in sending forth patrolmen and guards, who wrongfully assaulted and

falsely imprisoned the plaintiff, was acting under the general directions of the superior officials of the appellant, which directions, under the circumstances attending their issuance, were broad enough to contemplate the use of force and violence if necessary in repelling the assaults of strikers or their sympathizers upon those operating the appellant's cars, or in arresting such of these as were injuring or destroying its property. In carrying into effect these instructions Fitch and his underlings were but obeying orders, and if they exceeded their duty in so doing through a mistaken excess of zeal their principal would be liable not merely under the doctrine of respondeat superior, but as a joint participant in their wrongful acts.

The judgment will be modified by striking therefrom the item \$500 assessed as exemplary damages, but as to the other items thereof will be and is hereby affirmed; each party to pay its costs upon this appeal.

EMPLOYER'S LIABILITY—INJURY TO THIRD PERSON—NEGLIGENCE OF EMPLOYEE—*City of Indianapolis v. Lee, Appellate Court of Indiana (October 28, 1921), 132 Northeastern Reporter, page 605.*—Sam Neff was in the employ of the city of Indianapolis as a truck driver. He had been instructed by his employer not to permit any person to operate the truck without permission in writing. On April 26, 1918, he was ordered to take some freight to another part of the city. While executing that order he came upon one Claude Merrill, who was having trouble with his automobile. Neff in attempting to help Merrill told Merrill to drive the city truck and he took Merrill's car and proceeded up the street. One of the wheels of the city's truck ran into a depression in the street. This caused the truck to turn and run up on the sidewalk striking and injuring Mrs. Pearl Lee. She brought this suit for damages and judgment was rendered in her favor.

The city appealed, but the appellate court affirmed the judgment. The court said that it was clear that the relation of master and servant did not exist between the city and Merrill and therefore the city could not be held liable for Merrill's conduct. But Neff, in violation of orders, directed Merrill to operate the truck, and while working together, Merrill under the immediate supervision and control of Neff, they were doing the work which the master had intrusted to Neff. Upon these facts the court held the city to be liable for the negligence of Neff.

EMPLOYERS' LIABILITY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ORDINARY CARE—*Egan v. Trenton Gas and Electric Co., Supreme Court of Missouri (June 23, 1921), 233 Southwestern Reporter, page 239.*—Samuel Egan had been in the employ of the defendant company for 10 years. He had assisted in the building and construction

of defendant's electric supply system. On the day in question Egan was acting under orders of the president of the company to "change the leads entering the old electric plant to the new oil engine house." He was working on a tower through which the distributing wires carried the current of electricity generated in the plant. During the morning Egan had caused the current to be cut off. Before going to his midday lunch he had the current turned on again. In the afternoon he resumed his work without cutting off the current or giving orders to others to cut it off. While attempting to put a wire through a hole in the wall of the tower the dead wire which he held came in contact with a live wire and as a result he was instantly killed. Ida Egan, widow of deceased, brought a suit to recover damages for the death of her husband. The suit resulted in a verdict for \$8,000, from which the defendant company appealed. The supreme court reversed the judgment of the lower court on the ground that Egan was guilty of contributory negligence. The court held that "while the character of the defendant's business was hazardous and a high degree of care was required in conducting it, this did not lessen the duty of the deceased to exercise ordinary care," and after reviewing some authorities the court concludes:

The deceased knew of his danger; he was not instructed to do the work as he did it, and the inevitable conclusion is he neglected to take a reasonable and sensible precaution for his own safety, and by his neglect he lost his life. This, without more, is sufficient to show that the deceased was guilty of neglect as a matter of law and hence the case should be reversed.

EMPLOYERS' LIABILITY—NEGLIGENCE—EMPLOYEE GOING TO WORK—TRANSPORTATION BY EMPLOYER—*Phillips v. Armour & Co., Supreme Court of Kansas (March 12, 1921), 196 Pacific Reporter, page 245.*—Fred Phillips was employed by Armour & Co. Because of a street-car strike the company undertook to transport its employees to its plant. To do this it hired a motor truck from the A. T. Powell Transfer Co., which also furnished the chauffeur. In collecting employees the truck arrived at Phillips' home at 5.45 a. m.—before daylight—and was then already crowded. Phillips was forced to sit on the tail gate with two other employees. While the truck was being driven over rough streets at a dangerous rate of speed the chains supporting the tail gate broke and Phillips was violently thrown to the pavement and seriously injured. He brought suit for damages on the theory that the driver of the truck was in fact defendant's employee. Judgment was rendered in favor of Phillips, and the defendant appealed to the Supreme Court of Kansas on the ground that the truck was owned and operated by an inde-

pendent contractor and therefore it could not be held liable. The decision in favor of Phillips was affirmed. The opinion, in part, is as follows:

There was manifest negligence in the transportation of the plaintiff to his work, and the question which divides the parties is, What was the duty and obligation of the defendant towards him? Can the defendant escape liability for the negligence because it had employed the transfer company to transport its employees to their work? The company assumed the responsibility of carrying the plaintiff and other employees to and from their work, and it provided the instrumentalities by which they should be carried. The plaintiff had nothing to do with the selection of the persons who drove the vehicles, nor of the instrumentalities of transportation. These selections were made by the defendant. While the vehicles and the drivers were furnished to the defendant by the transfer company, the latter had no control over either from the time they went to the packing plant until they returned after the work was done. Under the arrangement the drivers reported to the defendant, and it gave them instructions as to the loading and transportation of employees. Upon arrival at the plant the foreman of the defendant took charge of the vehicles, marked them with the name of the defendant, and gave the drivers orders what to do and where to drive. The drivers were therefore the agents of the defendant, and the vehicles were its instrumentalities, and, having thus assumed the duty of carrying the employees to their work, the latter had the right to assume that the company would select instrumentalities that were reasonably safe, and that the drivers would exercise reasonable care in carrying out the duties assumed by the company. Having taken upon itself the responsibility of the transportation, the defendant owed its employees the duty to inspect the instrumentalities used in it, and to see that the traffic was as carefully conducted as if the vehicles had been owned by it or been driven by its foreman or other employees. The relation of master and servant existed, and the defendant could not rid itself of responsibility for the safety of employees because the vehicles in which they were carried were owned by another.

EMPLOYERS' LIABILITY—NEGLIGENCE—OBLIGATION OF EMPLOYER TO CARE FOR SICK EMPLOYEE—*Carey v. Davis et al.*, *Supreme Court of Iowa (January 12, 1921)*, 180 *Northwestern Reporter*, page 889.—The plaintiff, Carey, was employed as a farm laborer by the defendants and was detailed to work in an open gravel pit. While working in the gravel pit he was overcome by heat and fainted. When he was revived he resumed his work, but he again had an attack of the same nature, and while in an unconscious condition defendants had him placed in an open wagon box. He was left to lie in the wagon for four hours, when he sufficiently recovered to make his way home with great difficulty. He became sick, was confined to his bed, and wholly incapacitated for labor. He sued defendants,

charging them with negligence in their care of him in his sick and helpless condition, alleging that their careless treatment aggravated his sickness. The district court sustained a demurrer to the complaint, and plaintiff refused to amend, and when judgment was entered against him he appealed. In reversing the order sustaining the demurrer and remanding the case for trial the supreme court said in part:

There is no allegation or claim that the faintness or prostration of the plaintiff was caused or in any manner produced by the neglect or misconduct of the defendants. So far as the pleading goes, the cause of his ailment is entirely unknown, a misfortune for which damages are recoverable from no one. If there be any failure of legal duty alleged, it is in the charge that plaintiff, being stricken down and rendered helpless while in the defendants' service, and upon their premises and in their presence, it became their duty to render him the needed aid and relief. Did such legal duty arise under the alleged circumstances? It is unquestionably the well-settled general rule that, in the absence of any agreement or contract therefor, the master is under no legal duty to care for a sick or injured servant for whose illness or injury he is not at fault. Though not unjust in principle, this rule, if carried unflinchingly and without exception to its logical extreme, is sometimes productive of shocking results. To avoid this criticism there is a tendency of the courts to hold that, where in the course of his employment a servant suffers serious injury or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the master, if present, is in duty bound to take such reasonable measures or make such reasonable effort as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency.

It is argued in his behalf that even if it is held that defendants would otherwise not be liable, yet, having assumed to pick him up in his unconscious condition and remove him from the place where he had fallen, it then became their duty to use reasonable care in so doing not to aggravate his misfortune, and for failure in this respect with resulting injury to him an action for damages will lie. This proposition is quite in accord with the reasons and principles which underlie the law of negligence. One person seeing another in distress may or may not be under legal obligation to afford him relief, but, if he does undertake it, he is, of course, bound to act with reasonable prudence and care to the end that, if his effort be unavailing, it shall at least not operate to increase the injury which he seeks to alleviate.

The judgment below is reversed, and cause remanded, with direction to the district court to overrule the demurrer.

Reversed and remanded.

EMPLOYERS' LIABILITY — NEGLIGENCE — VOLUNTEER — REASONABLE CARE—*Rook v. Schultz et al.*, Supreme Court of Oregon (May 24, 1921), 198 Pacific Reporter, page 234.—Antone Rook acting as a

volunteer, was assisting a driver of the plaintiff company in distributing milk. The facts appear to be that Rook was standing on the running board when the driver made a sudden turn from one street into a cross street without warning the plaintiff of his intention, with the result that Rook was thrown to the ground and badly injured. The lower court allowed a recovery from the employer, and the supreme court upheld the judgment. The court quoted from the decision in the case of *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141, 57 N. W. 459, which laid down the doctrine as follows:

"But if, after discovering that such volunteer has placed himself in a position of danger, even through his own negligence, the servants fail to exercise reasonable care to avert the danger, the master will be liable. * * * This liability does not rest on any contract obligation, but on the general duty not to inflict a wanton or willful injury on another. As respects this duty, a volunteer can not occupy a less favorable position than a trespasser."

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—ASSUMPTION OF RISK—ENGINEER INJURED BY MAIL CRANE—*South-eastern Pacific Co. v. Berkshire*, *United States Supreme Court* (January 3, 1921), 41 *Supreme Court Reporter*, page 162.—W. A. Linder was employed as an engineer in operating a passenger train from El Paso, Tex., to Deming, N. Mex. While leaning out of the cab of the engine to examine the main driving pin, which had been getting hot, he was struck on the head by a mail crane and rendered unconscious. A short while later he died, and Berkshire, the administrator of his estate, brought this action against the railroad company under the Federal employers' liability act to recover damages. Judgment was rendered in favor of the plaintiff, and the railway company brought a writ of certiorari to the Supreme Court. In reversing the decision the court held that the railway company had not been negligent in maintaining mail cranes along its road, and that deceased Linder had assumed the risk of the injury which resulted in his death.

Mr. Justice Holmes delivered the opinion of the majority of the court. After speaking of Linder's experience on the road, and his presumed acquaintance with conditions, the structure and uses of mail cranes were considered, for which the Post Office Department fixes a standard for the sake of uniformity. He then said:

The railroad is required and presumed to know its duty in the matter, and it would seem that the court ought to be equally well informed. It can not be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case.

It would be impossible to use the contrivance with the absolute certainty that no accident would happen if a man put his head out

at the wrong moment. It is equally impossible to condemn railroads as wrongdoers simply for adopting the device with the conditions imposed by the Post Office Department. On the common law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expense of insurance upon those who use it. It is going very far to leave it open to a jury to attach liability in tort to a system by which the end of the arms of postal cranes come to fourteen inches from the car.

An experienced railroad man can not be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train. The probability is that the distance of the crane was somewhat greater than the minimum that we have assumed, but that we lay on one side. Confining ourselves to the case of postal cranes we are of opinion that to allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law. (*Butler v. Frazee*, 211 U. S. 459, 465-467, 29 Sup. Ct. 136, 53 L. Ed. 281; *Kenney v. Meddaugh*, 118, Fed. 209, 55 C. C. A. 115.)

Judgment reversed.

In a strong dissenting opinion, in which Justices Day and Pitney joined, after citing authoritative cases on assumption of risk, Mr. Justice Clarke continued in part:

It is "a strong thing" to hold, on the indefinite evidence in this record, which I have attempted accurately to detail, that a mail crane arm is such a permanent and conspicuous source of danger to a freight engineer as to bring this case within the scope of the decisions cited, and it is a yet stronger thing to reverse the finding of a jury properly instructed, and the judgments, on a question of fact, of two State courts, which the record shows acted with full appreciation of, and with a desire to follow, the decisions of this court with respect to assumption of risk.

In practice certainly, and I think in theory, the decision of the court in this case will introduce a new and unfortunate standard into the law of assumption of risk, which will confuse the doctrine as it has been worked out in the cases cited, will render railway companies careless in placing obstructions near to their tracks, and will result in the injury and death of many innocent and careful men, if the effect of it is not promptly corrected by the State and National statutes, and therefore I can not consent to join in it.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—DAMAGES—CHANCE OF PROMOTION—*Payne, Agent, v. Allen, Court of Civil Appeals of Texas (May 24, 1921), 231 Southwestern Reporter, page 148.*—T. O. Allen was a locomotive fireman killed by the derailment of the engine that was hauling an interstate train on the Texas and Pacific Railway. Mrs. Clara Allen, administratrix, brought

this action under the Federal law for damages resulting to her as widow and to her children by reason of the death of Allen. Judgment was rendered in favor of Mrs. Allen and the defendants appealed. The appellants assigned as error the fact that Allen was allowed to prove in the trial over objection that the deceased was in line of promotion from fireman to engineer. The appellants stated that "the chance of a locomotive fireman 45 years old to a promotion to a position with a better salary is too speculative, remote, and uncertain to be the basis for increasing the damages to be found by the jury caused by his death." The court of civil appeals upheld the lower court, saying that this evidence would be permitted in Texas and it should not be refused simply because the action arose under a law of Congress.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—EXPRESS MESSENGER—WAIVER—*Wells Fargo & Co. v. Taylor*, *Supreme Court of the United States* (December 6, 1920), *41 Supreme Court Reporter*, page 93.—*Wells Fargo & Co.* is a Colorado corporation organized for the purpose of conducting an express business. It entered into a contract with the St. Louis & San Francisco Railroad Co. by which it was given the exclusive privilege of maintaining an express service over the lines of the railroad. The railroad was to provide suitable cars for carrying express packages, to attach them to passenger trains and to permit employees of the express company to accompany express matter as passengers. The express company among other things agreed "(c) to assume all risk and damage to its agents and employees while engaged in its business on the trains or property of the railroad company." It also agreed to indemnify the railroad company for all claims for damages suffered by its agents. When the express company employed Taylor as its messenger it made him sign a contract in which he agreed not to hold the express company or the railroad company liable for any injuries sustained by him while in its employ and that he assumed every risk incident to his employment. The car in which Taylor was traveling as a messenger in charge of the express company's property became derailed and he was injured. He sued the railroad company in Mississippi for damages and recovered a judgment for \$4,000. The express company after having been refused permission to be made a defendant in that suit brought this action in the Federal court for an injunction to prevent Taylor from recovering this judgment, because if he did so it would have to indemnify the railroad, and in view of the contract with Taylor this would be inequitable and unjust. The district court granted the injunction and upon appeal the decision was reversed by the

circuit court of appeals. The express company appealed and the decision was again reversed and the injunction made effective and final. The opinion of the court as expressed by Justice Van Devanter is in part as follows:

Does the employers' liability act affect the validity of the messenger's agreement?

The act provides that "every common carrier by railroad" shall be liable in damages for the injury or death of any of its employees occurring while it is engaged and he is employed in interstate commerce and resulting in whole or in part from the negligence of any of its officers, agents, or employees, or, from any defect or insufficiency, due to its negligence, "in its cars, engines, appliances, machinery, track, roadbed," etc.; and in section 5 it declares that any contract whereby a common carrier exempts itself from "any liability created by this act" shall to that extent be void.

In his declaration in the State court Taylor did not claim that he was in the employ of the railroad company, and his judgment was not obtained on that theory. Here it is shown with certainty that he was not in that company's employ. True he urges that the contract between the two companies shows a coproprietorship or sort of partnership between them which made him an employee of both; but the contract discloses no basis for the claim or for distinguishing his case from that of the Pullman porter recently before us. (*Robinson v. Baltimore & Ohio R. R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491 [Bul. No. 152, p. 95].) The messenger here, like the porter there, was on the train as an employee, not of the railroad company, but of another by whom he was employed, directed and paid, and at whose will he was to continue in service or be discharged.

As respects the express company, it appears not merely that Taylor was in its employ, but also that the injuries were received while it was engaged and he was employed in interstate commerce; and so the question is presented whether the act embraces a common carrier by express which neither owns nor operates a railroad, but uses and pays for railroad transportation in the manner before shown. The district court answered the question in the negative and the circuit court of appeals in the affirmative. A negative answer also has been given in a like situation by the Court of Errors and Appeals of New Jersey (*Higgins v. Erie R. R. Co.*, 89 N. J. Law, 629, 99 Atl. 98), and a recent decision by the Supreme Court of Minnesota makes persuasively for that view (*State ex rel. v. District Court*, 142 Minn. 410, 172 N. W. 310).

In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier.

As Taylor was not an employee of the railroad company and the express company was not within the employers' liability act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement.

There being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions that the messenger's agreement was a valid and binding contract whereby

Taylor agreed to assume all risk of injury incident to his employment, from whatever cause arising, assented to the contractual arrangement between the two companies in respect of such injuries, and became obligated to the express company to refrain from asserting any liability against it or the railroad company on account of any such injuries. [Cases cited.]

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—CAR INSPECTION—NEGLIGENCE—*Hines, Director General of Railroads, v. Logan, United States Circuit Court of Appeals, Fifth Circuit (December 7, 1920), 269 Federal Reporter, page 105.*—Logan was employed by the Alabama Great Southern Railway Co. in its terminal station at Birmingham, Ala. He was on his way to inspect or repair a number of cars, some of which were being used in interstate commerce and some in intrastate commerce, when he found it necessary to pass through an opening of about three feet in another train of cars. This opening was purposely left to afford passageway for employees about the yards. As Logan was going through the opening some moving cars were thrown against the standing ones, causing them to come together and catch him between them. No warning as required by custom was given. Logan died as the result of his injuries, and his widow brought suit for damages under the Federal employers' liability act. She recovered a judgment, and the employer appealed on the ground that Logan was not at the time of his death engaged in interstate commerce and that there was no proof of negligence on its part. In affirming the judgment of the district court in favor of plaintiff the court said in part:

At the time of his death Logan was on his way either to inspect or repair cars, some of which were admittedly being used in interstate commerce, and he was therefore engaged in the performance of a duty that was required of defendant. He was inspecting, and, wherever necessary, repairing, cars which were being made ready for departure to several States, and was none the less engaged in interstate commerce, although it was also his duty to inspect and repair cars which were being used wholly within the State of Alabama.

Defendant moved for a peremptory instruction in his favor upon the ground that there was insufficient evidence of negligence to warrant the submission of the case to the jury. The trial court would have committed plain error if it had refused to submit that issue. There was evidence to show that a custom existed to give warning, either by ringing the bell or blowing the whistle, of the approach of the train of cars to the point on the track where Logan was killed. Several witnesses testified they heard no warning, and no witness testified that any was given. There was also evidence that the space or opening, the closing of which resulted in Logan's death, was left

there for the convenience of employees such as he was, and that there was a custom never to close it without warning. The jury was amply justified in finding for plaintiff from this circumstance, taken in connection with the admitted knowledge of the switching crew that the opening existed for the purpose already stated.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—ENGINEER INJURED WHILE GETTING OIL—*Hines, Director General of Railroads v. Burns' Admr., Court of Appeals of Kentucky (December 3, 1920), 226 Southwestern Reporter, page 109.*—Robbie Burns was employed as a locomotive engineer on a train on the Louisville & Nashville Railroad system which ran from Cincinnati, Ohio, to Knoxville, Tenn. While at Corbin, Ky., Burns was ordered to make the trip as engineer. He went to the locomotive, and finding that he needed some oil, he crossed the railroad yards to the oil house, got his supply, and proceeded to return to his engine. While making the return trip he was run into by an engine and killed. His administratrix brought suit for damages under the State employers' liability act and was awarded a judgment. The employer appealed, making as his chief contention that when Burns was killed he was engaged in interstate commerce, and that therefore the suit should have been brought under the Federal employers' liability act. The court accepted this view and reversed the decision on the ground that the suit should have been brought under the Federal statute. The opinion in part is as follows:

Taking up reason (a) in support of the motion for a directed verdict in favor of defendant, the uncontradicted evidence clearly establishes that decedent at the time he received the injuries complained of was in the employ of an interstate carrier, and that he himself was engaged in interstate commerce.

The petition alleges (and which fact is not denied) that at the time he received his injury he was engaged in procuring oil to use upon his engine while making the interstate trip, and it is shown by other witnesses whose testimony is not disputed that just before the accident the decedent came to the oil house and had his oil cans filled, and that he stated at the time that he was doing so to use the oil on his engine. The oil cans were found where it is claimed by plaintiff the injury occurred, which shows that decedent had them in his possession at the time he was injured. There is no testimony in the record, nor proven circumstances, contradicting the above-related facts.

It has been thoroughly settled in a number of cases from the Supreme Court that under the facts here appearing the servant was engaged in interstate commerce, and that a suit by him to recover damages for injuries while thus employed, or by his administrator to recover damages for his death, if he was killed, should be prosecuted under the Federal liability act, *supra*, and not under the laws of the State where the accident occurred.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—REPAIRS—*Koons et al. v. Philadelphia and Reading Ry. Co., Supreme Court of Pennsylvania (July 1, 1921), 114 Atlantic Reporter, page 262.*—One Koons, deceased, was a laborer at the car shops of the defendant company. While engaged in unloading a portion of a wrecked car from a gondola, a hook attached to the hoisting device slipped, allowing the load to fall, causing the death of Koons. The car had been wrecked while moving in interstate commerce, and was sent to the railroad shops to be repaired; while at the shops the accident occurred. John L. Koons and another brought an action for damages because of the death. Judgment was for the defendant, as it was found that deceased was engaged in interstate commerce and that the Federal employer's liability act would apply, the court holding that the interstate quality of the car inhered while in the shop. This act requires actions to be brought within two years from the time of the injury, which was not done in this case. Plaintiffs appealed, but the supreme court affirmed the lower court. Judge Kephart's decision is in part as follows:

Appellant's position is that deceased was not engaged in interstate commerce at the time of the accident that resulted in his death. The test seems to be: In what was defendant company's instrumentality of transportation engaged at the time the employee received his injury? There are no degrees of such interstate engagements; one car in such service makes the whole train subject thereto. "One element of interstate commerce * * * determines the remedy." (*Railroad v. Polk*, 41 Sup. Ct. 518.) As the Federal law supersedes the State law, so do acts done thereunder, and where intrastate and interstate acts are mingled, or at times alternate, there is no separation. The interstate feature predominates, and by it must the questioned act be judged. "To separate duties by moments of time or particular incidents of its exertion would be to destroy its unity. * * * This service and the other service can not be separated in duty and responsibility." (*Philadelphia & Reading Ry. Co. v. DiDonato*, 41 Sup. Ct. 516.) Employment follows interstate transportation and begins when the workman, on a carrier's premises, makes a forward move to serve in that traffic or employment, and ends only after he has completely dissociated himself therefrom. Interstate employment follows such character of commerce if the instrumentality is wholly or partly engaged therein.

What was it [the car] engaged in at the time it was disabled? If at that time it was in an interstate movement, its disablement does not suspend nor destroy that interstate character. The employment follows the kind of instrumentality through the delay in the repair shop until it returns to the transportation indicated. This seems to be the doctrine in *Great Northern R. Co. v. Otos*, 239 U. S. 349, 36 Sup. Ct. 124 [Bul. No. 224, p. 110]; *Minneapolis etc. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170 [Bul. No. 246, p. 94], etc. We need not here determine what might control if the instrumentality was diverted to intrastate service after it left the repair shop.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—RETURNING FROM WORK—*Director General of Railroads v. Bennett, United States Circuit Court of Appeals, Third Circuit (November 12, 1920), 268 Federal Reporter, page 767.*—Bennett was employed by a railroad as an engineer. He went out from the roundhouse and engaged in interstate commerce. Upon the completion of the work he proceeded to return to the roundhouse to put up his engine and go home, and while passing a train on an adjoining track his engine struck a bulging car of the other train. The impact tore off the safety valve of the engine and Bennett was killed by escaping steam. His administratrix brought suit for damages under the Federal employers' liability act, and recovered judgment. The employer appealed on the ground that in returning to the roundhouse Bennett was not at that time engaged in interstate commerce and that his engine was not at the time of the accident an instrumentality used in furtherance of interstate commerce. The court held that Bennett was engaged in interstate commerce and affirmed the decision. The opinion is in part as follows:—

Considering the question as it bears on the employment of the engineer, it was shown that he was either on his way home after a movement of interstate traffic or on his way to a place at which he might receive orders for further movements, either interstate or intrastate. The interstate movement just completed was not shown to have been merely a yard shifting movement but was, so far as the evidence discloses, a movement in actual furtherance of interstate commerce. Putting out of view the remote possibility of future employment as not determinative of the character of his work at the time of his injury, the day's work of the engineer, so far as the evidence shows, had ended and his movement was homeward. An employee's "trip through the yard to his engine in the morning" has been held to be a necessary incident to his day's work and necessarily to partake of the character of that work. If the first train movement the decedent engineer was ordered to make in his day's work had been of an interstate train, the trip of the engine from roundhouse to train would for like reason have been an incident to interstate commerce, and if injured in making the trip, he would have been entitled to the protection of the Federal employers' liability act. Similarly, on leaving his day's work, his last train movement having been of an interstate train, his movement homeward bound would be regarded as a necessary incident to the commerce he had just completed. On both reason and authority we are of opinion that when Bennett was injured while leaving his job at the end of the day, notwithstanding the movement might have been, but actually was not, interrupted by an order to proceed elsewhere on overtime, he was but discharging a duty of his employment in a manner necessarily incident to the interstate movement he had just completed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—INTERSTATE COMMERCE—STEAM SUPPLIED TO STATE AND INTERSTATE COMMERCE—*Gruszewsky v. Director General of Railroads, Supreme Court of Errors of Connecticut (April 5, 1921), 113 Atlantic Reporter, page 160.*—Gruszewsky was employed by the New York, New Haven & Hartford Railroad Co. It was his duty to generate steam at a heating plant in the yards of the company. He was obliged to feed the fires from coal cars standing near the boiler house. The ground was covered with snow, and he was compelled to keep a passageway open between the boiler house and the coal cars. The exposure resultant from alternately working in the hot boiler room and the cold yard caused him to contract lobar pneumonia from which he died. The steam generated in the heating plant was used to heat both interstate and intrastate cars standing in the yards. Gruszewsky's widow brought proceedings for compensation under the workmen's compensation act, but the compensation commissioner refused to make an award on the ground that Gruszewsky, when he incurred the injury from which he died, had been engaged in interstate commerce. Upon the widow's appeal to the superior court the latter asked the advice of the supreme court. The opinion was adverse to the widow's claim, and is in part as follows:

The Supreme Court of the United States has made the test of whether an employee was at the time of his injury engaged in interstate commerce depend upon answering in the affirmative the question: "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" (*Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941 [Bul. No. 225, p. 105].)

Several cases were then cited, showing the results of the application of this test. Continuing, the court said:

Gruszewsky, the deceased, was engaged in the operation of generating steam by means of a heating plant in a railroad yard from whence the steam was transmitted in pipes to cars standing on a track of the railroad, and by means of steam plugs connection was made with the cars and the steam supplied. The generation of the steam and its transmission to the cars was one process, more so even than the pumping of the water to the tanks and the supply therefrom to the engines, as in the Collins case. There was no separable part of this entire process. All of its instrumentalities and facilities were for the one end, the supply of heat for use in both kinds of commerce.

The superior court is advised that Gruszewsky, the deceased, was at the time he contracted pneumonia as described in the finding engaged in interstate commerce and subject to the provisions of the act of Congress of April 22, 1908 (U. S. Comp. St., secs. 8657-8665), and that the claimant is not entitled to compensation under chapter 284 of the General Statutes.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—NEGLIGENCE—FELLOW SERVICE—ASSUMPTION OF RISK—*DeBaur v. Lehigh Valley R. Co.*, United States Circuit Court of Appeals, Second Circuit (December 15, 1920), 269 Federal Reporter, page 964.—DeBaur was a member of a crew of a work train which was engaged in grading for an extension of a siding between Rush Station and Rochester Junction, N. Y. His duty was that of a flagman and he was required to take a position to the rear of the work train to give warning of its presence. At the time he was struck he was 1,500 feet to the rear of the work train on a curve and was seated on a rail with his feet between the tracks, his arms on his knees and his head bent as if asleep. The defendant company operated a local train from Manchester to the P. & L. junction. There were no turntables at the latter place, so the train was required to return with the tender running before the engine. As the train approached Rush Station it stopped for a block signal and whistled. Then it proceeded at about 15 or 16 miles an hour and again whistled at a sign post. From his position in the cab and because of the curve the engineer was unable to see DeBaur seated on the track. A brakeman who was seated on the tender, however, did see him when the train was about six or seven car lengths away. At the brakeman's signal the engineer whistled and when DeBaur showed no sign of having heard the whistle he signaled for a stop, but it was too late and DeBaur was run down and killed. His administratrix brought suit for damages, but after she had introduced her evidence the United States District Court dismissed the complaint on the ground that she had failed to prove negligence on the part of the defendant. She appealed, but the judgment was affirmed. The decision in part is as follows:

The action is brought under the Federal employers' liability act (Comp. St., secs. 8657-8665), and it is conceded that the plaintiff below is entitled to the benefit of the provisions of this act. If the defendant below was negligent, it must be predicated upon fault or neglect on the part of the engineer in charge of the train which struck the deceased. The statute permits a recovery against the carrier for death resulting in whole or in part from the negligence of its officers, agents or employees. It abrogates the common-law rule, known as the fellow-servant doctrine, by placing the negligence of a coemployee upon the same basis as the negligence of an employer. It, however, saves the defense of assumption of risk in cases other than those where the violation by the railroad company of the statute enacted for the safety of employees may contribute to the injury or death of the employee.

Upon what evidence here could negligent operation be predicated? The duty which was owed by those in charge of the train which struck the deceased was that, when the deceased was first seen sitting on the tracks, the engineer was obliged to use all means at his com-

mand to stop the train. If he discovered the deceased in his position of peril, it was incumbent upon him to exercise ordinary care to stop his train and prevent the accident; but from the foregoing facts it is apparent that the engineer did all that could be expected of a reasonably prudent man under similar circumstances.

This testimony is offered solely as the plaintiff's evidence. There is no evidence to show that the deceased was, in fact, sick. We are only asked to infer that solely from his sitting, apparently unconscious of the approaching danger. Nor is there evidence to indicate that the engineer from his position, if exercising due care, could have seen the deceased in his position sooner than he did.

The defendant below is liable if it could have avoided the death by the exercise of ordinary care after actually discovering his perilous situation. We think the engineer here did all that could be expected of him under the circumstances, and that the plaintiff below has failed to sustain the burden of proof of establishing negligence on the part of the defendant below, which would require the district judge submitting this case to the jury.

Judgment affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—PLACE OF SUIT—*Chicago, M. and St. P. Ry Co. v. McGinley, Supreme Court of Wisconsin (November 15, 1921), 185 Northwestern Reporter, page 218.*—Clarence S. McGinley was injured in an accident about June 12, 1920, while in the employ of the C. M. and St. P. Ry. Co. as a box packer and oiler in the city of Janesville, Rock County, Wis. A suit for damages was instituted by him against his employer in Renville County, Minn., some 500 miles from Janesville. The action was based on the Federal employers' liability act. The railroad company was granted a restraining order by the circuit court of Rock County, perpetually restraining and enjoining McGinley from maintaining, carrying on, or prosecuting any action in any court outside or beyond the limits of the State of Wisconsin, for personal injuries sustained by him in the city of Janesville, Wis. McGinley appealed from the order, the supreme court reversing the lower court, with directions to dismiss the complaint. It was stated in the course of the opinion that under the Federal employers' liability act the State courts have concurrent jurisdiction with the Federal courts. Equity may enjoin a citizen of one State from prosecuting a personal injury suit against a railroad company under the Federal act in the courts of another State where necessary to prevent hardship, oppression, or fraud. But in this case, simply because the witnesses do not live near by, or that under the Minnesota law, a verdict on the agreement of 10 or more jurors will be sufficient for a judgment, or that the jury will be prevented from viewing the premises, the broad relief granted by the trial court will not be sustained.

There was a charge that the suitor's attorney was an "ambulance chaser." As to which the court said in part:

Had it been made to appear in this case that counsel had been guilty of such practices, and that the defendant herein had materially cooperated with counsel in regard to the same, we would seriously consider this charge in connection with the other reasons assigned upon which the application for injunction was based.

We consider the relief granted by the trial court too broad, and such relief should have been confined, assuming that a proper case for injunction had been presented, in the instant case, to the injunction with respect to the further prosecution of defendant's action in the county of Renville.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SAFETY APPLIANCE ACT—CAUSAL RELATION OF INJURY—*Lang v. New York Cent. R. Co.*, *United States Supreme Court (March 28, 1921)*, *41 Supreme Court Reporter*, page 381.—Lang was employed as a brakeman by the New York Central Railway Co. on its railroad. A car with a defective coupler was standing on a siding in the company's yard at Silver Creek, N. Y. In making a switching operation several cars were kicked onto the siding. It was not intended to touch or in any way move the crippled car at that time. Lang was riding on one of the cars which were kicked onto the siding and before he applied the brake to stop them they bumped into the crippled car. The crippled car had no drawbar nor coupler apparatus on that end, so that when the cars came together their roofs touched and Lang's leg was crushed between them. He later died from his injuries and suit was brought for damages under the safety-appliance act, Comp. St., secs. 8605-8612. A verdict for \$18,000 was granted, which was affirmed by the appellate division of the New York Supreme Court but was reversed by the Court of Appeals of New York. Plaintiff brought a writ of certiorari to the United States Supreme Court which affirmed the decision of the court of appeals and reversed that of the New York Supreme Court. Mr. Justice McKenna, who delivered the opinion of the court, said in part:

The statement that "owing to the absence of the coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars" is disputed as a consequence or as element of decision independently of what Lang was to do and did—indeed, it is the dispute in the case. Based on it, however, and the facts recited, the contention of petitioner is that they demonstrate a violation of the safety appliance act, and justify the judgment of the trial court, and its affirmance by the appellate division.

The opposing contention of respondent is that—

"The proximate cause of the accident was the failure of the deceased to stop the cars before they came in collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause."

To support the contention *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 35 Sup. Ct. 785 [Bul. No. 189, p. 117], is adduced.

But necessarily there must be a casual relation between the fact of delinquency and the fact of injury and so the case declares. Its concluding words are, expressing the condition of liability, "that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." The plaintiff recovered because the case came, it was said, within that interpretation of the statute.

We need not comment further upon the case, nor consider the cases which it cites. There is no doubt of the duty of a carrier under the statute, and its imperative requirement, or of the consequences of its omission. But the inquiry necessarily occurs to what situation, and when, and to what employees do they apply?

The court of appeals was of the view that it was the declaration of the Conarty case that section 2 of the safety appliance act "was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. It was not to provide a place of safety between colliding cars and that "the absence of coupler and drawbar was not a breach of duty toward a servant in that situation." It further decided that Lang was in "that situation" and he "was not one of the persons for whose benefit the safety appliance act was passed."

Two questions are hence presented for solution: (1) Was the court of appeals' estimate of the Conarty case correct? (2) Was it properly applied to Lang's situation?

The court's conclusion that the requirement of the safety-appliance act "was intended to provide against the risk of coupling cars" is the explicit declaration of the Conarty case.

That case, therefore, declares the same principle of decision as the court of appeals declared in this and, while there is some difference in the facts, the difference does not exclude the principle. In neither case was the movement of the colliding car directed to a movement of the defective car. In that case the movement of the colliding car was at night, and it may be inferred that there was no knowledge of the situation of the defective car. In this case the movement of the colliding car was in the daytime and the situation of the defective car was not only known and visible, but its defect was known by Lang. He therefore knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. "It was not," the trial court said, "the intention of any of the crew [of the colliding car] to disturb, couple onto, or move the crippled car." It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it "so as not to come into contact with the crippled car," to quote again from the trial court. That duty he failed to perform and, if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the court of appeals answered, "still the collision was not the proximate result of the defect" or, in other words and as expressed in effect in the Conarty case, that the collision under the evidence can not be attributable to a violation of

the provisions of the law, "but only that, had they been complied with, it [the collision] would not have resulted in injury to the deceased."

Judgment affirmed.

A vigorous dissenting opinion was prepared by Mr. Justice Clarke, Mr. Justice Day concurring. The reasons for stating the grounds of dissent were said by Justice Clarke to be "because I think that the court's decision of this case will result in seriously confusing the law applicable to the safety appliance acts of Congress."

The defective car, though not intended to be removed or coupled to, was nevertheless standing on the track on which shifting was going on, having been left there some days for unloading. The unloading had been begun, and was completed on the day of the accident, so that "as a matter of fact, the defective car was actually in use in a most real and familiar way on the very day of the accident." Various opinions of the Supreme Court were cited, giving its construction of the purpose of Congress in the enactment of the safety appliance acts, starting from *St. L., I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616 (Bul. No. 78, p. 578) in which it was said that "the use of cars which do not comply with the standard, violates the plain prohibition of the law, and there arises from that violation the liability to make compensation to one who is injured by it." Chief reliance was placed on the decision in the case, *Louisville & N. R. Co. v. Layton*, 246 U. S. 617, 37 Sup. Ct. 456 (Bul. No. 246, p. 99). Here a switchman was injured through a defect of the coupling apparatus, and recovery in his behalf was affirmed, although at the time of the injury he was not himself engaged in the work of coupling, the court saying:

While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required, not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty.

Quite similar conditions existed in another case cited, *Minneapolis & St. Louis R. R. Co. v. Gotschall*, 244 U. S. 66, 37 Sup. Ct. 598 (Bul. No. 246, p. 100).

The last two decisions cited are subsequent to the decision in the Conarty case cited by Mr. Justice McKenna, and were relied upon by the New York Court of Appeals in its reversal of the judgment in behalf of the plaintiff. This case restricted liability for damages to those cases in which "the failure to obey these safety appliances laws is the proximate cause of injury to them [the employees] when engaged in the discharge of duty." The Layton and Gotschall cases coming later follow a divergent if not contradictory principle. The opinion concludes:

Neither of the men injured in the Layton or Gotschall cases was engaged in coupling or uncoupling cars when the accident occurred, but each was injured because of defective coupling appliances when he was going over the cars of his train in the discharge of his duty. Here Lang was injured, when in the discharge of his duty because a defective car had been placed upon a much-used track in a busy yard in such a position that it was impossible for him in the exercise of due care, to prevent the cars he was seeking to control from coming in contact with it.

It would be difficult to conceive of a case in which the negligence of the master could be a more immediate and proximate cause of injury to a servant than it was in this case.

Having regard to the extent to which this case must be accepted by other courts as a rule of decision, it would seem that the orderly and intelligible administration of justice required that the principle of Layton and Gotschall cases should be disavowed or overruled, for that principle is so plainly in conflict with the opinion in this case that courts and advising counsel will otherwise be left without any rule to guide them in the disposition of the many similar cases constantly pressing for disposition.

For the reasons thus stated, I think the judgment of the court of appeals entered by the Supreme Court of New York should be reversed, and the original judgment of the supreme court affirmed.

EMPLOYERS' LIABILITY—RAILROAD COMPANIES—FEDERAL STATUTE—SAFETY APPLIANCE ACT—WORKMEN'S COMPENSATION ACT—REMEDY—*Ward v. Erie R. Co., Court of Appeals of New York (January 11, 1921), 129 Northeastern Reporter, page 886.*—Ward was employed as a switchman by the Erie Railroad Co. in its yard at Elmira. While engaged in a switching operation the car on which he was standing came into contact with another car which had no drawhead or end sill, and he was caught between the roofs. The car in this condition was a violation of the Federal safety appliance act. The switching operation was not in any interstate commerce movement. Ward brought an action for damages against the Erie Railroad Co. and recovered a verdict upon which judgment in his favor was rendered. The employer appealed and the appellate division reversed the decision of the trial court and set aside the verdict on the ground that,

because the accident had not been suffered in interstate commerce, the case was governed by the workmen's compensation act and an action for damages would not lie. Ward appealed to the court of appeals which reversed the decision of the appellate division and affirmed the decision of the trial court in his favor. The decision in part is as follows:

The switching of the cars was not in aid of any interstate movement. There is no remedy, therefore, under the employers' liability act of Congress (U. S. Comp. St., secs. 8657-8665) which limits its protection to employees engaged in interstate commerce when injury is suffered. But the absence of the drawhead or end sill was a violation of another statute. The defendant, being an interstate carrier, was subject to the provisions of the safety appliance act (act March 2, 1893, c. 196, 27 Stat. L. 532), which gives protection to travelers and employees, whether the transit at the moment of the injury is interstate or local. The plaintiff has a remedy under that act, unless the workmen's compensation act of New York (Consol. Laws, c. 67) has taken it away from him. The defendant concedes that this could not be done if the remedy as well as the right was the creation of the Federal statute. The argument is, however, that all that Congress did was to clothe the employee with a right and the carrier with a duty, leaving the remedy, in case of infringement, to the law of the locality. It is a rule of the common law that a member of the class for whose benefit a statute has been enacted has a right of action against the offender for the damages sustained. The remedy for violation of the Federal statute is given, it is said, not by the statute, but by the common law of the locality, and what the locality has given the locality may change. This argument, rejected by the trial court, was sustained at the appellate division, and the complaint dismissed.

We reach a different conclusion. We find the inference irresistible that the plaintiff's remedy, like his right, has a statutory origin. If the purpose was, however, not merely to impose a duty, but also to create or to preserve a right of action for the damages, the right of action so established is immune from impairment except by act of Congress.

Here there are two provisions that unmistakably reveal the purpose to give to the right of action for damages then attaching at common law a statutory confirmation and a statutory sanction. The act provides (27 Stat. 532, act March 2, 1893, ch. 196, sec. 8) that any employee injured by any locomotive, car, or train in use contrary to the statute "shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." This provision assumes the existence of a remedy and limits the available defenses. The regulation of the remedy is equivalent to a declaration that a remedy there shall be. The States were without power, with that statute on the books, to make assumption of risk through continuance in employment an answer to a suit.

The will of Congress is expressed in abbreviated signs and symbols, but none the less it is expressed. Enough is there to forbid

the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the States. It is written there in substance: Anyone for whose benefit this statute is enacted shall have, in case of violation, a right of action for his damages, and it shall no longer be a defense that there was service with knowledge of the risk.

The judgment of the appellate division should be reversed, and that of the trial term affirmed, with costs in the appellate division and in this court.

EMPLOYERS' LIABILITY—SAFE PLACE—COMPLIANCE WITH STATUTE—*Central Coal & Coke Co. v. Barnes, Supreme Court of Arkansas (July 11, 1921), 233 Southwestern Reporter, page 683.*—Tom Barnes was an experienced mine shot firer in the employ of the Central Coal & Coke Co. On the day in question he went to work at 4.30 p. m. He went directly to the fourth south entry, where he found shots prepared for firing. He tamped the shots and went back to the air course. He opened the crosscut and found gas in it, which he brushed out and tamped a shot. He went back to the other side and fired the shot that he had first tamped, after which he returned to the crosscut and in an attempt to fire that shot with his open lamp there was an explosion caused by the accumulation of gas, which severely injured him. He knew that the gas was feeding in there, but did not know that it was coming in so rapidly. Barnes brought an action for damages because of his injury. The State mine inspector testified that under the law 200 cubic feet of air per minute was required to be circulated in all working places in the mine. In the evidence for the employer it was claimed that it was not practical to provide 200 cubic feet of air each minute in the crosscuts. There was a judgment in favor of Barnes, and the company appealed to the supreme court, which affirmed the lower court, declaring that the lower court had properly submitted the issue of negligence, on the part of the company, and assumption of risk, on the part of Barnes, to the jury. Judge Hart, speaking for the court on the question of compliance with the statute, said:

The testimony on the part of the defendant itself tended to show that the latter section of the statute had not been complied with. Counsel seek to justify the neglect on the ground that it was not practical to comply with the statute. This is a matter that addresses itself to the legislature, and does not furnish a defense to an action for negligence based on a noncompliance with the statute.

EMPLOYERS' LIABILITY—SAFE PLACE—GUARDS FOR DANGEROUS MACHINERY—NEGLIGENCE—*Standard Portland Cement Co. v. Foley,*

United States Circuit Court of Appeals (January 27, 1921), 270 Federal Reporter 203.—Foley was employed as an electrician by the cement company at its cement plant in Alabama, in which was a large electrically driven crane. It became necessary for Foley to get upon a very small platform to examine and, if necessary, repair the motor which ran the crane. A revolving shaft upon which was a collar with a projecting set screw was in close proximity to the motor. While making repairs to the motor in the restricted space of the platform Foley's right arm was caught by the set screw and wound around the shaft and severely injured. He brought suit for damages for personal injuries and recovered a judgment. The employer appealed but the decision was affirmed. The opinion in part is as follows:

This action is based upon the employers' liability act of Alabama, which provides in substance that, when a personal injury is received by an employee, the employer is liable as if the employee were a stranger, if the injury is caused by a defect in the condition of the ways, works, machinery, or plant of the employer. (Sec. 3910, Civil Code of Alabama of 1907.) The projecting set screw was the defect plaintiff relied on at the trial.

Error is assigned upon the refusal of the court to direct a verdict for defendant. To sustain this assignment it is argued that a projecting set screw is not a defect, but that it merely enhances the risk of injury in an employment that is inherently dangerous. While this view seems to prevail in some jurisdictions, it has been rejected by the Supreme Court of Alabama, which, in construing the act above cited, has held that it can not be asserted as a matter of law that an employer is not liable for injury to an employee caused by a projecting set screw on a revolving shaft, and the question of liability of the employer was properly left to the jury. (*Prattville Cotton Mills Co. v. McKinney*, 178 Ala. 554, 59 So. 498.)

The trial court allowed the jury to determine whether the projecting set screw constituted a defect. The place of work provided for plaintiff was dangerous at best. The platform was small, a goodly portion of it was taken up by the tool box, and the breaker coil, heavily charged with electricity, further contracted the space available. It appears to us that there was evidence to support the verdict that it was negligence on the part of the defendant to leave the set screw exposed and projecting at this point.

It is further contended that defendant was entitled to a peremptory instruction in its favor, because plaintiff failed to show that he had exercised reasonable care to discover the defect complained of. Plaintiff had the right to rely upon defendant to furnish him a safe place to work, and was under no duty to make an investigation.

EMPLOYERS' LIABILITY — SAFE PLACE — SCAFFOLD — STATUTORY STANDARD — ASSUMED RISKS — *Ross v. Delaware, L. & W. Ry Co., Court of Appeals of New York (May 31, 1921), 132 Northeastern Reporter, page 108.*—Stanley Ross was an employee of the defendant

company and was assisting in the construction of a coal trestle. It was necessary that he work about sixteen feet above the ground on planks laid as a temporary flooring upon several crossbeams. While he was carrying a heavy beam, one of the planks fell. For the injuries that resulted he sought to recover damages. At the trial the court, in its instruction to the jury, charged that the planks did not constitute a scaffold, and that section 18 of the labor law did not apply, with the result that the jury found a verdict for the defendant. The plaintiff appealed to the court of appeals, which held the charge erroneous and granted a new trial. The court declared that the planks constituted a scaffold, as they were temporarily laid for a temporary object and raised the workmen high above the ground. Continuing, the court said that the planks being considered a scaffold, section 18 of the labor law applied. Under this section the master is no longer permitted to delegate the duty of construction, as he is responsible, no matter who does the actual work, and "it requires that scaffold to be so safe as to give proper protection to the workmen engaged in their duty" and "however careful the master, he is responsible unless the scaffold is, in fact, a proper one—proper to protect the workman in his work." The principle of assumed risk would not be applicable, as the structure is held to be a scaffold.

EMPLOYERS' LIABILITY—SAFE PLACE—WARNING—INJURY FROM DEFECTIVE WATER GAUGE—*Naylor v. Holland-St. Louis Sugar Co. et al., Appellate Court of Indiana, Division No. 1 (March 11, 1921), 130 Northeastern Reporter, page 152.*—Naylor was employed by the Holland-St. Louis Sugar Co., which was having constructed a large beet sugar factory. The factory was to have a row of steam boilers on its first floor. The Larrowe Construction Co. (also designated as the Engineering Co.), which was building the factory, sublet the contract for installing the boilers to McNaul Boiler Manufacturing Co. The Holland-St. Louis Co. also agreed with the Engineering Co. to have the latter install a coal conveyor along the boilers, and as part of its agreement the Sugar Co. supplied Naylor to the Engineering Co. to act as its superintendent. The boilers which had been installed had defective and unguarded water gauges, and this was known to the defendants. Without warning, Naylor was sent to work on the conveyor about the boilers when a hydrostatic test of said boilers was being made. One of the water gauges burst and a piece of glass was thrown into Naylor's right eye, destroying its sight. Naylor brought suit for damages against the Sugar Co. and the Engineering Co., but failed to recover. He appealed and the judgment was affirmed as to the Sugar Co. because he was not its employee at the time of the

injury, but was reversed as to the Engineering Co. The opinion is in part as follows:

The negligence charged in the complaint against appellee Engineering Co. is that it assigned appellant, its employee, to work in close proximity to the defective water gauges, well knowing the danger, and knowing that appellant was ignorant of such danger. The complaint also charged negligence on the part of the McNaul Boiler Manufacturing Co. in putting in the water gauges. It is apparent from the record that, in holding the complaint insufficient as against the Engineering Co., the theory of the trial court was that the averments of the complaint showed the proximate cause of appellant's injuries to have been the said negligence of the McNaul Boiler Manufacturing Co. In this the court was in error. Even though the McNaul Boiler Manufacturing Co., an independent contractor, had been negligent in putting in the water gauges, such fact would not relieve the Engineering Co. from liability to its employee whom, without warning, it had assigned to the dangerous place of work when it knew of the dangers, and knew that its employee was ignorant thereof, as is alleged in the complaint.

The judgment is affirmed as to appellee Holland-St. Louis Sugar Co., but, as to appellee Engineering Co. the judgment is reversed, with instructions to overrule the separate demurrer of said company to the complaint, and for further proceedings not inconsistent with this opinion. Costs taxed against appellee Engineering Co.

EMPLOYERS' LIABILITY — SEAMAN — SAFE APPLIANCES — FELLOW SERVANT—*George Leary Construction Co. v. Matson, United States Circuit Court of Appeals, Fourth Circuit (February 1, 1921), 272 Federal Reporter, page 461.*—Charles Matson was an employee of the appellant company. He was one of a number of men working on a scow under the direction of Martin, a foreman. The scow was equipped with a mast, boom, and engine. At the time of the injury the men were engaged in placing pile-driver leads in a permanent position at the forward end of the scow. To do this it was necessary to use certain pieces of timber. The planks selected could not stand the strain and broke, injuring Matson. By sufficient care in selection, pieces could have been found adequate to stand the strain. Matson brought an action for personal damages and was awarded judgment. The construction company appealed but the circuit court affirmed the district court, stating:

Under Federal statutes, Martin was not a fellow servant of Matson, but a representative of the master. Revised Statutes, section 3 (Comp. Stats., section 3), gives this general definition:

"The word 'vessel' includes every * * * water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Under title 53, section 4612, Revised Statutes, as amended by act of December 21, 1898, c. 28, section 23 (Comp. Stats., section 8392). the statutory definition of "vessels" and "seamen" are as follows:

"In the construction of this title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

Under these definitions, "scows" and "pile drivers" are "vessels" and Matson was a "seaman."

By act March 15, 1915, c. 153, paragraph 20 (Comp. Stats., section 8337a), it is provided:

"In any suit to recover damages for injuries sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

Martin was a seaman having direct command of the work in hand and of the men performing it. Matson was a seaman under his authority. Martin was therefore not a fellow servant of Matson, but a representative of the owner of the vessel.

For an injury due to accident, or to the mere negligence of the master of the vessel in giving orders, even if he be regarded as the representative of the owner, a seaman has been held not to be entitled to recover indemnity, but only for maintenance and cure. (*The Osecola*, 189 U. S. 158-175, 23 Sup. Ct. 483.) And it may be this rule is unaffected by section 20 of the seamen's act above quoted, as was held in *Chelentis v. Luckenbach S. C. Co.*, 243 Fed. 536, 156 C. C. A. 234, and *John A. Roebling's Sons Co. v. Erickson* (C. C. A.), 261 Fed. 986, and intimated in *Chelentis v. Luckenbach*, 247 U. S. 372, 38 Sup. Ct. 501 [Bul. No. 258, p. 139]. But since under the statute the master of the vessel, or seaman in command, is not a fellow servant of those under his authority, his selection and supply of the appliance and appurtenances used for the service on the ship under his direction is the selection and supply of the owner, and for injury to a seaman due to negligence in such selection and supply the owner is liable for full indemnity for the injury. (*The Baron Napier* (4th Circuit), 249 Fed. 126, 161 C. C. A. 178; *The Colusa*, 248 Fed. 21, 160 C. C. A. 161.)

EMPLOYMENT OF CHILDREN—CONSTITUTIONALITY OF STATUTE—
TAXATION AS METHOD OF REGULATION—STATE AND FEDERAL POWERS—
George v. Bailey, *United States District Court, Western District of North Carolina* (Aug. 22, 1921), 274 *Federal Reporter*, page 639.—
Congress attempted to meet the objections raised in the decision of the Supreme Court in the case of *Hammer v. Dagenhart* (Bul. No. 258, p. 96) by placing a tax of 10 per cent on the net income derived from the operation of establishments employing child labor contrary to the provision of the statute. Suit was brought for an injunction to

restrain the collection of the tax. A temporary restraining order was granted and later it was made permanent, on the ground that the law was unconstitutional. The opinion of the court rendered by District Judge Boyd is in part as follows:

The question which suggests itself in the outset is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to deter the violation of the child labor provision. It would be a rather nonproductive revenue system which imposed taxes, the effect of which would be to annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied.

Upon consideration of the prime question in this case and the authorities bearing upon it, the conclusion seems to be irresistible that the National Legislature can not do indirectly that which it is forbidden by the Constitution to do directly; and it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the States, then Congress can not intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method.

In the presentation of this case counsel for the defendant moved to dismiss complainant's bill, relying upon section 3224 of the Revised Statutes (Comp. St., sec. 5947), which is in the following language:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

It is insisted that this statute renders the courts powerless to intervene where the Government is proceeding under assessments to collect taxes, no matter whether the tax is legal or illegal, well-founded or erroneous, constitutional or unconstitutional. If this position can be maintained, then Congress, under the guise of raising revenue by taxation, can overcome all constitutional barriers.

The conclusion is that the defendants' motion to dismiss for the want of jurisdiction should be denied; that in passing the act in question Congress exceeded the powers delegated to the United States by the Constitution; that the assessment against the complainant is unwarranted, and is not a tax such as contemplated by law to raise revenue, but may be termed a penalty to prevent the violation of the provisions of the act, which could not be enforced by assessment and warrant of distraint, even if the act was valid; that he is entitled to the relief prayed for in this bill; and that the temporary restraint heretofore granted should be made permanent.

HOURS OF LABOR—WAGES—REGULATION—CONSTITUTIONALITY OF KANSAS STATUTE—*Court of Industrial Relations v. Chas. Wolf Packing Co., Supreme Court of Kansas (October 8, 1921), 201 Pacific Reporter, page 418.*—The court of industrial relations ordered the Chas. Wolf Packing Co. to establish certain hours of labor and to put into effect a prescribed scale of wages, which they refused to do. The plaintiff brought original proceedings in the Supreme Court of Kansas to compel the defendant company to comply with its orders. The company answered the proceedings and presented a number of

questions of law. The plaintiff stated that the company did not show a good defense in law. On the plaintiff's request that the questions of law be disposed of in advance of the final hearing, this procedure was followed by a decision in favor of the plaintiff. On the question of the authority of the plaintiff to sue in its own name and prosecute actions in the supreme court, that court said:

The industrial court law is a remedial statute, and should be liberally construed to promote its object. A liberal construction is that the statute gives to the court authority to prosecute in its own name actions of this character. The statute expressly authorizes the court of industrial relations to bring proper proceedings to compel compliance with its orders. Mandamus is a proper proceeding, and the court can bring it. The industrial court is not directly interested in the result of this action; the State is the party that is interested, but the State has authorized the court to bring the action. This is at least one of the ways in which it may be brought.

The contention was made that proceedings could only be brought by the party injured. The decision stated that the action was not brought to compel the payment of definite wages to certain employees, but to compel the company to obey an order of the plaintiff fixing a scale of wages and establishing hours of labor. The defendant insisted that the orders of the plaintiff were not effective until approved by the supreme court, but it was held otherwise. The supreme court in deciding on the constitutional questions involved said:

The defendant contends that the industrial court law and the orders sought to be enforced in this action violate the fourteenth amendment of the Constitution of the United States, in that the law and the orders made thereunder deprive the defendant of its liberty and property without due process of law, and deny to it the equal protection of the laws. To support this contention the defendant argues that employees can not be governed by the orders of the industrial court; that the wages of the defendant's employees are not affected with a public interest so as to subject such wages to regulation by the State; that the law and orders made by the industrial court deprive the defendant and its employees of the freedom of contract concerning wages; and that the classification of the businesses to which the law applies is arbitrary and unjust. These matters will be discussed in the order named.

The statute must be construed so as to uphold its validity, if possible.

The basis of the contention that the defendant's employees can not be governed by the industrial court is that those employees can not be compelled to work for the wages fixed, while the defendant is compelled to operate its plant and to pay those wages.

The defendant is not, by the law, compelled to operate its plant at a loss, nor is it prohibited from changing its business, nor from quitting the business, if it desires to do either of these things in good faith, not intending thereby to violate any provision of the act.

The authorities lead to this conclusion that public utilities can be compelled to operate but not at a loss. Control of public service

corporations is justified by the fact that they are affected with a public interest. The defendant is operating a packing plant. It is not a public service corporation, but the legislature has declared that its business is effected with a public interest, and for that reason has assumed to exercise control over it.

If the defendant is conducting a business that is affected with a public interest, it ought to be subject to legislative control the same as if it were conducting a waterworks system, an electric-light plant, or a railroad. When the defendant's business became affected with a public interest, the public had the right to say something about the manner in which it should be conducted.

The question argued is not that the business of the defendant is not affected with a public interest, but is that the wages of the defendant's employees is not affected with a public interest. The State may control the rates to be charged by those who are engaged in a business affected with a public interest. Wages is one of the largest factors that go to make up the expense of conducting a business, and must be considered in determining what the rate shall be. In many instances wages can not be increased unless rates or charges are increased, and in many instances rates or charges can not be decreased unless wages are decreased. In all business enterprises affected with a public interest rates or charges and wages are so bound together that they can not be separated. Rates can not be completely controlled unless wages are controlled, and wages can not be controlled unless charges are controlled.

The compensation paid to workingmen for their labor is the most fruitful cause of industrial unrest and of the conditions produced thereby. The State is not powerless to regulate the wages to be paid for labor in those enterprises without the continuance of which the people must suffer. Hours of labor have been the subject of legislative action, and a number of laws fixing hours of labor have been upheld.

Laws fixing minimum wages and hours of labor for women are justified on moral and physical grounds; laws fixing wages for men may be justified on similar, although not the same, ground. Sex is a proper basis for classification of the subjects of this kind of legislation, but it does not answer constitutional objections. The dangers to a man while working should be reduced to a minimum; the conditions under which he labors, so far as possible should be conducive to health and comfort. Intensive work of either mind or body, or both, should not be continued beyond his powers. A laboring man with a family, for honest work, should receive wages sufficient to enable him to feed, clothe, and shelter his family and educate his children. If the wages received by him are not sufficient to do these things, he becomes discontented, and the evil consequences that flow from such discontent may follow. The State should—it does—have power to protect laboring men to the same extent that it protects working women.

In 1916 a general strike of railroad employees in the United States was threatened. To avoid that strike Congress passed the Adamson Law (U. S. Comp. St., secs. 8680a-8680d) which fixed 8 hours as a day's work, and fixed the wages that should be paid at not less than the then standard per day and a pro rata wage for overtime. That law was upheld in *Wilson v. New*, 243 U. S. 382, 37 Sup. Ct. 298

[Bul. No. 224, p. 144], where the court declared that Congress had authority to pass the law under the commerce clause of the Constitution. If under the commerce clause of the Federal Constitution Congress can regulate wages and hours of labor of those working on railroads, the State under the police power should be able to regulate the wages and hours of labor of those working in a packing plant operating wholly within the State. The powers of Congress under the commerce clause of the Constitution are no greater than the authority of the State under the police power. Congress is controlled by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law, while the State is bound by the fourteenth amendment, which provides that no State shall deprive any person of life, liberty, or property without due process of law. Congress in its entire field of legislation must be obedient to the fifth amendment the same as the States in their field of legislation must be obedient to the fourteenth amendment to the Federal Constitution.

Legislation to meet emergencies arising in the State similar to those arising in the Nation ought to be upheld for reasons the same or similar to those given in *Wilson v. New*. The duty of the Federal Government to protect from suffering the people of the Nation is no more binding than that of the government of the State to protect its people from suffering. If the Adamson law was compelled by an emergency, the Kansas industrial court law was likewise compelled by an emergency. The purpose of the latter law is to meet such emergencies as will prevent a suspension or interference with the operation of the several kinds of business named in that law. This purpose is revealed by the entire act.

A part of the subject that has just been discussed and inseparably connected with it is the defendant's contention that the law deprives employers and employees of the freedom of contract concerning wages. Practically every law regulating the conduct of men restricts their freedom of action, and practically every law regulating business affected with a public interest restricts the freedom of contract. Every law that has been passed regulating wages or the hours of labor has been a law restricting the freedom of contract. A large number of these have been upheld, and they must continue to be upheld if the State is to perform its governmental functions and prevent violence caused by controversies between employers and employees over these questions. If the State can make regulations for the government of a business affected with a public interest, it ought to be able to extend that regulation to the wages paid to the employees of that business. The flow of food supply from producer to consumer should not be stopped by conditions produced by industrial unrest arising out of wage problems. If that flow is threatened and the State under its police power can remove the danger, that should be done. That and that alone the Kansas industrial court law attempts to do.

The legislature had power to enact the industrial court law and to make it apply to the classes of business named therein, without including any other class.

HOURS OF LABOR—WOMEN—MANUFACTURING AND MECHANICAL ESTABLISHMENTS—NEWSPAPER COMPANY—*State v. Crounse, Supreme Court of Nebraska (February 10, 1921), 181 Northwestern Reporter, page 562.*—In Nebraska there is a law prohibiting the employment of women (Laws 1919, Ch. 190) in any manufacturing, mechanical, or mercantile establishment for more than 9 hours a day, or in the nighttime after 10 p. m. Crounse was superintendent of the World Publishing Co., which was engaged in publishing a daily and Sunday newspaper. He required eight women who were employed in the mailing room to work after 10 p. m. and before 6 a. m. He was charged with the violation of the act above mentioned, but the prosecution was dismissed by the district court on the ground that the publishing company, not being a manufacturing, mechanical, or mercantile establishment, did not come within the provisions of the law. The county attorney took exception to this decision. The supreme court in affirming the decision of the lower court said in part:

The courts are not in entire accord on the question of whether or not such a publishing company is a manufacturing establishment within the commonly understood meaning of that term.

The work which characterizes the business of publishing a newspaper is the gathering and disseminating of news, the furnishing to subscribers of various kinds of information, the carrying of advertisements, and the writing of editorials and articles on matters of public interest. Machinery and mechanical labor are indispensable, but are only incidental to the carrying on of the main purpose of the business. A newspaper is the product of intellectual effort, not of mechanical labor.

A newspaper publishing house not being, then, a manufacturing establishment, can it be said to be a mechanical establishment within the purview of the law?

The statute is not directed specifically at mechanical labor wherever the same may be performed, but at all labor performed by women in those institutions only which are to be classed as mechanical establishments. For the general purpose of the law, it was evidently deemed best by the lawmakers to describe in what establishments female labor should be regulated, rather than to attempt to regulate certain kinds of labor in all establishments. Almost all business establishments employ some mechanical element in their operations. The mere fact that machinery or mechanical appliances, or mechanical or manual labor, is used, or found to be employed, does not necessarily characterize the establishment as a mechanical establishment.

What has been said with regard to manufacturing has also some bearing in the interpretation of the word "mechanical," as applied to establishments. A newspaper can not be said to be the product of mechanical effort any more than it can be said to be a manufactured article, nor can it be said that a newspaper publishing house, taken as an entirety, is a mechanical establishment within the meaning of the law.

It is our opinion, therefore, that a newspaper publishing house, such as the one here before us, is not one of the institutions where the legislature intended to regulate the hours of employment of women.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OFFICES CONTINUOUSLY OPERATED—DAY AND NIGHT OFFICES—MEALTIME—*United States v. Cornwall & L. R. Co., United States District Court for Pennsylvania (November 29, 1920), 268 Federal Reporter, page 680.*—The United States brought suit against the Cornwall & Lebanon Railroad Co. for the violation of the federal "hours of service" act of March 4, 1907 (Comp. St., sec. 8678) which provides in part:

That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime.

The railroad company operated a telegraph office in Lebanon, Pa. The hours during which it remained open were from 6 a. m. to 9 p. m. in winter, and from 6 a. m. to 10.30 p. m. in summer. Killinger, one of the telegraphers, was required to remain on duty from 6 a. m. to 5 p. m., a period of 11 hours, when he was succeeded by another operator who worked until closing time. In holding that this was a violation of the law the court said in part:

The sole question presented as to Killinger, therefore, is whether he was employed in a "daytime" office or a "day and night" office. In determining the question, the nature and purpose of the act must be borne in mind. In interpreting the proviso, it must be given such reasonable, sensible construction as will promote its beneficial purpose, and effect the intention of the Congress that enacted it.

It is reasonable to suppose that Congress intended in general to include in the "daytime" class such offices as had the lighter business, which could be readily handled by one operator, and to include in the "night and day" class those offices which had such amount of business as would require several operators, in which case only would it be practical to have a 9-hour limit. Therefore, in the former class the 13-hour period was allowed; in the latter, only a 9-hour period.

In the case of Killinger, his hours were from 6 a. m. until 5 p. m., or 11 hours, when he was succeeded by another operator, who served from 5 p. m. until 9 p. m. or 10.30 p. m. The office itself was open 15 hours in winter and 16½ hours in summer. It was not such an office as was contemplated by Congress in the term "operated only during the daytime," and the Government's contention is consequently correct, that defendant violated the act in requiring Killinger to remain on duty more than 9 hours.

In the last five counts the railroad company was charged with the violation of that part of the law that prohibits the employment of

a telegrapher for more than 13 hours in a 24-hour period in a "day-time" office. The company required Garman, its telegraph operator at Bellaire, Pa., to remain on duty from 6.40 a. m. to 9 p. m., a total period of 14 hours and 20 minutes. Of that period the office was temporarily closed 50 minutes in the morning, and 30 and 40 minutes at noon and in the evening, respectively, when Garman got his meals. The railroad company contended that these periods should be deducted from the total hours of service. The court, however, refused to allow this deduction, saying in part:

It is contended by defendant that, if the period of 30 or 40 minutes for meals at noon and in the evening be deducted, together with a 50-minute period in the morning, it would bring the time Garman was on duty within the 13 hours. This presents a question, therefore, not arising in the case of Killinger, viz: Is a respite granted the operator during the period for meals to be deducted from his hours of duty? In the Atchison case the Supreme Court said: "A trifling interruption would not be considered." (220 U. S. 37, 31 Sup. Ct. 362.) It has been practically held, in the cases to which reference has already been made, that the defendant can not break the continuity of working hours by closing the office for small periods of 30 or 40 minutes during the day, and in this manner avoid the statute. (*U. S. v. St. Louis Southwestern Railway Co. of Texas* (D. C.), 189 Fed. 954.)

The statute was intended to promote the safety of employees and the traveling public by affording sufficient time for recreation and rest, so that small periods during their hours of duty for meals would not offer any opportunity for rest as contemplated. Such intermission must be counted as a part of the continuous service. Brief periods allowed for meals should not be deducted from the time of service; they are "trifling interruptions," in the language used by the Supreme Court in the Atchison case. It follows that Garman remained on duty more than 13 hours in a 24-hour period, in violation of that statute.

Defendant must accordingly be found guilty upon each of the 11 counts. In none of the cases does the violation appear aggravated; hence judgment will be entered against defendant for the minimum fine of \$100 on each of the counts, being a total of \$1,100. Defendant to pay the costs.

HOURS OF SERVICE—RAILROADS—TELEGRAPH OPERATORS—"ON DUTY"—*United States v. New York, N. H. and H. R. Co., United States Circuit Court of Appeals, First Circuit (June 29, 1921), 274 Federal Reporter, page 321.*—Charles W. Crane was employed by the defendant company as a telegraph operator at its station at Marlboro Junction, in the State of Massachusetts. He was paid for 12 hours' service out of 24-hour periods, but was actually on duty between 5 and 7 hours. His hours were 4 p. m. to 4 a. m., but he was relieved several times during the night by the train dispatcher, and

during these periods of relief he could go and come as he pleased, as he was not subject to any call. The United States brought an action against the employer to recover penalties provided for violations of the Federal hours of service act of March 4, 1907 (see case above).

The district court found in part as follows:

That the release periods allowed to the operator should be deducted from his total hours of service, and that when he was released for a definite time by the train dispatcher he was not "on duty."

An appeal was taken to the circuit court of appeals, which affirmed the judgment of the district court. Judge Johnson, in the course of the opinion, said:

The controlling purpose of Congress in the enactment of this statute was the protection of the lives of the traveling public, by preventing the employment of men charged with responsible duties as to movements of trains by telegraph or telephone for so long a time as to render them incapable of performing their duties efficiently.

The act applies to all stations "continuously operated night and day" and provides that a telegraph operator shall not "be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period" in such stations except in case of emergency.

The Supreme Court of the United States having decided that the 9 hours of service in 24 in which a telegraph operator is employed need not be continuous, but that the aggregate of his employment within the 24-hour period determines whether he has been employed more than 9 hours in contravention of the act, the test which has since been applied by the courts in the construction of this act has been whether the release periods were of such substantial length and at such a time as to afford rest and release from the strain of labor. In the present case the operator had three release periods, each of them of more than an hour in length, and knew each day when he came to work, as he testified, that he would receive these release periods at substantially the same time and for the same duration as on previous days. He was notified by the train dispatcher at the close of each period of actual service when he might leave and when he should return to his post and during these intervals he was free to employ himself as he saw fit.

HOUSING—REGULATION OF RENTS—CONSTITUTIONALITY OF RENT LAW—PUBLIC INTEREST—*Block v. Hirsh*, *United States Supreme Court* (April 18, 1921), 41 *Supreme Court Reporter*, page 458.—Julius Block was in possession of a house in the city of Washington, D. C., under a lease. Before the expiration of the term of the lease Hirsh bought the house and gave Block notice to vacate when the lease expired. Upon the expiration of the lease Block refused to sur-

render possession on the ground that under act of October 22, 1919, chapter 80, Title II, 41 Stat. 297, he was not required to do so. The act cited was passed to relieve employees of the Federal Government from excessive rentals for homes, and provided that tenants of dwellings could not be ejected for refusal to pay increased rentals, nor, when a lease under which they have been holding possession expired, could they be required to either vacate or pay a higher rental. Hirsh sued for possession, and Block set up the law as a defense. The Court of Appeals of the District of Columbia declared the law unconstitutional, and the case was brought to the United States Supreme Court on an application for a writ of error. In reversing the decision of the District of Columbia court, and declaring the law constitutional, Mr. Justice Holmes, delivering the opinion of the court, said in part:

The question is whether the statute is constitutional or, as held by the Court of Appeals, an attempt to authorize the taking of property not for public use and without due process of law, and for this and other reasons void.

No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern.

Decisions sustaining laws regulating the construction, etc., of buildings were noted, and the court continued:

But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain,

it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.

Noting that the act was of only temporary effect, and that provision was made to secure to the landlord a reasonable rent, the act was sustained.

There was a vigorous dissenting opinion by Mr. Justice McKenna, concurred in by three others, claiming that the act was in violation of the fifth amendment. This forbids the enactment by Congress of any law depriving of life, liberty, or property without due process, or taking private property for public use without just compensation.

INSURANCE OF EMPLOYEES—POWER OF MUNICIPALITIES—LIFE INSURANCE—*People ex rel. Terbush and Powell (Inc.) v. Dibble, City Comptroller, Supreme Court of New York, Special Term (February 19, 1921), 189 New York Supplement, page 29.*—The city of Schenectady, N. Y., by an ordinance authorized and directed its mayor to enter into a contract for group life insurance, insuring the lives of city officers and employees other than those whose salaries were fixed by law. A policy had been issued to the city, under the terms of which one death claim had been paid. The comptroller refused to pay the premium, claiming that the city had no authority in law to make such a contract of insurance. A writ of mandamus was sued for against the comptroller to compel the payment of the premiums due.

The application for a mandamus was denied, Judge Borst stating the reasons as follows:

A search for authority conferred by the legislature does not reveal any enactment granting power, express or implied, within the accepted provisions of law laid down by Mr. Dillon, authorizing the taking of the policy in question by the city and incurring liability therefor. The workmen's compensation law (Consol. Laws, c. 67) does not authorize it, for that insurance only relates to hazardous employments, while the employees [are] actually engaged in the service of the employer, while the insurance in question is general life and permanent disability insurance to the employee, insuring him against loss from death or such disability, irrespective of whether such death or disability occurred from any act in the course of his employment.

Neither in the charter of second-class cities nor in General City Law (Consol. Laws, c. 21), art. 2-a, added by chapter 247, Laws of 1913, known as the home-rule law, can be found any provision authorizing the power claimed on the part of the city to take the insurance in question. This insurance has no relation to the public health, public morals, nor the public safety, nor any of the other objects which come within the scope of the city's power. Attention is called to the granting of pensions to city employees, but it will be noted that in such cases the action of the city authorities is provided for by legislative enactment.

LABOR ORGANIZATIONS—BOYCOTT—CONSPIRACY—CLOSED-SHOP AGREEMENT—MONOPOLY—INJUNCTION—*Brescia Const. Co. v. Stone Masons' Contractors' Association et al.*, *Supreme Court of New York, Appellate Division (March 4, 1921)*, 187 *New York Supplement*, page 77.—The plaintiff is a company almost entirely owned by Brescia, and is engaged in the business of doing stone and brick construction work. The defendants are an association of employers who are also engaged in a contracting construction business in stone and brick, known as the Stone Masons' Contractors' Association, and various labor unions, composed of members who are engaged in brick-laying and stone masonry work. The defendant employers' association had an agreement with the defendant union whereby the employers undertook to employ none but union labor on their jobs, and the unions agreed to refuse to permit any of their members to work for contractors who were not members of the association or who were not in good standing. Brescia had been a member of the employers' association, but owing to a difference of opinion on the subject of dues he was expelled. The William Phelan Realty Co. had under way a building project in the Bronx and contracted with Brescia for the construction of the stone and mason work of the foundations. After Brescia got started with this work the employers' association brought pressure to bear on the unions to compel the latter to call off the men working on Brescia's job. Brescia got other men, but again the unions called the men off the work. Brescia brought suit for damages and for an injunction against all the parties. The defendants set up their agreement in defense, and the complaint was dismissed upon the merits. The plaintiff appealed, and the decision was reversed. In granting the injunction prayed for the court said in part:

Assuming that Brescia was justly expelled by the Contractors' Association from its membership, its jurisdiction over him ceased with his expulsion. The difference between him and that association did not justify the means it adopted in depriving the plaintiff of its workmen and driving it out of business. It resorted to unlawful methods in punishing the plaintiff because its president may have offended the officers of the association or refused to comply with its mandates. The defendant Contractors' Association being without lawful warrant to destroy plaintiff's business, it follows that those who actually aided and abetted it in effectuating these illegal acts are equally culpable with it.

The defendant unions, in acting as the tools or instrumentalities of the Contractors' Association for meting out punishment to the plaintiff corporation, thus also became wrongdoers. As has been observed, the labor unions had no grievance of their own against the plaintiff, and yet they carried out the behests of the Contractors' Association to ruin the lawful occupation of the plaintiff. The acts of the combined associations were malicious, wanton interferences with the

rights of the plaintiff, which contravened the provisions of section 580 of the penal law (Consol. Laws, c. 40), which declared that:

"If two or more persons conspire * * * 5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act by force, threats, intimidation, * * * each of them is guilty of a misdemeanor."

It seems to us clear that the provisions of the agreement between the defendants which obligated the members of the union to work exclusively for members of the Stone Masons' Contractors' Association, with the unimportant exception therein mentioned, as well as that provision of the agreement which requires the members of the defendant unions not to do any work "for or under any contractor, builder, corporation or persons owing money to any member of the Stone Masons' Contractors' Association, for work performed or materials furnished," are illegal and against public policy. The effect of such a contract is to force by intimidation, threats, and coercive measures one who is unwilling to become a member of the Contractors' Association to join it, or, upon his failing so to do, to deprive him of the labor which he may require and to interfere with his pursuit of his lawful vocation; and in case any debt is claimed to be due to any member of the Contractors' Association, the agreement contemplates that the labor unions will assist in collecting by arbitrary and oppressive measures claims thus asserted. In other words, instead of according alleged debtors the right to have their disputes determined by the legal tribunals established for that purpose, the defendant associations have constituted themselves the judges of the facts and the law and the agencies for enforcing their unauthorized decrees.

Another grave objection to the agreement is that it tends and is calculated to create a virtual monopoly of the stone and mason foundation work in the borough of the Bronx. Under the agreement the Stone Masons' Contractors' Association has it within its power to throttle competition, to fix prices at excessive rates against the welfare and interest of the community, to dictate terms, and to assume practical control of all the foundation masonry work in its district.

The vice of the agreement lies in this: That it is calculated not only to be oppressive to nonunion workmen, but also to contractors and builders who are not members of the Contractors' Association. The disagreement between the plaintiff's president and the Contractors' Association furnished no legal justification for its acts of oppression.

The judgment should therefore be reversed with costs, and judgment rendered in favor of the plaintiff for the injunctive relief demanded in the complaint, and if a judgment for damages as prayed for be desired, a reference will be ordered to compute the same, with costs. Settle order on notice, reversing findings inconsistent with this decision and containing new findings. All concur.

LABOR ORGANIZATIONS—BOYCOTT—CONSPIRACY—INTERFERENCE
WITH INTERSTATE COMMERCE—INJUNCTION—*Burgess Bros. Co.*
(*Inc.*) *v. Stewart et al.*, Supreme Court of New York, Trial Term,

King's County (March 5, 1921), 187 New York Supplement, page 873.—The plaintiff company is a large exporter of lumber. It had some difficulties with its union teamsters and lumber handlers, whose unions demanded that it maintain a closed shop and employ no one but members of the unions. This the company refused to do, but stated that its employees could become members of the union if they so desired. Being unsuccessful in securing their demands, the Teamsters' Union and the Lumber Handlers' Union then called on the International Longshoremen's Union to cooperate. This union, which is composed of the checkers, weighers, and handlers of freight employed on the docks by the steamship companies, ordered its members to refuse to handle any freight offered for shipment by the plaintiff until it acceded to the demands of the Teamsters' Union. The longshoremen were so solidly organized that the plaintiff was unable to ship any lumber. It therefore brought an action against the steamship companies that refused to handle its lumber and against the union for an injunction. In granting the injunction the court said in part:

The conditions prevailing in the port of New York at the time in question were and are a matter of common knowledge. There was a great shortage of labor, due to the then existing abnormal conditions. Steamship owners were at the mercy of the labor unions, and they felt, no doubt, that it was more profitable to tolerate, and, in fact, to openly countenance, the unjust and illegal acts of the unions, than to discharge those of their employees who refused to handle plaintiff's lumber.

It would be strange, indeed, if the law is so impotent as to furnish no relief from a condition forced upon it, which, if continued must inevitably bring financial ruin upon the plaintiff. Plaintiff has been guilty of no wrongdoing, but is engaged in a lawful pursuit. The plaintiff is not required to await the result of criminal proceedings, and allow its business to be ruined in the meantime, but may proceed by civil action to prevent the continuance of a wrong when the wrong is the result of a conspiracy in violation of the criminal law.

It is the purest sort of sophistry to argue that a decision here adverse to the labor unions is a violation of the Federal Constitution, in that it imposes involuntary servitude upon the employees of various of the defendants. There is no suggestion that any of the employees are compelled to work for these defendants. Their right to work for whom they please, and when they please, is inalienable, and any judgment of the court to the contrary could not stand; but it would be absurd to permit the employees to continue on a course of conduct which makes the steamship owners guilty of a violation of the statute in discriminating unlawfully against the shippers of goods. If such a course of conduct is countenanced, it must, if carried to a logical conclusion, result in destroying all who do not employ union men—coercion greater, in fact, than that of which some of the defendants are now complaining.

Those defendants, who were owners or agents of steamships, were required to serve the public without discrimination, and if their em-

ployees continued voluntarily in their service the same obligation rested also upon the employees. This record is barren of any evidence which would indicate a desire on the part of the steamships' representatives to receive or handle plaintiff's lumber. They did not discharge or reprimand any of their employees for discriminating against plaintiff, but openly sanctioned such conduct and connived at it, on the theory, no doubt, that it was better that plaintiff should suffer than that the movement of freight in the port be "tied up." The concerted action both of the employer and employees leads to the accomplishment of an unlawful act; i. e., that of violating both the United States shipping act (39 Statutes at Large, 728 [U. S. Comp. St., secs. 8146a-8146r]) and the United States Criminal Code, sec. 37 (U. S. Comp. St., sec. 10201).

This statute is declaratory of the common law, which placed an obligation upon the common carrier to serve the public without discrimination. A carrier can not avoid this responsibility. It is no answer to a charge of misconduct, amounting to a discrimination to say that the unlawful act is that of an employee. It was the duty of the employers to find those who would handle all goods offered for shipment, and if those employed to do that work refused there could be no other alternative but to discharge such employees, even though it may have led to a great financial loss to the steamship owners and inconvenience to the public. The employee is the alter ego of the principal, and any act of the employee in violation of the common law, or of the statute, is the act of the principal, for which the principal is liable.

It is apparent that plaintiff will suffer irreparable damage, for which it has no proper or adequate remedy at law, unless an injunction issue, and as the shipping act (sec. 16, shipping act) is broad enough to include agents, stevedores, receiving clerks, etc., the injunction will run against all the defendants.

LABOR ORGANIZATIONS—CONSPIRACY—"CHECK-OFF" SYSTEM—
UNIONIZATION OF MINES—INJUNCTION—*Gasaway et al. v. Borderland Coal Corp.*, *United States Circuit Court of Appeals, Seventh Circuit (Dec. 15, 1921)*, 278 *Federal Reporter*, page 56.—Suit was brought by the mining corporation against the United Mine Workers of America and others for an injunction. It was averred on an application for a temporary injunction and the proof showed a combination and working arrangement, a conspiracy, between the United Mine Workers of America and the coal operators in the so-called "Central Competitive Field," to destroy what some of the conspirators called the "vicious competition" of the West Virginia mines. The business of the coal corporation was shown to be interstate. The evidence showed that the competition sought to be destroyed was competition in the sale of bituminous coal throughout the several States. The method adopted by the conspirators to thus destroy competition was to unionize the West Virginia field, so as to

compel operators to run upon a union basis, which would result in raising the price of the West Virginia product so that it could not compete with the "Central Competitive Field." Violence followed the attempt to unionize the mines, developing into a state of war which continued until the President sent troops into the State. By an arrangement between the mine workers' union and the operators, fines and assessments are withheld from the wages of the workers and are paid over to the organization. This is the "check-off" system. The United Mine Workers sent more than two and a half million dollars to unionize West Virginia. Ammunition and arms were purchased, and money was used for feeding and furnishing supplies to those union miners who had been evicted from their homes or deprived of a living or put to a disadvantage in carrying on the struggle.

At the close of the hearing, the miners asked for time to procure further evidence. Mr. John L. Lewis, the president of the United Mine Workers of America, being in court at the hearing, was asked by the court whether he would agree to cease efforts to unionize the mines in West Virginia until the evidence could be obtained and the court have time thoroughly to investigate the matter. This he refused to do, and a temporary injunction was issued by Judge Anderson against the use of the "check-off system" by certain employers resident in the State of Indiana, further conspiracy, or aiding in the attempted unionization of the nonunion mines in Mingo County, W. Va., and Pike County, Ky. Actual necessities were permitted to be sent to members out of employment or living in tents in these two counties. But two of the union officials named in the bill were within the jurisdiction of the court, and the names of all the others were on motion stricken out. The two defendant officials, Ora Gasaway and W. D. Van Horn, prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit. That court remanded the cause to the district court with directions to enter a preliminary injunctive decree in consonance with the opinion of the court. The opinion, written by Judge Baker, is, in part, as follows:

Because the bill states a good cause of action, and because the decree is merely interlocutory, nothing is now involved but the question whether the decree clearly discloses an improvident exercise of judicial discretion.

In examining that question, we accept as conclusive the district court's findings of fact based on appellee's verified bill and affidavits.

Appellee asked that the United Mine Workers be dissolved or enjoined from functioning, on the ground that it is a seditious and otherwise unlawful organization. The district court declined to find that the union is an unlawful body. But, as we have already indicated, appellee must stand solely on its own private rights:

appellee is not the guardian of others; appellee is not the vindicator of the public's rights, criminal or civil; and it was not the conspiracy, but the trespasses of joint tortfeasors, who are liable independently of the conspiracy as a ground of action, that inflicted the injury upon appellee's property.

Appellee sought and obtained a decree restraining "the unionization or attempted unionization of the nonunion mines" in the Williamson district. Appellants, and their agents and representatives in West Virginia, are thus enjoined from publishing lawful union arguments and making lawful union speeches in the closed district; from making lawful appeals to those in the pool of unemployed labor to join the union rather than the nonunion ranks; and from using lawful persuasion to induce any one of appellee's employees to join the union and thereupon instantly and openly to sever his relationship with appellee, not in violation of, but in exact accordance with, his contract with appellee.

If the arguments of the owners of closed nonunion shops should be universally accepted, labor unions would have no ground of complaint, either legal or equitable, for their decline and fall. If the arguments of the advocates of the closed union shop should prevail, then similarly their opponents would have no legal or equitable cause of action. In either case the outcome would be due to the exercise of reason and free will. In this as in every other instance of antinomy, of conflicting interests and mutually restricting rights, the rule of conduct is that each side shall so exercise its rights as not to injure the rights of the other. In the present state of the law, and without a constitutional exercise of the legislative power of regulation, appellee had no greater right to a decree suppressing lawful action (such as the publications, speeches, and personal persuasions, heretofore mentioned in this paragraph) in support of the closed-union shop program than appellants had to a similar decree suppressing similar lawful action in support of the closed nonunion shop program. Neither side had any such right.

Appellee sought and obtained a decree enjoining the performance of existing contracts between the operators and their union employees in the Central Competitive Field with respect to what is called the check-off provision. So far as the contracts themselves and this record disclose, the check-off is the voluntary assignment by the employee of so much of his wages as may be necessary to meet his union dues and his direction to his employer to pay the amount to the treasurer of his union. In that aspect the contract provision is legal; and quite evidently there are many lawful purposes for which dues may be used. If in truth the bargaining with respect to the contract was not free, if either the employee or the employer put the other under duress, the injured party might have cause to seek cancellation. (But if he had nothing to urge in the way of duress except "economic necessity," he might not succeed.) If in bargaining one of the parties was not free by reason of the greatly preponderant power of the other, the legislatures of these Central States and the Congress might consider whether public interest required or justified the limitation of the otherwise existent freedom of contract by abolishing the check-off as a subject-matter of contract, in similitude to the legislative abolition of truck stores, dangerous appli-

ances, unsanitary working places, exhausting hours, etc., as permissible subject-matters of contract. But appellee is not a party to the contract, is not the attorney of either contracting party, and is not the agency to establish the public welfare.

Appellee insists that it is entitled to have the performance of the existent check-off contracts enjoined, because the check-off is the "heart" of the United Mine Workers organization. Appellee is confusing a series of remote causations with the proximate cause of the injury. The only property that was injured was appellee's freedom in operating its mine and in putting its coal onto cars in West Virginia to be shipped in interstate commerce. The proximate cause of the injury was the described interferences in the Williamson district with appellee's aforesaid right to freedom. Without the direct and immediate interfering acts, the desires and intents of the conspirators in the Central Competitive Field would have been innocuous. In the series of causations the check-off provision was undoubtedly one of the elements. Manifestly unless money was collected, the union's executive officers could not send it into West Virginia to aid or promote the interfering acts. But in the same contracts that contain the check-off feature were provisions for the payment of wages and the recognition of the miners as human beings with the physical capacity to labor. On a parity with appellee's contention respecting the check-off element, all the other elements in the series of causation leading up to the proximate cause should also be enjoined. Money could not be sent into West Virginia by the executive officers, unless it was collected from the miners' wages; nor unless the miners earned wages; nor unless the miners were human beings having the capacity to labor.

From the record as it now stands we are convinced that the district court committed substantial errors in exercising its judicial discretion in the following particulars: (1) In not confining the grant of relief to appellee; (2) in not limiting the prohibition of the unionization or attempted unionization of appellee's mine to the threatened direct and immediate interfering acts shown by the bill and affidavits; (3) in not limiting the prohibition of the sending of money into West Virginia to the use thereof in aiding or promoting the interfering acts; and (4) in enjoining the performance of the existent check-off contracts in the Central Competitive Field.

The decree should be recast.

LABOR ORGANIZATIONS — CONSPIRACY — MONOPOLY — COMBINATION IN RESTRAINT OF COMMERCE—*Charles A. Ramsey Co. v. Associated Billposters of the United States and Canada et al., United States Circuit Court of Appeals, Second Circuit (December 23, 1920), 271 Federal Reporter, page 140.*—The Charles A. Ramsey Co., a company engaged in the advertising business, brought suit against the defendant for treble damages for the violation of the Sherman Antitrust Act of July 2, 1890 (Comp. St., secs. 8820–8830). The defendant is an association of men who are engaged in the business of posting bills upon billboards. They license solicitors who may secure ad-

vertising by means of bill posters and refuse to post any bills not procured by their licensed solicitors. The plaintiff claims that this is an unlawful conspiracy in restraint of interstate commerce. The defendants demurred to the complaint and moved for judgments on the pleadings, which were granted. The plaintiffs appealed, but the judgments were affirmed. In rendering the opinion of the court, Circuit Judge Ward said in part:

The defendant Associated Billposters of the United States and Canada, a corporation of the State of New York, does no business itself, but is composed of members who are engaged in the business of billposters, only one being admitted to membership in each town or city. The other defendants are solicitors of advertising.

The rules of the association defendant prohibit its members from accepting from any advertising solicitor, other than one licensed by the association, national work; i. e., billposting in a different town or city in the same State from that in which the advertiser resides, or in any town or city in a different State. The rules also regulate the prices for billposting in various places and prohibit the licensed solicitors from employing any billposter not a member of the association in any town or city where there is one.

It is also alleged that the association has prevented manufacturers of certain posters—that is, lithographers—from furnishing them to customers other than members of the association, by the refusal of such members to deal with them if they do so. This is another way of saying that the members of the association will post bills only for such advertisers as send their bills through its licensed solicitors. Even if it means more than this, it does not avail the plaintiffs, because they are not lithographers, and can not sustain injury thereby. It will be seen from the foregoing that there is no combination between the advertisers, and that competition in their business is quite unrestrained.

The plaintiffs had been licensed as solicitors by the association, but their licenses were canceled in 1911, as the result of which their profits have been greatly diminished. If the combination is an illegal one under the Sherman Act, the plaintiffs have a right to maintain the actions, even though they are not themselves engaged in interstate commerce.

The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, the posting of them by the billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40.

The Supreme Court held that the business of the members of the exchange was not interstate commerce, that the association affected interstate commerce not directly, but incidentally, and accordingly that it was not within the prohibition of the Sherman Act. We think it follows from this decision that the regulations of the association defendant in this case, both as they affect their own members,

and also the advertising solicitors licensed by it, is not interstate commerce, and therefore not obnoxious to the act.

There is an intimation in the complaint of jurisdiction because of a diversity of citizenship between the plaintiffs and nearly all the defendants, even if there be no jurisdiction under the Sherman Act. But no combination is alleged which would be unlawful at common law.

The judgments are affirmed.

LABOR ORGANIZATIONS—CONSPIRACY—MONOPOLY—COMBINATION IN RESTRAINT OF COMMERCE—*Sullivan et al. v. Associated Billposters and Distributors of the United States et al., United States District Court, Southern District of New York (September 30, 1919), 272 Federal Reporter, page 323.*—In 1891 a number of billposters combined to monopolize and control the billposting business throughout the United States and Canada, and formed an association, which was incorporated in 1902. The measures adopted by this association to control interstate and foreign trade and commerce were: (a) Membership confined to one billposter in each town; (b) rules preventing members of the association from dealing with any advertiser who furnishes business to a nonmember; (c) agreed schedules of prices for billposting; (d) furnishing members with funds to buy competing plants; (e) since July, 1911, prohibiting members from accepting work from advertisers direct, and permitting them only to accept work licensed by the association; (f) threatening to discriminate against lithographers who furnished sample posters to independent billposters or to advertisers desiring to employ independents, by refusing to deal with such lithographers. The plaintiffs were engaged in soliciting billposting business, and were alleged to have been injured in their business by the conduct of the defendants. Plaintiffs sued to recover treble damages under the Sherman Antitrust Act. Defendants contended that the plaintiffs had no cause of action against them. The court decided in favor of the defendants. Judge Hand wrote the decision of the court, part of which is as follows:

It is strongly urged by the defendants that they have merely furnished additional facilities for advertising and have been neither engaged in interstate commerce nor have directly affected it. The direct result and intended purpose of the alleged combination, however, was to prevent posters from being transported from State to State, except for erection on billboards by the defendants or their agents. Lithographers who dealt with any independent billposter could not deal with them. As a result, the defendants in the billposting business caused a continuous transmission of billposters from State to State, to be placed by members of the association in their respective localities. No advertiser could place his poster, except through their agency. The members of the association were

freed from the competition of independent billposters, for, if the advertiser, or the lithographer, dealt with an independent billposter, he could not deal with defendants. Lithographers who allowed their posters to be placed by independents would lose the privilege of having their posters placed by the defendants, and could only have their posters handled by independent billposters, who had become few in number and consequently offered limited facilities. The advertiser can not have his billposters delivered for placing in the various States, unless he arranges his billposting through one of the defendants' solicitors. He can not even buy his posters from the lithographer, unless he deals with the billposters in the defendant association, for the lithographers can not allow their posters to be placed by independent posting concerns, because of the risk of boycott by the association. The scheme is not only so devised as to define the agencies which must be employed in placing posters, but is so arranged as to prevent the possibility of purchasing posters from the leading lithographers unless the requisites of the association are met.

Within the doctrine laid down by the Supreme Court in the case of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, this arrangement would not constitute a restraint of interstate commerce, in violation of the Sherman Act, if it was limited to preventing members of the association who had purchased posters from the lithographers from being employed by advertisers to post their bills who did not give all their billposting business to such members. But in the complaints under consideration it is stated that billposters not only put up posters for advertisers, but at times themselves purchased sample posters and sold them to, as well as placed them for, advertisers. An agreement among the defendants to purchase from no lithographer who sold sample posters to an independent billposter would clearly be in restraint of interstate commerce. It would be a direct interference with the sale and transmission of posters from one State to another and would violate the Sherman Act.

The question remains, however, whether the plaintiffs are shown to have been injured by any restraint of commerce disclosed by the complaints. Various decisions have held that a plaintiff who had been injured may recover damages, though he has not himself been engaged in interstate commerce. (*United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. at page 577, 146 C. C. A. 532.) There must, however, be a direct relation between the restraint and the injury.

Nothing in the decree or opinion of Judge Landis [in a suit to dissolve the Associated Billposters] tends to show that Sullivan suffered injury arising out of any agreement in restraint of commerce, and for this reason the general demurrer to the Sullivan complaint must be sustained.

LABOR ORGANIZATIONS—CONSPIRACY—STRIKE TO COMPEL CONTRACT—DESTRUCTION OF PROPERTY—*People v. Raymond et al.*, Supreme Court of Illinois (February 15, 1921), 130 Northeastern Re-

porter, page 329.—A. B. Raymond, R. H. Williams, and the other defendants, were officers and members of a Journeymen Barbers' Union. They had a working agreement relating to hours and working conditions with the Master Barbers' Union which expired in April, 1919. In February and March the Journeymen Barbers' Union attempted to arrive at a new agreement with the Master Barbers' Union but were unsuccessful. The members of the Journeymen Barbers' Union went on a strike to induce the signing of the contract, in furtherance of which Raymond and other defendants engaged in a campaign of window smashing and bomb throwing. The defendants were apprehended and charged with conspiracy to destroy property and were convicted. They brought a writ of error, but the decision was affirmed. In discussing the case Judge Farmer of the supreme court said in part:

There was evidence that pending the negotiations between the two organizations, some statements of a threatening character were made by defendants to induce the acceptance of the agreement by the master barbers. They declined to accept it, however, and immediately on the strike being called by defendants' organization a campaign of smashing windows of barber shops began. Bricks and "stink bombs" were thrown through the plate-glass windows of about 150 shops. Attacks were of almost nightly occurrence for about a month, and the shops thus attacked were located in various sections of the city. Tesch and Donnawell were arrested first. They were in the act of placing a bomb at a barber shop. They made confessions. Neither of them was a barber, but they said they were employed by Freiheit, whose arrest followed next day. He was a barber, and also confessed, and testified he was employed and paid by Raymond and Williams so much per window for each window smashed, and that they gave him the location of the shops to attack. He secured assistance in carrying out the work, which was done by throwing the missiles from an automobile they had procured, while driving by the shops late at night. These depredations ceased when the arrests were made.

Our conclusion from the testimony is that the competent testimony abundantly warranted the verdict, and if no prejudicial error was committed on the trial there is no justifiable reason for reversing the judgment. We have examined the complaints made, and are satisfied the errors, if any, in this respect were so trivial in character that they did not prejudice defendants. The indictment charges the conspiracy was entered into May 18, 1918, but, of course, that was not controlling. It was proper to show the conspiracy had been formed at any time within 18 months before the indictment was returned. It is contended the evidence shows that whatever conspiracy was proven was entered into early in May. The evidence of acts and declarations prior to May 1, when the Journeymen Barbers' Union went out on a strike and the work of smashing windows began, tends to show that defendants contemplated resort to violence and trouble if their terms were not accepted. It was not necessary that it be shown just what the character of the acts they proposed or had in view would be. If they intended by acts of violence and damage

to force an agreement to their terms the evidence was competent. It is sufficient to say we agree with the conclusion of the appellate court that there was no error so prejudicial, either in the rulings on the evidence or in giving and refusing instructions or in the conduct of the court or State's attorney, as to justify a reversal of the judgment.

The judgment is affirmed.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—CRIMINAL SYNDICALISM—MEMBERSHIP AS VIOLATION OF LAW—*State v. Hennessy, Supreme Court of Washington (January 25, 1921), 195 Pacific Reporter, page 211.*—Mike Hennessy became a member of the Industrial Workers of the World, said to be an organization designed to bring about industrial, economic, social, and political changes in the Government by means of "crime, sedition, violence, intimidation, and injury." Such organizations are prohibited by a law of the State of Washington (ch. 174, acts of 1919) which makes "criminal syndicalism" a felony. Hennessy was convicted under this act, appealed on the ground, among many others, that the statute was unconstitutional; first, because it purported to punish constructive treason, and, second, because it was class legislation in that it was intended to restrict the right of labor organizations to discuss industrial questions. The judgment of conviction was affirmed. The court in rendering its opinion on the two points above mentioned said:

It is the general rule, that, where a single offense may be committed in different ways or by different means, it may be charged in the information to have been committed by more than one of the ways or means.

To meet the charge of unconstitutionality the court cited *Fox v. State of Washington*, 236 U. S. 273, 35 Sup. Ct. 383, in which a law of like nature was upheld as constitutional, and continued:

The fact that treason is defined in the Federal Constitution does not deprive the State legislature of the power to enact the statute which is intended to prevent the teaching of crime, sedition, violence, or intimidation as a means of overcoming or destroying the present social order.

The fourth point is that the statute is class legislation. The argument here seems to be based on the assumption that it was "intended to restrict the discussion of economic and industrial questions among labor organizations." There is nothing, however, on the face of the act to justify this assumption, and the court in considering the question is governed by its terms. The legislature has power to pass all needful police regulations, and so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts. The act is general in its terms and provides that "whoever" shall do the things there prohibited shall be guilty of a felony. Under this language any one, no matter what

his business associations or professional calling might be, who did the things prohibited by the act, would be subject to its provisions.

Various other contentions were rejected, the law was upheld, and the conviction affirmed.

LABOR ORGANIZATIONS—INDUSTRIAL WORKERS OF THE WORLD—SABOTAGE—INTERFERENCE WITH GOVERNMENT—*Haywood et al. v. United States, United States Circuit Court of Appeals, Seventh Circuit (Oct. 5, 1920), 268 Federal Reporter, page 795.*—Wm. D. Haywood, as president, and others as members of the Industrial Workers of the World were charged on four counts of an indictment for conspiracy to violate or obstruct the execution of certain laws of the United States. They were convicted on each of the four counts, and they brought a writ of error. The convictions under counts 1 and 2 were reversed, but the convictions under counts 3 and 4 were affirmed. Counts 1 and 2 referred to activities of the defendants in conspiring to commit sabotage, to interfere with the production of war munitions, to break machinery, to spoil materials, to strike, and to use force in preventing strike breakers from taking their places. In reversing the convictions under these counts the court said in part:

How was the execution of these various laws to be prevented by force? Defendants were officers and agents of the Industrial Workers of the World. That organization was opposed to capitalism and the wage system, believed that the "workers" should seize the "tools of industry," was hostile to our system of Government, denounced our entry into the war as the result of the influence and desire of the "ruling, capitalistic classes," and undertook to block our efforts to win. Defendants, having control of that organization as an instrument, conspired to have their members, who were workmen in factories engaged in producing war munitions and supplies, break machinery, spoil materials, strike, and use force to prevent other workmen from taking their places; also to have their members refrain from registering in obedience to the selective-service act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, secs. 2044a-2044k), to have them desert, if brought into registration offices, and to rescue them by force, if caught; and also, in defiance of the espionage act, to cause all whom they could influence by speeches, pamphlets, and newspapers to keep out of the military service.

Those parts of the case under the first count that have to do with violations of the selective-service act and the espionage act must here be eliminated, for the following reasons: Count 3 is for conspiracy to violate the selective-service act. Count 4 is for conspiracy to violate the espionage act. Granting that section 6 of the Penal Code, on which count 1 is predicated, is broad enough in its terms to cover conspiracies to use force in preventing, hindering, or delaying the execution of the selective-service act and the espionage act, the penal provisions of these last-named acts constitute the specific directions of Congress for the punishment of all obstructions, forcible or otherwise, of the recruiting and enlistment service. Congress did not in-

tend, in the face of the constitutional prohibition, to inflict punishment twice for the same offense.

There remains, then, the question whether forcible interference with the operations of producers from whom the Government was expecting to buy or had contracted to buy war munitions and supplies constituted a forcible prevention of the execution of the acts of Congress in declaring war and making appropriations therefor.

Undoubtedly Congress, under the war power, could have protected by legislation the operations of such producers from all interference, forcible or otherwise, and as the war progressed various strengthening laws were enacted. But the question now before us concerns the true meaning of section 6 [of the Penal Code]. This was enacted long before the war. It must be enforced after the war is officially ended. Manifestly in each period, before, during, and after, it must be given the same meaning and effect.

So the question under section 6 covers not only war supplies, but also any peace-time supplies which the Government might intend to buy or had contracted to buy. The Government Printing Office is conducted under laws directing and making appropriations for its operations. Any direct interference by force with its operations might possibly be held to be a forcible prevention of the execution of laws of the United States. * * * Producers who have contracts to furnish the Government with supplies, are not thereby made officials of the Government. Defendants' force was exerted only against producers in various localities. Defendants there may have violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of Federal statutes; and the lawmakers owe the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. Section 6 should not be enlarged by construction. Its *prima facie* meaning condemns force only when a conspiracy exists to use it against some person who has authority to execute and who is immediately engaged in executing a law of the United States.

We conclude that no case was made under count 1.

Similar attacks were made upon the case under count 2.

This count is based on section 19 of the Penal Code (Comp. St., sec. 10183), which denounces conspiracies to injure citizens of the United States in the exercise of any "right or privilege secured to him by the Constitution and laws of the United States."

Defendants were charged with conspiring to prevent by strikes and sabotage such of the producers described in count 1 as were citizens from fulfilling their contracts with the Government for war munitions and supplies. To produce, to sell, to contract to sell to any buyer, are not rights or privileges conferred by the Constitution and laws of the United States. If the buyer is an agent of the United States, he needs a Federal law to qualify him as a buyer; but the producer and seller is exercising only such rights as antedated Federal law, were not included in the grants of power in the Constitution (except to the extent that his product comes under Federal taxation, regulation of interstate commerce, and the like), and were expressly reserved by the tenth amendment. Foreign governments, foreign and domestic corporations, individuals, who

were not citizens, all sold war supplies to our Government, equally with citizens. No case was made under count 2.

Counts 3 and 4 involved no question of labor, but of conspiracies to hinder the enlistment and military service of the members of the I. W. W. by persuasion, etc., and call for no consideration in this compilation.

LABOR ORGANIZATIONS—INTERFERENCE WITH INCORPORATED LOCAL UNION BY FEDERATION—INJUNCTION—*Kunze et al. v. Weber et al.*, Supreme Court of New York, Appellate Division (May 27, 1921), 188 New York Supplement, page 644.—The plaintiffs were eight directors of the Musical Mutual Protective Union, a membership corporation organized under the laws of New York, and affiliated with the American Federation of Musicians, an unincorporated association.

The members of local unions become members of the federation ipso facto when the local union is organized under or affiliated with the federation, and the existence of the local unions as members is simply an administrative factor to accomplish the purposes sought to be accomplished by the federation.

A Mr. Finkelstein had been elected president of the Protective Union. There arose a difference in the union over the acts of Finkelstein, and as a result eight members of the board of directors preferred charges against him, suspending him as president and giving him notice of a hearing. Finkelstein then went to Joseph N. Weber, who was president of the American Federation, and who issued an order staying all proceedings for the presentation or consideration of charges against Finkelstein and forbidding the eight officials to act as directors of the Protective Union. Arthur Kunze and others brought this action to procure a permanent injunction against Weber. From an order granting a temporary injunction, defendants appealed. The appellate division affirmed the decision of the lower court, and through Judge Smith said:

This Protective Union is a corporation with a statute regulating its affairs. It was authorized to make by-laws, and the by-laws adopted provided how the president could be removed. The directors took proceedings for the removal of the president by making charges and giving him notice of a hearing, and meantime they suspended him from acting as president. Then came the order from Weber. It seems clear that the mere fact that this Protective Union was affiliated with the American Federation neither gives to the federation nor to the president thereof the power to interfere with the internal management of the corporation. If the union itself had committed any act which was repugnant to the purposes of the federation, the right of affiliation might have been withdrawn. The power, however, to regulate the internal affairs of this corporate union is given under the laws of the State, and is not subject to interference from this unincorporated association.

In this respect the rights of the members of this union materially differ from the rights of members of a union organized under the federation itself, wherein the federation might itself make laws which defined and designated those rights. The right to suspend an officer of the corporation, given to the majority of the board of directors under the by-laws passed in pursuance of the laws of the State, is not subject to review by this president of the Federation. Under the orders which were disregarded by these directors, and for which these directors have been expelled, the president of this federation assumed to take the power given by law to the directors of the Protective Union away from those directors. This was in excess of the president's authority.

Having suspended this president of the Protective Union, as might be lawfully done under their by-laws, neither the American Federation nor the president of the federation had the right to reinstate him and enjoin the members from interfering with his acting as president while he was so suspended. Nor had the federation or its president the right to enjoin the trial of the charges made against the president of the Protective Union. The remedy of the president of the Protective Union was through the corporation and its own by-laws, and not by appeal to the American Federation, except so far as the right of appeal was given by the by-laws of the Protective Union itself. When the eight directors disregarded this order of the president staying the action of the local union, the president made another order, in which he first made all members of any affiliated union members of the federation, and by a later order expelled these eight members. Of course, if these men were not members of the federation, he could not make them members of the federation merely for the purpose of expelling them. It was not necessary to make them members of the federation. They were already members.

But, even if this corporation had not been incorporated, this president had no authority to expel these members thus summarily without giving them a hearing, even if he had the right to expel them at all. But he has expelled them, and notified the employers of musicians that they were expelled as members, which has resulted in their being thrown out of employment. The emergency clause in the constitution and by-laws of the federation, in which powers are given the president in emergencies, will not be construed by the courts to give him any further power than are necessary to preserve the status quo, or to protect the federation until action can be taken by the executive council or the federation in convention. The power to expel is given to the executive board of the federation, and not to the president. Otherwise, if the executive board were not in actual session, the president would have the power to expel anyone and call it an emergency matter, which would hold until the next meeting of the convention, which might be a year off. This would be true, even if the union were not a corporation. Such a power involving property rights is denied, because inequitable. This order was clearly in excess of any powers, emergency or otherwise, and an injunction was properly granted to prevent this president exercising any such powers. That these by-laws can not authorize this president to deprive plaintiffs of their rights as members of the corporation by any

emergency clause comes directly within the ruling of the Court of Appeals in the matter of *Brown v. Supreme Court*, I. O. O. F., 176 N. Y. 132, 68 N. E. 145.

It is claimed, however, that these respondents have no right to appeal to the courts until they have exhausted their remedies within the corporation. As a general proposition this is true. But here these men have been expelled, and notice of their expulsion given, and they have been deprived of their livelihood, without a hearing. There is no provision under the by-laws of the American Federation for any appeal from any emergency order of the president, except to bring the matter up at the next convention. If there were any such provision for review, it must be prompt in its action; otherwise, the power to expel a member as an emergency act would be unreasonable and invalid.

The order should therefore be affirmed.

LABOR ORGANIZATIONS—INTERFERENCE WITH INTERSTATE COMMERCE—PICKETING—CONSPIRACY—INJUNCTION—*Herket & Meisel Trunk Co. et al. v. United Leather Workers International Union*, United States District Court, Eastern District of Missouri (November 26, 1920), 268 Federal Reporter, page 662.—The plaintiff company named and others engaged in similar lines of manufacture had procured a temporary injunction against the leather workers' union to prevent picketing and other interference with the conduct of business. A strike had been called by the union, involving practically all of the employees of the plaintiff companies, following a failure to agree on a new contract between the employers and the union. Picketing by numbers, accompanied by threats and intimidation and the use of abusive and opprobrious terms, prevented the employment of other workmen and led to a large reduction in the output of the factories affected.

The first question disposed of, after a statement of the "unpeaceful and unlawful" methods used by the pickets, was that of jurisdiction. There was no diversity of citizenship involved, the only ground for a Federal court to take cognizance of the case being a claim that there had been a violation of the Sherman antitrust law, so called. The pertinent provision of this law (sec. 1, 26 Stat. 209) declares illegal "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The major part of the goods customarily manufactured by the plaintiff companies went into interstate commerce and interstate orders were on hand at the time of the strike. The strike, therefore, interfered with the production of goods to fill interstate orders or to meet such orders as might be obtained from time to time. Otherwise there was no interference by the plaintiffs with shipments in interstate commerce, such goods as were actu-

ally made for interstate shipment having been forwarded without let or hindrance by the strikers.

It was the contention of the union that the terms of the antitrust act did not apply until interstate commerce actually began by the delivery of the goods to a common carrier for transportation, or the actual commencement of their transfer to another State, citing *In re Greene*, 52 Fed. 113. This definition had been applied in *Hammer v. Dagenhart* (247 U. S. 251, 38 Sup. Ct. 529, Bul. No. 258, p. 96), where it was said, "If it were otherwise, all manufacture intended for interstate shipment would be brought under Federal control, to the practical exclusion of the authority of the State"—a result not contemplated by the framers of the Constitution.

Judge Faris, who delivered the opinion of the court, admitted that the point was "at least, on principle, a close and difficult one." Recognizing the force and effect of the citations offered, he said that if the matter were one of first impression in the circuit within which the State of Missouri lies he would feel constrained to agree that these statements were final. However, the question had been passed upon by the Circuit Court of Appeals of the Eighth Circuit in *Dowd v. United Mine Workers* (235 Fed. 1, 148 C. C. A. 495, Bul. No. 224, p. 168) and *United Mine Workers of America v. Coronado Coal Co.* (258 Fed. 829, 169 C. C. A. 549, Bul. No. 290, p. 192). These cases involved the same parties, though under somewhat different title. In the former the finding in the case, *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.* (166 Fed. 254, 92 C. C. A. 318) that a conspiracy to prevent the production of goods by a manufacturer who procures the supplies and disposes of his products by means of interstate commerce, preventing him from engaging in business at all, necessarily places restriction upon such commerce, was quoted with approval. The cases of *Loewe v. Lawlor* (208 U. S. 274, 28 Sup. Ct. 301, Bul. No. 75, p. 622) and *Lawlor v. Loewe* (235 U. S. 522, 35 Sup. Ct. 170, Bul. No. 169, p. 140) were also cited in support of the position that interference with manufacture, the products of which were for interstate shipment, was an interference with commerce within the terms of the antitrust law. In the second case the defendants undertook to reopen the question, but the point was said to have been decided in the *Dowd* case, and a reexamination was refused.

In the *Dowd* case, the coal, or much of it, which was intended for interstate commerce, but which was prevented from flowing therein by the unlawful acts of the defendants there, had not been mined, and therefore was not in existence as a commodity of any sort of commerce for transportation.

The situation so closely paralleled that existing in the instant case that Judge Faris felt himself constrained "as in duty bound, regard-

less of my own views," to hold that the plaintiffs here were engaged in interstate commerce within the purview of the first section of the Sherman Antitrust Act.

The question of the conspiracy was disposed of "more briefly and with less difficulty." Following the call for a general strike practically all the employees of the plaintiffs quit work and many of them became pickets. "Picketing was done in a way that was not lawful, and which is not legally permissible, even under the broad provisions of the Clayton Act." Committees of the defendant unions managed the strike, "which, of course, largely meant to manage the pickets who were engaged in picketing the shops of plaintiffs." The pickets and other striking employees received strike benefits, but there was no extra compensation for doing picket duty, which was voluntarily engaged in.

If these pickets committed unpeaceful and unlawful acts, therefore, absent any protest or disciplinary action by the local unions, the latter are liable for such acts. Neither is it necessary to prove the conspiracy alleged in the complaint by direct evidence. Such conspiracy may be shown by circumstantial evidence. If the rule were otherwise, it would ordinarily be impossible to establish a conspiracy in any case; a fortiori, in a labor dispute.

The conclusion was reached that the facts and circumstances disclosed a conspiracy within the meaning of the law, hurtful and injurious to "the interstate commerce of the plaintiffs as that commerce has been defined in this circuit." A permanent injunction as prayed for was therefore directed to be drawn.

LABOR ORGANIZATIONS—PICKETING—INTERFERENCE WITH CONTRACT OF EMPLOYMENT—INJUNCTION—*Cyrus Currier and Sons v. International Molders' Union of North America, Local No. 40, et al., Court of Chancery of New Jersey (July 23, 1921), 115 Atlantic Reporter, page 66.*—This suit was to restrain the defendant union, its officers and agents, from picketing the complainant's foundry and interfering with its employees and from soliciting them to join the union in violation of their contract of employment. A strike in which pickets were employed about the complainant's plant in 1917 had been stopped by an injunction. Thereafter the company adopted a policy of excluding all union men from its service, and made this a condition of employment. In 1920 the union again picketed the complainant's plant to persuade the core makers and molders to join the union in breach of the conditions of their employment. The solicitations to join the union were accompanied by threats of violence and sometimes with actual violence against the reluctant and unwilling, with the result that complainant was greatly hampered in carrying on its business. The defendant knew the conditions of em-

ployment. The new members of the union were enjoined to secrecy with the aim eventually to unionize the complainant's shop. An injunction was granted by the court in an opinion which quotes freely from the case of the Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (Bul. No. 246, p. 145). The court compared Stevenson, the financial secretary of the defendant union, with Hughes in the Hitchman case above. In the opinion Vice Chancellor Backes for the court said:

As to Stevenson's guilt of intimidation, violence, and seduction of the complainant's employees, I have no doubt, notwithstanding his denial. He professes to have acted as an individual unionist, and not as a representative of his local; but this is idle evasion. The defendant local is an unincorporated organization of men—a co-partnership—bound together for the attainment of worthy objects, mutually beneficial, sometimes, unfortunately, sought to be obtained by unworthy means, and in the prosecution of their common object the action of any one member is binding upon all; and so the conduct of Stevenson in behalf of the organization, and his methods, though obnoxious in the eyes of the law, are chargeable to the defendant local, and, indeed, as I read the answer of the defendants, the local, while specifically denying the representative capacity of Stevenson, does not shirk or seek to evade responsibility for his activities in its behalf. The joint answer of the union and its officers specifically denies the charges of intimidation and violence, but collectively they admit, with argumentative modification, the charges of picketing and the solicitation of the complainant's employees to membership in the organization, and implicitly adopt all of Stevenson's efforts, charged and proved, lawful and unlawful, as their community efforts. Stevenson embodied the union.

It is the complainant's legal right to hire men unaffiliated with labor unions, and to make continuance of unaffiliation a condition of the employment. That is as assured to the employer as is the right of the unions to make it a condition of membership that their members shall not work in shops where nonunion men are employed. And it is the master's legal right to have his servants abide with him, free from interference of the union, as it is the right of the union to prosper unmolested by the employer. The right of each to lawfully prosecute his affairs is equally within the protection of the law, and if in their competition for labor harm falls to one from the lawful promotion of the other's business, the injury is an inevitable incident, legitimately inflicted and excusable. So long as each keeps advancing his interest without purposely intending to harm the other, there is no room for complaint or cause for action; but when either converges the line of advance in assault upon the other, then the law, through its courts, calls a halt by injunction. In other words, in their progress they must not step on the other's toes with intent to injure.

Labor has not as yet appealed to the courts, but if the present "employer's closed-shop" movement has for its ultimate object the overthrow and destruction of organized labor—an ulterior and unlawful object—and, by means as unworthy as those here reprehended, capital is certainly extending the invitation.

LABOR ORGANIZATIONS—PICKETING—SECONDARY BOYCOTT—LAWFULNESS OF PURPOSE—ATTEMPT TO CAUSE BREACH OF CONTRACT—INJUNCTION—*Parker Paint & Wall Paper Co. v. Local Union No. 813 et al.*, *Supreme Court of Appeals of West Virginia* (February 8, 1921), *105 Southeastern Reporter*, page 911.—The plaintiff company was engaged in the painting, papering, and decorating business in the city of Huntington, W. Va., and employed 5 to 10 men. It became a member of an association of employers known as the Master Painters' Association of the City of Huntington. The members of this association were operating under a wage contract with the defendant, Local Union No. 813, and maintained a "closed shop." The defendant was a branch of the Brotherhood of Painters, Decorators, and Paper Hangers of America. In January, 1920, friction arose between the union and those of its members who composed the Master Painters' Association, and the latter were refused permission to sit in the meetings of the local union or participate in its affairs. After attempts to adjust the differences had failed, the local union refused to allow its members to work for members of the Master Painters' Association. In order to fulfill their contracts the Master Painters employed non-union men. The local union then adopted the plan of "bannering" or picketing the places at which members of the Master Painters were engaged at work. Plaintiff had a contract to paint a 5 and 10 cent store, and proceeded with his work with nonunion men. The local union proceeded to picket the store, and banners bearing the inscriptions "This Store is Unfair to Union Painters," "This Store is Unfriendly to Union Labor," were carried up and down before the store. The manager of the store became intimidated and ordered plaintiff to stop work. He then negotiated with the union, which stated that plaintiff would never be permitted to complete the work, and that he should give the work to the union to be completed. The manager refused, and plaintiff resumed its painting of the store, whereupon the union again proceeded to picket and banner the store. The manager of the store fearing a loss of his trade again ordered plaintiff to stop work. Plaintiff also had a contract to paint the Cammack house; and, while its men were at work on the house, the union induced them to cease work, and otherwise interfered with and hindered the work so that Cammack canceled his contract with the plaintiff; and, in order to get his house painted, permitted the union to complete the work. Other instances of a like nature occurred to the plaintiff, and he brought this action for an injunction to restrain the activities of the union in picketing his business and interfering with its work. The circuit court refused to grant the injunction, but on appeal the supreme court granted the injunction prayed for. The circuit court dissolved the injunction and plaintiff appealed. In reversing the de-

cision and in reinstating the injunction the supreme court rendered in part the following decision:

There are two legal propositions which are applicable to this case: (1) A lawful purpose can not be carried out by the use of unlawful means; (2) If the purpose be unlawful, it may not be accomplished even by means that would otherwise be legal.

What was the purpose of these various acts of the defendants? They affirm that their purpose was a lawful one, and was for the maintenance of their organization; that their acts were peaceful and persuasive. But it is manifest that the means by which this end was sought to be attained was the destruction of plaintiff's business by bringing combined pressure upon the persons with whom plaintiff had contracted for the sale of its labor, and causing them to abrogate those contracts. There can be no question of the right of the defendants to form a union for their mutual protection and advantage, and enlarge their union by inducing others to join for this legitimate and proper object; but there can be no question, on the other hand, that this right must be so used as not wantonly to conflict with the rights of others. The same is true of the master painters' organization. A person can use the highway in his automobile, but he must not forget that others have the same right, and he must not damage them wantonly or unwittingly. If one person wantonly or maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, an action will lie.

Martin on Modern Law of Labor Unions asserts that the great weight of authority is to the effect that organized labor's right of coercion and compulsion by strikes or withholding labor or threats thereof is limited to strikes or withholding of labor or threats thereof against persons with whom the union has trade disputes. And the use of such means against one's customers in order to coerce them to compel him to comply with demands made on him by the union is an unjustifiable interference with the rights of such customers. Martin's Mod. Law of Labor Unions, sec. 77.

It is not clear just what reasons dictated the acts complained of in the bill. If for the purpose of compelling plaintiff to withdraw from membership in the Master Painters, it is unlawful. Plaintiff is as free to join an organization for the lawful furtherance and protection of its affairs as are the members of the Local Union No. 813 to become members of that organization, designed for their protection. If for the purpose of preventing a member of the Master Painters from laboring with his hands in performing his own contracts, it is unlawful.

It would be cumbersome and serve no purpose here to review the various decisions and textbooks on boycott, primary and secondary, or on the subject of picketing. The decisions are legion, and some of the niceties and distinctions found in them are difficult to apprehend and are not very instructive. It is sufficient to say that the secondary boycott, where A is brought into a labor dispute between B and C, A having no difference with either, is generally condemned. This "secondary boycott" contemplates that A upon the request of B, and under the moral intimidation lest B boycott him,

may thus be constrained to withdraw his contracts or patronage from C, with whom he has no dispute, the controversy being only between B and C. The English courts, and the Federal courts of this country, vigorously condemn it.

Even some of the State courts which hold that a reasonable boycott is lawful condemn "picketing," holding that the end to be attained thereby, however artful may be the means employed, is the injury of the boycotted business through physical molestation and physical fear caused to the employer and his employed, or who may seek his employment, and to the general public.

LABOR ORGANIZATIONS—PROTECTION OF EMPLOYEES AS MEMBERS—CONSTITUTIONALITY OF STATUTE—*People v. Western Union Telegraph Co. et al.*, *Supreme Court of Colorado* (April 4, 1921), 198 *Pacific Reporter*, page 146.—The Western Union Telegraph Co. and others were charged with a violation of the antioercion act of Colorado (ch. 5, Laws 1911). The above company as a condition to the continued employment of one Holson required of him a contract that he sever his connection with the Commercial Telegraphers' Union of America, and upon his refusal to comply, discharged him, which the statute mentioned above undertook to penalize. Judgment was given releasing them from liability. The State appealed to the supreme court but the judgment was affirmed. The court in deciding this issue said:

That this act is a plain violation of the Federal Constitution has been clearly determined by the Supreme Court of the United States. (*Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 [Bul. 169, p. 147].) In that case a decision of the Supreme Court of Kansas was reversed, and a statute of that State, in all material particulars identical with the one here under consideration, was declared a violation of the "due process" clause of the United States Constitution.

LABOR ORGANIZATIONS—RULES—EXPULSION OF MEMBER—RESTORATION BY EQUITY COURT—*Burke v. Monumental Division, No. 52, Brotherhood of Locomotive Engineers, et al.*, *United States District Court, District of Maryland* (August 12, 1919), 273 *Federal Reporter* 707.—Plaintiff, Dominic J. Burke, was a member of the Brotherhood of Locomotive Engineers. Affiliated with the brotherhood was a mutual aid and benefit association, and a life and accident association. Burke, in the event of sickness, accident, or death was entitled to payments from them, the aggregate value of the right being upwards of \$3,000. This amount would be lost if his membership had been taken from him. In June, 1916, the train employees authorized their brotherhood executives to call a strike in the event of failure to secure a basic eight-hour day with pay at the rate

of time and a half for all overtime. The railroads and the trainmen could not agree, and the executives united in calling a nationwide strike, to begin on Labor Day, 1916. Congress passed the Adamson bill, and the strike order was recalled. The railroads claimed that the law was unconstitutional, and a test case was appealed to the Supreme Court. Pending the decision much was said in favor of compulsory arbitration, and the brotherhoods, which were strongly opposed to such a plan, wished to force the eight-hour day before Congress could act. The brotherhood executives, who believed that the strike vote made in June, 1916, still authorized them to act, called a strike to begin March 17, 1917. Burke believed that the strike vote had expired when the strike order of September, 1916, was rescinded, and so when asked his opinion on the strike by his foreman he stated he was against it and was ready to go into court to prevent it. A bill of complaint was drawn up by the railroad's legal department, praying that the strike be enjoined, and it was signed by Burke on March 17. March 19 the railroads conceded to the demands of the trainmen, and the issues raised by Burke's bill became moot questions. Plaintiff's fellow-workers, however, learned what he had done, and in consequence preferred a charge against him which resulted in his expulsion. The plaintiff sought to compel defendants to restore him to membership. The court held that the plaintiff was entitled to the relief for which he asked. It was held that the district court had jurisdiction because Burke alleged that he had been expelled for the reason that he exercised his constitutional right to bring a suit in a court of the United States. The defendants made a motion to dismiss, stating that Burke should have gone into a law court and asked for mandamus, but the court held that as the brotherhoods were unincorporated associations mandamus could not lie and that the relief was in a court of equity. A decree was ordered for the plaintiff. Judge Rose speaking for the court said in part:

The charge upon which plaintiff was expelled was that in bringing the Philadelphia suit he had violated section 35 of the standing rules of the brotherhood, which imposes the penalty of expulsion upon any member who, by verbal or written communication to railroad officials or others, interferes with a grievance that is in the hands of a committee, or at any other time makes any suggestion to any official that may cause discord in any division. There is here no mention of legal proceedings. The place in which this section appears among the rules does not suggest that it had reference to them. The language employed does not give the impression that the framer of it had them in mind. An intention to deny all access to the courts of the land will not be presumed. If it be enforceable at all, it must be unmistakably expressed.

At the hearing something was said as to section 54 of the rules. That does prohibit resort to the courts in any controversy arising

within the organization, and for which the laws of the brotherhood provide a means of settlement, without having previously exhausted all remedies within the brotherhood. Nothing which plaintiff is charged with having done offends against this rule. The grand chief ordered a strike to begin in a few days. The only possible appeal within the order was to the next triennial convention, which would not meet for 14 months. Plaintiff says he believed that in giving such an order the grand chief was doing something that under the laws of the brotherhood he had no right to do. Under the circumstances, there was nothing the plaintiff could do within the order, and there would have been nothing he could do had he been absolutely right in his contention that the authority given 9 months before was at an end. The rule by the clearest implication sanctions a resort to the courts when a remedy within the brotherhood does not exist.

The learned and zealous counsel for the defendants at the hearing frankly conceded that one of the recognized limitations upon the very broad powers of discipline over their members, possessed by voluntary unincorporated societies, is that they may not be exercised to punish one for seeking aid of the courts where the machinery of the organization can not give it. Yet the only charge upon which the plaintiff was put upon trial was that he had gone into court. This, of course, is admitted. The charge was in writing and speaks for itself.

This would end the case were it not that the defendants contend that plaintiff was expelled, not for suing, but because he sued at the instance, under the direction, and at the expense of one of the railroads, the opposing parties to the controversy in which the brotherhood was engaged. There is no charge that in what was done there was aught of champerty or of maintenance. The complaint is not that the railroad, with the assistance of the plaintiff, was interfering in something which did not concern it, but that it, on the other hand, was vitally interested on a side of it upon which plaintiff, had he been a loyal member of the brotherhood, would not have been found.

All of which he was accused was the bringing of the suit. If that was sufficient ground for expulsion, there could be no defense because the fact was so; but if the gravamen of his offense was his cooperation with the railroad, he should have been told so, in order that he might have made such explanation as he could. The rules of the brotherhood themselves require that the charges upon which a member is brought to trial shall be in writing.

It follows that the plaintiff is entitled to the relief for which he asks.

LABOR ORGANIZATIONS—RULES—RIGHT OF MEMBERS TO PETITION—
REINSTATEMENT OF EXPELLED MEMBER—*Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railway Trainmen of Pottstown, et al., Supreme Court of Pennsylvania (March 21, 1921), 113 Atlantic Reporter, page 70.*—H. F. Spayd was a member of the Ringing Rock Lodge No. 665 of the Brotherhood of Railway Trainmen. Rule 23 of the by-laws of the union provided that:

Any member of the brotherhood using his influence to defeat any action taken by the national legislative representative or any action

regularly taken by the legislative representatives in meeting assembled, or of legislative boards under their proper authorities, shall, upon conviction thereof, be expelled.

The legislature of the State of Pennsylvania passed an act on June 19, 1911, known as the full-crew law (P. L. 1053). This law was attacked in the courts, but was upheld by the supreme court in the case of *Penn. R. R. Co. v. Ewing*, 241 Pa. 581, 88 Atl. 775 (Bul. No. 152, p. 156). Since this decision several efforts have been made to secure the repeal of the law. Spayd was expelled from the union as having violated the above rule 23 because he subscribed to a petition to the legislature to reconsider this statute. He brought suit against the union to require it to reinstate him, but the common pleas court dismissed the bill. On appeal the superior court reversed the decision and ordered Spayd reinstated, whereupon the union appealed to the supreme court. In affirming the decision of the superior court, a decision was rendered from which the following is quoted:

Defendants contend plaintiff confined his case to "the ground that rule 23 was void, and not that he had not infringed it"; and, although the superior court considered other additional matters, since we are of one mind that the rule, as construed by defendants, breaches the fundamental law of the State, we shall accept their suggestion as to the limits of the controversy, and rest our decision on constitutional points alone.

The Pennsylvania bill of rights, sec. 7, says:

"The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty"; that the citizens shall have the right to petition "those invested with the powers of government for redress of grievances or other proper purposes"; finally, that such prerogatives of the individual citizen are "excepted out of the general powers of government and shall forever remain inviolate."

The present case turns on a consideration of these fundamental principles; we shall first express our general view concerning their application, and then consider the subject of the right of petition more particularly. The rights above noted can not lawfully be infringed, even momentarily, by individuals, any more than by the State itself; and least of all can they be breached by corporations and unincorporated associations, which function only by grace of the State, and the "supervision and control" of which are specifically vested in courts of equity by the act of June 16, 1836 (P. L. 784, sec. 13, par. 5; Pa. St. 1920, sec. 4562). We have often said that the by-laws, rules, and regulations of these artificial bodies will be enforced only when they are reasonable, and they can never be adjudged reasonable when, as here, they would compel the citizen to lose his property rights in accumulated assets, or forego the exercise of other rights, which are constitutionally inviolable. Defendant lodge is part of a beneficial organization, and there is a

finding that plaintiff has a substantial property interest therein. Under these circumstances, it will not do to say that he can freely regain full liberty of action, at any time, by disassociating himself from the order; but, even if he could, the rule, as construed by defendants, would still be discountenanced, and void in law.

When plaintiff signed the petition to the legislature to repeal the full-crew law, he was communicating his "thoughts and opinions" to that body and seeking at its hands redress of what he considered a public "grievance"—relief which the lawmakers alone could grant. Since plaintiff viewed the statute petitioned against as such a grievance, the course of conduct pursued by him was not only within his legal rights, but accorded with his solemn duty as a citizen, for the exercise of which he can under no circumstances be penalized.

Appellants' contention that the application of rule 23 to plaintiff does not deprive the latter of his right of petition, but merely delegates it to defendant order during his association therewith, can not be sustained. Any agreement or contract handing over to others such a prerogative, to be exercised on the citizen's behalf, is against public policy and void. The right here involved, and the voting franchise, are the only means by which peaceful changes in our laws and institutions may be sought or brought about, and they can not, with safety to the State or the whole body of the people, be gathered into the hands of the few for any purpose whatsoever. Therefore, on principle, the law will not sanction their delegation. We may add that a temporary giving up or denial of an inalienable right such as the one in hand is as void as though permanent in character; that portion of rule 23 hereinbefore quoted, as construed by defendants—denying plaintiff the right to petition the legislature—has no binding force; hence Spayd was improperly expelled for a violation thereof.

LABOR ORGANIZATIONS—STRIKES—ACTS OF VIOLENCE—INJUNCTION—*Charleston Dry Dock and Machine Co. v. O'Rourke et al., United States District Court, Eastern District of South Carolina (August 11, 1921), 274 Federal Reporter, page 811.*—A suit was brought against the defendants, who were members of unions that had called a strike in the plaintiff's yard. The court granted a motion for a preliminary injunction against the defendants to restrain them from doing unlawful acts in connection with the strike, because, said the court, "It may be impossible to identify any particular individual as the one who shot out the lights, or committed the other acts against the property of the complainant, calculated to injure its property and harass and obstruct it in its operations, yet it is manifest that these acts, as well as the acts of violence upon the persons of its employees and the threats extended to them, are the sequence of the strike and are in pursuance of the intentions, threats, and acts of the defendants." Judge Smith continued:

The fundamental basis of this free Government is that its citizens shall be free—free to own their own property, and perform their

own tasks, and follow their own lives, in pursuit of their own happiness, as each sees it, provided only that the laws of the Republic are observed. The moment any number of citizens, relying on greater physical strength, assume to themselves, by violence or intimidation, to prevent another citizen from exercising his legal rights, or by unlawful coercion, inducement, or persuasion attempt to put an end to the freedom of another citizen, by depriving him of the power to use his own labor and enjoy his own property as allowed by law, at that moment the ordered freedom of the Republic is destroyed and the despotism of a lawless mob substituted.

The difference between a mob of lynchers, who put a helpless captive to death without trial, and a mob of so-called strikers, who beat a helpless fellow workman because he differs from them in opinion as to how he shall exercise his undoubted legal rights, is one of degree and not of kind. In either case, it is an essential law of a free people that is violated. Nothing may be more base and cowardly than the assault of a number, relying on the strength of their numbers, upon an unprotected individual, whose helplessness is taken advantage of to compel him, by physical maltreatment, to yield up his legal rights, unless it be the willful failure of the guardians of the peace to afford protection to the weak, or of the courts to award the shield of the law's enforcement.

Whatever may have been supposed to be the ancient rule that an injunction could not issue from a court of equity to restrain the commission of a crime, it may be regarded as settled in this country, since the decision in the case of *In re Debs*, 158 U. S. 564, 593, 15 Sup. Ct. 900, that the fact that the threatened invasion of plaintiff's rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the instance of a private party.

LABOR ORGANIZATIONS—STRIKES—CONCILIATION AND ARBITRATION—CONSTITUTIONALITY OF STATUTE—*Moore Drop Forging Co. v. Fisher et al.*, Supreme Judicial Court of Massachusetts (September 16, 1921), 132 *Northeastern Reporter*, page 169.—The Moore Drop Forging Company in December, 1920, discharged from its employ 58 men. Thereafter 120 men left its service and combined to maintain and carry on a strike against the plaintiff. The defendants in this action comprised the board of conciliation and arbitration, who, on January 18, 1921, gave notice that they intended to hold a public meeting to investigate the strike. On January 19, 1921, the plaintiff filed a suit in equity to enjoin the officers and members of various unions carrying on the strike, alleging that the strike was unlawful and was carried on by unlawful means. The plaintiffs asked for a temporary injunction against the holding of a public meeting of the board, pending the outcome of the litigation, claiming that the action of the board would prejudice their rights in their suit for injunction against the strikers.

The suit against the board was dismissed, and the plaintiffs appealed to the supreme court. That court affirmed the action of the

lower court, holding that a statute authorizing investigation of strikes was valid, and that the administrative investigation of strikes pending a suit for an injunction was not an interference with the functions of the judicial department. Chief Justice Rugg, speaking for the court said:

The public has a just interest in the causes of strikes and in placing responsibility and blame for their instigation, prosecution, and continuance. The disorder and violence which frequently accompany strikes are matters of common knowledge and often have been adverted to in decisions. The economic waste and immediate financial loss both to employers and employees arising from strikes are too well known to require discussion. Where a strike exists involving more than 25 employees, the public concern in the matter is sufficient to justify an impartial investigation by an unbiased board of public officers within the bounds set forth in the statute. Legislation such as is here assailed is authorized by the general welfare clause of chapter 1, section 1, article 4, part 2, of our Constitution. It has direct connection with the public safety, health, and welfare, the recognized foundations for the exercise of the police power. It is within the class of statutes upheld in many cases reviewed in *Holcombe v. Creamer*, 231 Mass. 99, 120 N. E. 354 [Bul. No. 258, p. 144], and is supported by the principle of that decision which need not be here further amplified.

It must be presumed that the defendants will proceed in accordance with law and will not violate constitutional guaranties of personal liberty and individual freedom.

LABOR ORGANIZATIONS—STRIKE—EFFECT ON CONTRACT OF EMPLOYMENT—STATUS OF EMPLOYEES—*Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co.*, *United States District Court, Northern District of Georgia* (March 26, 1921), 271 *Federal Reporter*, page 743.—This was a suit in equity in which a receiver was appointed for the defendant company. N. H. Evans and others for themselves and as representatives of several unions moved for a declaration of the status of striking employees at a hearing on the question of wages to be paid by the receiver to the employees. (See p. 219.) Judge Sibley, speaking for the court, said, in part:

Aside from statutory uses, employment means, in common-law language, the existence of the relation of master and servant. This may consist either in a binding contract for service or in actual service without a definite contract. One or the other is necessary. The right (with well-known exceptions) of one to refuse to serve, even though under a binding contract to do so, is a part of the constitutional personal liberty of the land. The failure or refusal to perform a contract of service may create a liability in damages, but no court will enforce the service.

A lawful strike, whether the employment consists in a definite contract or is merely an existing relation, involves generally an abandonment of the employment and a termination by the strikers of the

employment so far as they are concerned. It may be a strategic move to force at last a better employment, but it definitely destroys the present one, so far as the employees can destroy it. In this case the motion itself admits that there was a complete strike—a concerted refusal of all employees represented to do their customary work when summoned by the receiver. He accepted the situation and employed others to the number of 900, as many as he is at present able to pay. Evidently these and not the old men are now the employees.

But it is said that as to the trainmen the receiver had improperly announced a reduction of pay, and this is true. But the rights of the trainmen, under the Newlands Act (Comp. St., secs. 8666-8676), may be analogized to those that would exist under a definite contract to serve for the 20 days involved, at the fixed wage. As in the case of a contract, the benefit of the act may be waived by the trainmen. (Fort Smith Railway Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526.) The wages here were not payable in advance of service, but were not due until about April 1st. The receiver's announcement was no more than an anticipatory breach of his duty to pay, like an anticipatory breach of a contract to pay, which gave the other party the choice of treating the relation as broken and abandoning it without incurring liability, or of denying the right to terminate it and performing or tending the service and claiming the pay.

Both things may not be done. A contract could not be treated as broken and abandoned; and also treated as unbreakable and to be performed.

In this case, after the receiver announced his wage reduction, the trainmen, with the others, conferred with him and insisted on the sole jurisdiction of the Labor Board, but made no mention of the Newlands Act; and as to the question discussed they were referred by the receiver to the provision in the court's order for a hearing at any time before the court. The men remained at work under protest. This was, as has been ruled, sufficient to reserve all rights, including those under the Newlands Act, and rebutted any inference of consent to the reduction.

The refusal to work further on March 5th, when summoned by the receiver, no matter what the reason or justification, terminated the employment. The invitation to present any contention to the court was extended by the original order of February 28th. A definite time for a hearing was set in advance of the next pay day on March 26th, without withdrawing the original invitation, which was open for any time. After the strike had commenced on March 5th, an order was made emphasizing the right to a hearing, and warning of this very complication, if the service should be abandoned.

A strike, though a lawful and a valuable economic weapon, is not a substitute for orderly procedure in court and can not be allowed as a legal remedy for legal rights as against a receiver, without asserting that our courts can not or will not do justice, which is to announce the failure of orderly government. Although the strike vote was taken January 28th, weeks before the receivership, and involved only a demand for a decision by the Labor Board, which it has held itself without authority to make, and although this only

was agitated in the conference with the receiver, and as to this question the men have been held to be in the wrong, yet there was the aggravation of the oversight of the Newlands Act, and reason, perhaps, for misunderstanding about the hearing. The strike has been conducted without violence connected with the striking employees and without personal bitterness between them and the receiver and no reason appears why they should not be reemployed, so far as the receiver has employment for them. He testifies that he will be glad to give it to them. We do not, however, think it right to direct him to reemploy them in a body, not only because he has not now sufficient business, but also because it would not be right to discharge those who have taken some of the places and are proving acceptable and contented employees. Reemployment must be treated as an administrative detail and to be taken up with the receiver.

LABOR ORGANIZATIONS—STRIKES—INJUNCTION—CONTEMPT OF COURT—FELONY—*State ex rel. Hopkins, Atty. Gen., et al. v. Howat et al., Supreme Court of Kansas (June 11, 1921), 198 Pacific Reporter, page 686.*—The defendants were officers and members of the district board of District No. 14, United Mine Workers of America. The Legislature of Kansas at the special session of January, 1920, passed a law creating a court of industrial relations for the supervision of and to secure the continuous operation of industries affected with a public interest. This court had taken jurisdiction of a controversy between employers and miners, and in the exercise of such jurisdiction had subpoenaed Howat and others to testify as witnesses. They had refused to obey these subpoenas and other subpoenas for like purpose issued by the district court, and had been committed to jail for contempt of court. The attorney general filed a petition for an injunction against the United Mine Workers of America and the officers and members of local unions of District No. 14 to enjoin them from interfering with the operation of coal mines in the mining districts of the State of Kansas. The petition alleged that the defendants were conspiring and confederating among themselves and with others to violate the act creating the court of industrial relations. The injunction was granted. In February, 1921, the officers of the district board of District No. 14 ordered a strike. The members of the union obeyed the order. Howat and the other defendants were accused of contempt, and after a hearing, the court, without a jury, found them guilty of violation of the injunction and of contempt of court. It was ordered that they be confined to jail for a period of one year and pay the costs of the prosecution. The defendants appealed to the supreme court. The assignments of error presented questions relating to the validity of the violated injunction and the validity of the act creating the court of industrial relations. The supreme court affirmed the judgment of the district court in a

lengthy decision which cited many authorities, set forth several industrial and economic facts, and as a note included chapter 29, Special Laws of 1920, creating the court of industrial relations. The following quotations are taken from the opinion written by Judge Burch:

The power of a court in any case to grant an injunction for any purpose is not statutory. In the absence of statute, power exists in courts to grant injunctions for numerous purposes. The power not being statutory, and not being in derogation of the common law, is not strictly construed. If the power were statutory, it would be liberally construed, to accomplish just and equitable purposes, because of an express statute of this State.

It is said the injunction was invalid, as an attempt to enjoin a crime. If so, the injunction order was not void, and the defendants are precluded from attacking it in this proceeding.

The purpose of the injunction was not to enjoin crime, and bore no other relation to administration of the criminal law. The purpose was to prevent the irreparable injury which the petition for injunction alleged would occur, and which the court found would occur, unless the defendants were restrained from executing their designs. It might be the defendants would incur sentences to the penitentiary or to jail, but the imposition of those penalties would not fulfill the obligation of the State of Kansas to protect its people from the calamitous consequences of the defendants' wrongdoing, and for which there was no redress.

Nor is there in this any invasion of the constitutional right of trial by jury. * * * The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. (In re Debs, 158 U. S. p. 594, 15 Sup. Ct. 910.)

It is contended the act creating the court of industrial relations contravenes section 16 of article 2 of the constitution of the State, in that it contains more than one subject, and the subjects are not clearly expressed in the title.

In a certain sense, the act embraces two subjects: Regulation of public utilities, and regulation of those industries which have to do with supplying the people with necessities of life. In the same sense, the second subject is doubly triple. It embraces food, clothing, and fuel, and it embraces production, manufacture, and distribution. According to the same method, the act might be conceived as divided into as many subjects as a carefully prepared index of its contents would disclose. That, however, is not the method by which to determine the scope of a statute. The question in any case is, Are the particulars so diverse that they may not be connoted in a single generic concept? In this instance the general concept is enterprise affected with a public interest, and the grouping is not only natural, but consistent and harmonious.

Employers and employees disagree about how the product of their joint contributions to industry shall be divided. In the last analysis, hours, working conditions, recognition of union, etc., revolve about this fundamental subject of grievance. The subject is of great im-

portance to the employer. It is of even greater importance to the employee, because on wages depend food, clothing, and shelter; recreation, and the details of daily living; the value of the worker to the community in which he lives; and even the length of time he will live. Disagreements become acute, the contestants become hostile to each other, sometimes each one resorts to force, and the public, the great employer of both labor and capital, suffers grievously.

The court concludes the business of producing coal bears an intimate relation to the public peace, good order, health, and welfare; that such business is affected with a public interest; and that such business may be regulated, to the end that reasonable continuity and efficiency of production may be maintained.

It is said the act of 1920 is void because it trenches on personal liberty. The personal liberty contended for is liberty to leave the employer's service. All the leading cases in which the principle involved have been discussed are cited. It is not necessary to review them. The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. As many others as desire may do likewise, and they may do so as the result of mutual interest consultations. No employee may, however, transgress the limits of his personal privilege, as defined earlier in this opinion, for the purpose of limiting or suspending production, contrary to the provisions of the act.

The foregoing case together with another case of the same title (107 Kans. 423, 191 Pac. 585; see Bul. No. 290, p. 170) came to the Supreme Court of the United States on writs of error. The earlier case involved the power of a district court of the State to punish by imprisonment persons who refused to comply with the subpoenas and summons of the court of industrial relations.

The writs of error were for the purpose of testing the constitutionality of the laws creating the court of industrial relations, but Chief Justice Taft, speaking for the court, found that the State courts had disposed of the questions before them on principles of general law, no Federal questions being involved (*Howat v. Kansas*, 42 Sup. Ct. 277). The Kansas Supreme Court had cited *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, as authority for the power of a properly constituted court to enforce the investigative features of the industrial relations act. This was approved, and an added citation given by Chief Justice Taft in support of the position taken, adding that even if the features of this law which were complained of had been void, the power to punish for contempt had been sustained on general law.

Passing to the second case, set forth above, much the same situation was found to exist. An injunction issued by a constitutional court of general jurisdiction with power to issue injunctions, and having the parties within its jurisdiction must be obeyed, and can

not be attacked in a collateral proceeding. "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on this decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." No Federal question being involved, this writ also was dismissed.

LABOR ORGANIZATIONS—STRIKES—INTERFERENCE WITH CONTRACTS—"CHECK-OFF"—STRIKE TO COMPEL COLLECTIVE AGREEMENT—INJUNCTION—*Kinloch Telephone Co. et al. v. Local Union No. 2 of International Brotherhood of Electrical Workers et al., United States Circuit Court of Appeals, Eighth Circuit (June 27, 1921), 275 Federal Reporter, page 241.*—The complainant telephone companies operate a telephone system in the States of Illinois and Missouri. The defendants are the union, certain of its officers and all of its members. The companies had a contract with their employees dated July 3, 1919, which was to be effective for one year. It provided that complainants' business would be operated on an open-shop basis, that the complainants would not interfere with the union affiliations of their employees, and that, in the event of a disagreement, a committee of employees and other persons on complainants' part would act as a board of arbitration, whose decision would be binding.

During January and February, 1920, a demand was made by the union that the complainants pay the union dues of certain of their employees or see that such dues were paid or discharge men who did not pay such dues. The demand was refused. A strike was then called. Complainants filed suit for the purpose of enjoining defendants from inducing their employees to break their contract. A motion for a temporary injunction was denied in the district court because of section 20 of the Clayton Act.

An appeal was made to the circuit court of appeals. That court reversed the order appealed from and remanded the case to the court below with instructions to issue a temporary injunction, upon the authority of *Hitchman Coal and Coke Co. v. Mitchell and Duplex Printing Press Co. v. Deering et al.* Judge Carland, speaking for the court, said:

We agree with the trial court that the contract between the appellants and their employees required arbitration of any dispute which the evidence may show existed between the appellants and their employees, and that the committee referred to in the contract was intended to be a committee on the part of the employees composed of employees of appellants, and not a committee of the local union to which said union employees of appellants might belong, or a commit-

tee composed of the members of the conference board of local unions, and that neither [on] a proper construction of the contract nor in common fairness or reason is there any obligation on the part of appellants to pay the union dues of their employees, or to see that such dues are paid, or to discharge men who do not pay such dues, although it is clear that this is one of the chief ostensible reasons for calling the strike. We also agree with the trial court in finding that the strike was called in a studied and concerted effort on the part of appellees to unionize the business of appellants, or, in other words, to compel them to convert their business from an open shop into a closed shop. We further agree with the trial court that appellees, as members, officers, and agents of the International Brotherhood of Electrical Workers and as individuals, are causing, maintaining, and supporting the strike in question upon wholly feigned and insufficient grievances, with the aim and intent to compel appellants to unionize their business; that the result of such action upon the part of appellees has been to cause the contract existing between appellants and its employees to be breached by such employees without sufficient reason or excuse in law or in fact, and, further, that appellees threaten to cause other of appellants' employees to break their contract with them; and that appellees are seeking to attain the results above stated by advice, persuasion, and inducements, bottomed upon labor unionization and union obligations. The trial court was of the opinion upon the facts as stated that, laying aside section 20 of the Clayton Act (38 Stat. 738), the case of *Hitchman Coal & Coke Co. v. Mitchell* (245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145]) clearly entitled the appellants to a temporary injunction, but it was of the opinion that the Clayton Act did not pass under judgment in the *Hitchman* case, as that case, although decided three years after the Clayton Act took effect, was commenced seven years before that time. The form of relief asked for in the *Hitchman* case, however, operates only in futuro, and the right to it must be determined as of the time of the hearing. (*Duplex Printing Press Co. v. Deering et al.*, 254 U. S. 443, 41 Sup. Ct. 172 [Bul. No. 290, p. 174] decided by the Supreme Court, January 3, 1921, and since the decision of the court below in the present case.) Therefore the Supreme Court in the *Hitchman* case must have considered the effect of the Clayton Act on that case. Light is thrown upon the *Hitchman* case by the language used by Justice Brandeis in his dissenting opinion in the *Duplex* case. He said:

"Unlike *Hitchman Coal & Coke Co. v. Mitchell*, there is here no charge that defendants are inducing employees to break their contracts, nor is it now urged that defendants threaten acts of violence."

The only inference to be drawn from this language is that the *Hitchman* case established the law on the facts appearing therein, notwithstanding section 20 of the Clayton Act. We are therefore of the opinion in view of the decision of the Supreme Court in the *Duplex* case, that the trial court erred in holding that section 20 of the Clayton Act forbids the issuance of an injunction in the present case. In the *Duplex* case it was decided that section 20 is limited to the employees affected regarding their own employment, and does not confer privileges upon all members of a labor organization to which they might belong. It was also decided in the same

case, if we interpret the decision correctly, that while anyone may quit their employment even though a contract exists, yet they may not peacefully persuade others to break their contracts in order to gain their ends, and the Clayton Act does not legalize such interference. The appellees, who were not employees of appellants, persuaded some of the employees under contract to break same, were attempting to persuade others to do likewise, and threatened to have the telephone operators break their contract. The employees testified in this case that they had no dispute with their employers, and especially is this true in regard to the women, who had a separate contract which appellees threatened that they would cause to be broken. The object and purpose of a temporary injunction is to maintain the status quo. The issuance of such an injunction generally rests in the sound discretion of the trial court, and that discretion will not be interfered with by an appellate court as to the facts, unless there has been a serious error committed in the consideration of the same.

The law, however, as at present established when applied to the facts herein stated, fully warrants the issuance of a temporary injunction. It is therefore ordered that the order appealed from be reversed, and the case remanded to the court below, with instructions to issue a temporary injunction in accordance with the views herein expressed.

LABOR ORGANIZATIONS—STRIKES—INTERFERENCE WITH CONTRACTS—PERSUASION BY PROPER ARGUMENT—INJUNCTION—*McMichael et al. v. Atlanta Envelope Co. et al., Same v. Webb & Vary (Inc.)*, Supreme Court of Georgia (August 10, 1921), 108 *Southeastern Reporter*, page 226.—The two cases were heard together in the trial court upon the same evidence, which resulted in a temporary injunction being issued against the defendants, McMichael and others, individually and as representatives of Atlanta Printing Pressmen and Assistants' Union No. 8, enjoining their interference with the employees of the plaintiff companies. It was alleged that the defendants made a demand upon the plaintiffs that they contract to give to all the pressmen and feedmen employed by them at that time a large increase in wages, to reduce the working hours, and also to "close" the shop. Upon refusal of the demands all of the pressmen and feedmen then employed by plaintiffs walked out, making it necessary for plaintiffs to secure nonunion pressmen and feedmen or yield to the demands which they claimed would cause bankruptcy. The plaintiffs had at great expense made contracts of employment with nonunion men upon the understanding that such employment would immediately cease if the employee should join the said union. The allegations further declared that the defendants had approached the nonunion men employed by plaintiffs and sought by threats, menaces, intimidation, coercion, and persuasion to induce them to breach their contracts of employment with plaintiffs and leave their employment.

The defendants appealed to the supreme court, but that court, speaking through Judge Gilbert, upheld the judgment of the lower court, saying in part:

The question to be determined is whether the plaintiffs in error in this case exceed their lawful rights. Plaintiffs in error rely upon the case of *Jones v. Van Winkle Gin & Machine Works*, 131 Ga. 336, 62 S. E. 236, where this court held that—

“Equity will not enjoin employees who have quit the service of their employer from attempting by proper argument to persuade others from taking their places, so long as they do not resort to force or intimidation, or obstruct the public thoroughfares.”

We find no fault with that decision, and think that it is sound in principle; and if striking employees do no more than to attempt, by “proper argument,” to persuade others from taking their places, and do not resort to force and intimidation, that a court of equity would not be authorized to interfere. We are equally sure that where such former employees attempt by improper argument to dissuade others from taking their places, and do resort to force, coercion, or intimidation, it would equally be the duty of a court of equity, in a proper case, to interfere by injunction.

The persuasion that the law permits in these circumstances is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition. Where there is no such freedom of action, more than mere persuasion has been exercised, and it amounts to duress, intimidation, coercion, or other like influence.

In each instance the object sought by the defendants undeniably was to bring about a severance of the relation of employer and employee between the printing establishments and their new employees. Whether the object was stated in plain terms or not, if successful the effect was to cause a breach of the contract. Whether the evidence in regard to interference with some of the printing shops and as to some of the defendants, considered alone as if in a separate case, would not authorize the grant of an interlocutory injunction, the judgment will not be reversed where the evidence authorized the judgment in behalf of some of the plaintiffs against some of the defendants. The exception is to the judgment as a whole. The plaintiffs brought the actions together against the defendants, the Pressmen’s Union acting through their members and officials, charging that the latter were conspiring and acting together against the plaintiffs as a whole.

Judgment affirmed.

LABOR ORGANIZATIONS—STRIKES—PICKETING—ILLEGAL ACTS—
INJUNCTION—*Densten Hair Co. v. United Leather Workers’ International Union of America et al.*, *Supreme Judicial Court of Massachusetts* (January 7, 1921), 129 *Northeastern Reporter*, page 450.—The employees of the Densten Hair Co., the Farmers’ Product Co., and two glue companies organized themselves during the summer of 1919 into Local No. 10 of the United Leather Workers’ International Union of America. Shortly afterwards the union demanded that the

hours be reduced from 55 to 48 per week without a corresponding reduction in pay. This demand was granted. Later the union demanded a 15 per cent increase in wages, but this was refused, and after a strike of 2 weeks in July and August, a compromise was arrived at. In January, 1920, the union again demanded a 15 per cent increase in wages but the employers refused to answer. On the evening of Wednesday, February 18, 1920, the members of the union voted to go on a strike in the morning of the following Friday. No notice was given the employers of this proposed action, but they, having heard of the strike vote, assembled their employees on Thursday evening and informed them that the factory would shut down until the following Monday, and that those who were satisfied with the prevailing wages could return, but those who were not satisfied were discharged. The union members proceeded to picket the plants of the employers and indulge in acts of violence and intimidation, whereupon the employers procured decrees of injunction to restrain such acts and the union appealed. In affirming the decrees the court said in part:

As respects the action of the employees, the master finds that they "did not intend to return to work next day, and that their attitude and belief is that they are on strike against the plaintiffs for an increase of wages * * * that the only demand made was for an increase in wages, and that there was no implied requirement that the plaintiffs should conduct closed shops."

The master also specifically finds:

"That the plaintiffs have obtained a substantially complete working force and are not desirous that the former union employees shall return; and that after the closing of the factories on February 19 they made no attempt to procure the return of the old employees."

We assume in favor of the defendants, as did the master and the judge in the superior court, that the "discharge" of the men was not intended nor understood to be a complete severance of the relation between the employers and their employees, but was a means adopted by the employers to counteract the force of the strike which they knew was scheduled to take place the following morning. We also assume in favor of the defendants that the "mass" action of the employees at its inception was legal because it was taken with a lawful purpose to force the employers to raise the wages of their employees as they had been requested to do, and as they, at least impliedly, had refused to do.

The question argued by the defendants whether a strike instituted for a lawful purpose can be determined and made illegal, without the knowledge and consent of the striking employees, by filling their positions with permanent new employees, upon the facts of these cases is a moot question, which calls for no decision because the acts of the defendants were illegal even if the strike continued until the filing of the bill and the entry of the final decree. (See *M. Steinert & Sons Co. v. Tagen*, 207 Mass. 394, 93 N. E. 584.) The illegal acts of the defendants in aid of the strike and of those persons and

unions that were induced and persuaded by the defendants to act in sympathy with the efforts of the defendants, as found by the master, consisted of picketing, the throwing of a snowball with a stone in it against the wind shield of a truck of one of the plaintiffs, and the intimidation of employees of the plaintiffs by the use of unpleasant language spoken to them, by the throwing of stones at them and by jostling and crowding them, as such persons went to and from their work. (*Folsom Engraving Co. v. McNeil*, 235 Mass. 269, 126 N. E. 479.) It results that the decree is affirmed with costs.

Ordered accordingly.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INTERFERENCE WITH CONTRACTS—INJUNCTION—CLAYTON ACT—STATUS OF EMPLOYEES ON STRIKE—*Quinlivan et al. v. Dail-Overland Co. et al.*, *United States Circuit Court of Appeals, Sixth Circuit (July 19, 1921)*, 274 *Federal Reporter*, page 56.—A bill for an injunction was filed by a North Carolina corporation against the Willys-Overland Co., an Ohio manufacturing corporation, certain union and labor men, and a distributing corporation organized under the laws of Virginia for the purpose of distributing the Willys-Overland automobile. The Virginia and Ohio corporations admit the facts set forth in the plaintiffs' bill and pray for an injunction against the union and labor men, who were conducting a strike against the manufacturing corporation. A temporary injunction was granted allowing picketing. Later a permanent injunction was granted without the right to picket. From this order the union and labor men appealed. The circuit court of appeals held that the district court had jurisdiction. As to the merits of the case the court held that "the allegations of the original bill, as well as those of both crossbills (which must be regarded as admitted by appellants), state a flagrant case of unlawful interference with the operation of the Overland plant, and of long-existing conditions of intimidation, violence, and bloodshed, justifying relief so far as the court below had jurisdiction to give it." The court said that it was "settled that the right of an employer to keep his business running is a property right under section 20 of the Clayton Act, notwithstanding the existence of a strike." On the objection that peaceful persuasion and peaceful picketing were improperly forbidden the court said "that there was no longer a controversy between the Overland Co. and its employees respecting terms and conditions of employment; that the plant was then running at full capacity and full production; that the strike had then long ceased to exist, except for certain annoying manifestations on the part of a comparatively few people; and that none of those could longer be regarded as employees."

LABOR ORGANIZATIONS—STRIKES—PICKETING—INTERFERENCE WITH CONTRACTS—COLLECTIVE BARGAINING—INJUNCTION—*United Shoe Machinery Corporation v. Fitzgerald et al., Supreme Judicial Court of Massachusetts (March 4, 1921), 130 Northeastern Reporter, page 86.*—The United Shoe Machinery Corporation employed about 6,000 employees, most of whom were machinists. In order to prevent machinists who had been trained by the company at considerable expense from leaving its employ the company entered into individual contracts with each machinist good for one year, in which the hours and rates of wages were fixed. The defendants are the officers and members of trade-unions composed of machinists. The union at first protested against these "individual contracts"; then it presented an agreement by which the company would have to agree to employ none but union men in its plant and to recognize the union's shop committees. The company declined to accept the agreement and continued making the individual contracts. The union withdrew the proposed agreement and went on a strike, employing the usual tactics, including picketing, to compel the company to submit to its terms. The company then brought proceedings to secure relief, and obtained an injunction. The defendants appealed, but the decree was affirmed. The opinion of the supreme court is in part as follows:

The means being legitimate, the company could protect itself from the interruption of its business and consequent damage from the action of discontented employees hired in the mass, and controlled at all times in their contractual relations, by the union of which they were members.

The union also was under no obligation whatever to recognize the "individual contracts," and its members who had not thus obligated themselves could retire at will from the company's service, leaving it to go into the labor market and obtain competent workmen if any could be found. But the defendants, as the master states, were not satisfied to take this course, or any other action short of organizing and precipitating a strike which should so cripple the industrial powers of the company as to compel it to abandon its policy of selecting and hiring employees whenever and wherever it pleased. The situation very likely was becoming critical as the contracts were being steadily adopted by considerable numbers of the machinists until on March 5, 1920, 2,222 employees of a total of about 6,000 had signed.

It is expressly found that there was no dispute concerning wages, hours of employment, or general conditions of labor. The master reports that the union claimed before him that the strike was called in defense of "collective bargaining," while the plaintiff as alleged in the bill contended that it was ordered to compel the abandonment of the "individual contracts." The question whether the strike was lawful does not depend upon the choice of descriptive words. If the company surrendered to the union it must of necessity give up in the future the "individual contracts" as applied to employees of the

machine department; and the demands, even in modified form, were not limited to "collective bargaining" but included an irrevocable abandonment of the "individual contracts."

The defendant's answer to all of the essential allegations of the bill is nothing more than a general denial; and, on the master's findings with such material inferences of fact as properly could be drawn, the single justice as shown by the decree could determine that the strike was for the purpose of compelling the company to do away with "individual contracts" and to recognize the rights of the union as stated by their representative; and this conclusion, not being plainly wrong, should not be reversed.

But if, notwithstanding the unequivocal and positive statements to the contrary appearing in the circulars it sent out broadcast, the contention of the union that the strike was solely to compel the company to adopt "collective bargaining" the decree should stand. "Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through them to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make." (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65 [Bul. No. 246, p. 145].) The strike being illegal, St. 1913, c. 690 [protecting persuasion in certain circumstances], is not applicable, and the maintenance by the union of relays of pickets from 25 to 75 in number patrolling the streets in the vicinity, and at the main entrance of the company's factory calling out at various times the epithets recited in the report, while not sufficient as the master finds to frighten or coerce other employees, was unjustifiable. The action taken also was intended to be an interference with existing contracts. Before the vote to strike was taken the union appointed committees who were instructed to investigate and report the names of members who had signed existing contracts in order that charges could be preferred against them, and some 49 members who had signed contracts joined the strikers, of whom 5 were in the ranks of the picketers. The circulars which were distributed, as we have said, directly and indirectly assailed the individual contract system; and the assaults, even if confined to single instances by individual members, were all committed upon men who were under contract. It is plain on the entire report that what was done was the outgrowth of concerted action manifested in various forms, but all for the single purpose of forcing compliance with the terms of the union. We are accordingly of opinion that the injunctive relief granted is supported by the record, and the decree should be affirmed with costs.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INTERFERENCE WITH CONTRACTS—STRIKE TO COMPEL COLLECTIVE AGREEMENT—INJUNCTION—*Floersheimer v. Schlesinger et al.*, Supreme Court of New York, Special Term, New York County (March 23, 1921), 187 New

York Supplement, page 891.—Floersheimer is a manufacturer of dresses and is a member of the Dress and Waist Manufacturers' Association. The defendants are the International Ladies' Garment Workers' Union and its officers and members. The plaintiff and other members of his association had entered into a collective agreement with the union which expired on December 31, 1920. The plaintiff refused to renew the collective agreement, but instead contracted with his employees individually, requiring in each case that the employees agree not to become members of or become affiliated with the defendant union. The union thereupon declared a strike to require plaintiff to eliminate this feature from the individual contracts. Picketing was resorted to and various acts of violence were indulged in. The plaintiff brought an action for an injunction, which was granted. The decision is in part as follows:

The plaintiff, in view of that situation, elected to conduct his business with his employees, and upon the express agreement with them that during the continuance of their employment they should at all times refrain from joining or becoming members in any way or affiliated with the defendant International Ladies' Garment Workers' Union, or in any other union, and that written agreements with such employees were made. It is charged that the defendants have entered into a conspiracy and are conducting a strike against plaintiff's business, and causing pickets to congregate about plaintiff's factory, and threatening them with physical violence and intimidating such workers, and inflicting violence upon them in visiting their homes and attempting to persuade the workers to join the defendant union, and threatening such workers with bodily harm if they fail to join such union, and that the defendants are attempting to carry out their plans and purposes by the use of threats, intimidation, violence, and direct action. Attached to the moving papers are a number of affidavits of employees of the plaintiff showing that threats have been made by some of the defendants against them, and in a number of cases such employees were assaulted. Attached to the complaint is a copy of agreements signed by a large number of plaintiff's employees, agreeing not to belong to the union.

The amended complaint sets forth a good cause of action. The objection thereto made by defendants that it omitted to allege, first, that the defendant union had notice of the employment contracts, is met by the allegation in paragraph 13:

"That all of the workers engaged by the plaintiff were and still are employed pursuant to contracts of employment, all of which defendant union had notice of."

It is clear from a reading of the amended complaint that it sets out a cause of action against all of the members of the union, in charging them with forming a conspiracy to cause plaintiff's factory to shut down and are wrongfully instigating his employees to quit work. The objections to the sufficiency of the amended complaint must be overruled.

Upon all the facts and authorities cited, the motion for an injunction pendente lite will be granted. Settle order on notice.

LABOR ORGANIZATIONS—STRIKES—PICKETING—INTIMIDATION—INJUNCTION—*Southern California Iron and Steel Co. v. Amalgamated Association of Iron, Steel and Tin Workers, Golden State Lodge, Local No. 3, et al., Supreme Court of California (August 4, 1921), 200 Pacific Reporter, page 1.*—A permanent injunction was granted to the plaintiff company restraining the defendant union from interfering with plaintiff's business, intimidating its employees, and placing pickets near its place of business. The defendants appealed, claiming that the evidence in the case was insufficient to sustain any of the material findings as found by the trial court. The company insisted that there was ample evidence to sustain a finding of conspiracy and acts done in furtherance thereof. Judge Lawler wrote the opinion modifying the decree of the lower court. After quoting from several cases, principally *United States v. Kane* (C. C.), 23 Fed. 748, he said:

In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services. Furthermore, it is lawful for the employee who has quit to peaceably persuade a fellow employee to leave his position. Moreover, if there are a number of employees who had left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal. But where violence, threats, or intimidation are used in an effort to induce another to quit his employment, then the acts of an individual or a number of individuals, are unlawful, and may be enjoined. However, it is not necessary to the enjoining of such acts that it be shown there was actual force or expressed threats of physical violence used. It was said in *Allis-Chalmers Co. v. Iron Molders Union* (C. C.), 150 Fed. 155, 173, that—

"Intimidation * * * includes persuasion by or on behalf of a combination of persons, * * * resulting in coercion of the will from the mere force of numbers."

After reviewing the conflicting evidence, he continued:

We think it clear from the foregoing summary of the evidence that the trial court could have found that the union and its members entered into a "combination, confederation, and conspiracy" with the design and for the purposes alleged and found. There was an abundance of evidence that in carrying out the plan the strikers used unlawful means, and this evidence amply supports the findings of threats and intimidation. As to the responsibility of the union and all its members for the acts of individual strikers, it has been shown that the strike itself was authorized and directed by the vote of the union, and at a subsequent meeting it was voted to direct the strikers to visit the vicinity of the plant in order to persuade the employees to quit. If the acts of the strikers in congregating around

the respondent's mill were unlawful, under the rule governing the liability of coconspirators, each of the strikers, "by virtue of uniting in that preconceived purpose, * * * makes himself responsible for what any one does." (U. S. v. Kane, supra.)

The judgment as entered, however, is too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business, and not for the purpose of intimidating employees of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business. The judgment is not clearly expressed in other respects, and it is therefore liable to be misunderstood in the enforcement thereof if it should be violated. Consequently it should be modified in these particulars.

LABOR ORGANIZATIONS — STRIKES — PICKETING — OPEN - SHOP DISPUTE — INJUNCTION — *American Steel Foundries v. The Tri-City Central Trades Council et al.*, United States Supreme Court (December 5, 1921), 42 Supreme Court Reporter, page 72. — The American Steel Foundries is a New Jersey corporation operating a large plant for the manufacture of steel products in Granite City, Ill. In May, 1914, it filed a bill in the district court for the southern district of Illinois to enjoin the defendants, the Tri-City Central Trades Council, and 14 individual defendants from carrying on a conspiracy to prevent complainant from retaining and obtaining skilled laborers to operate its plant.

The Tri-City Central Trades Council is a labor organization composed of 37 trade-unions. Complainant's plant, which ordinarily employed 1,600 men, closed down in November, 1913, but resumed operations in April, 1914, with about 350 of its regular men. When business was resumed in April the skilled workmen were given wages at rates from 2 to 10 cents an hour below those paid before the plant shut down. A committee representing the Trades Council, in an attempt to secure reinstatement of the previous wage scale, were told by the manager of the complainant that he ran an open shop, did not recognize organized labor, and would not deal with the committee, but would entertain any complaint by an employee. The council then declared a strike on complainant's plant. Only two men, Churchill, a member of the Machinists' Union, and Cook, who was not a member of any union, acted upon the order to strike. The Council then established a picket, which was carried on for

three or four weeks without intermission until the bill for an injunction was filed on May 18. Violent methods were pursued from time to time in such a way as to characterize the attitude of the picketers as continuously threatening. The defendants in their answer to the bill in the district court, admitted that the Council had established a picket upon the streets leading to the plant, with instructions to notify all persons entering it that a strike had been called because of reduction of wages, and to use all honorable means to persuade such persons not to take the places of the men on strike; but denied threats of injury or violence or responsibility for the violence that admittedly had occurred. A restraining order was issued on the filing of the bill, and a final decree was entered by which the strikers were forbidden to interfere with employees or would-be employees by persuasion, violence, or threats; picketing at or near the premises of the employer, or in the streets leading thereto was also forbidden.

These restrictions were challenged on appeal to the Circuit Court of Appeals, which modified the final decree by striking out the word "persuasion" in the four places in which it occurred and by inserting after the clause restraining picketing the following: "in a threatening or intimidating manner." (238 Fed. Rep. 728. See Bul. No. 246, p. 158.)

The case was then brought to the Supreme Court of the United States for review. Mr. Chief Justice Taft delivered the opinion of the court.

It was first decided that, though the Clayton Act was passed after the commission of the acts of violence above noted, it must control any decision rendered after its enactment. Section 20 of the act was quoted, and its provisions forbidding injunctions in labor disputes "unless necessary to prevent irreparable injury to property, or to a property right," and forbidding injunctions against striking, persuasion, or attending where one might lawfully be, for purposes of giving or obtaining information were discussed as follows:

It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of section 20, includes injury to the business of an employer, and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and persons who are neither ex-employees nor seeking employment. (*Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172 [Bul. No. 290, p. 174].) Only two of the defendants, Cook and Churchill, who left at the time of the strike, can invoke in their behalf section 20. We must, therefore, first consider the propriety of the decree as against them, and then as against the other defendants.

The prohibitions of section 20, material here, are those which forbid an injunction against, first, recommending, advising, or persuading others by peaceful means to cease employment and labor; second, attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from working; third, peaceably assembling in a lawful manner and for lawful purposes. This court has already called attention in the Duplex case to the emphasis upon the words "peaceable" and "lawful" in this section. (254 U. S. 443, 473.) It is clear that Congress wished to forbid the use by the Federal courts of their equity arm to prevent peaceable persuasion by employees, discharged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Congress thought it wise to stabilize this rule of action and render it uniform.

Continuing, the Chief Justice said:

The object and problem of Congress in section 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction on the one hand and the right of the employee, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks on the other. If in their attempts at persuasion or communication with those whom they would enlist with them those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court's duty, which the terms of section 20 do not modify, so to limit what the propagandists do as to time, manner, and place as shall prevent infractions of the law and violations of the right of the employees and of the employer for whom they wish to work.

How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work men have a right to as free a passage without obstruction as the streets afford consistent with the right of others to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.

The nearer this importunate intercepting of employees or would-be employees is to the place of business the greater the obstruction and interference with the business, and especially with the property right of access of the employer. Attempted discussion and argument

of this kind in such proximity is certain to attract attention and congregation of the curious or, it may be, interested bystanders and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes. In the present case the three or four groups of picketers were made up from four to twelve in a group. They constituted the picket line. Each union interested, electricians, cranemen, machinists, and blacksmiths, had several representatives on the picket line, and assaults and violence ensued. They began early and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced, and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful. When one or more assaults or disturbances ensued they characterized the whole campaign, which became effective because of its intimidating character in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it. We are supported in that view by many well-reasoned authorities, although there has been contrariety of view. [State and Federal cases cited.]

A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerve and physical strength and courage. But while this is so, we must have every regard to the congressional intention manifested in the act and to the principle of existing law which it declared, that ex-employees and others properly acting with them shall have an opportunity, so far as is consistent with peace and law, to observe who are still working for the employer, to communicate with them and to persuade them to join the ranks of his opponents in a lawful economic struggle. Regarding as primary the rights of the employees to work for whom they will, and, undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor, and keeping in mind the right of the employer incident to his property and business to free access of such employees, what can be done to reconcile the conflicting interests?

Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representa-

tive for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the chancellor who has heard the witnesses, familiarized himself with the *locus in quo* and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries.

With these views, it is apparent that we can not sustain the qualification of the order of the district court which the circuit court of appeals made. That court followed the case of *Iron Molders Union v. Allis-Chalmers Co.*, 166 Fed. Rep. 45 [Bul. No. 83, p. 157], and modified the order of the district court which enjoined defendants "from picketing or maintaining at or near the premises of the complainant or on the streets leading to the premises of said complainant, any pickets and picketing" by adding the words "in a threatening or intimidating manner." This qualification seems to us to be inadequate. In actual result, it leaves compliance largely to the discretion of the pickets. It ignores the necessary element of intimidation in the presence of groups as pickets. It does not secure practically that which the court must secure and to which the complainant and his workmen are entitled. The phrase really recognizes as legal that which bears the sinister name of "picketing" which it is to be observed Congress carefully refrained from using in section 20.

There remains to consider, so far as defendants Churchill and Cook, the ex-employees, are concerned, the part of the decree of the district court which forbade them by persuasion to induce employees, or would-be employees to leave, or stay out of, complainant's employ. The effect of it is to enjoin persuasion by them at any time or place. This certainly conflicts with section 20 of the Clayton Act. The decree must be modified as to these two defendants by striking out the word "persuasion."

The second important question in the case is as to the form of decree against the Tri-City Trades Council and the other defendants. What has been said as to picketing applies to them, of course, as fully as to the ex-employees, but how as to the injunction against persuasion?

The argument made on behalf of the American Foundries in support of enjoining persuasion is that the Tri-City Central Trades Council and the other defendants being neither employees nor strikers were intruders into the controversy, and were engaged without excuse in an unlawful conspiracy to injure the American Foundries by enticing its employees, and, therefore, should be enjoined.

It is to be noted, that while there was only one member of the unions of the Trades Council who went out in the strike, the number of skilled employees then engaged by the Foundries was not one-quarter of the whole number of men who would be engaged when it was in full operation. The works manager said that 80 or 90 per cent of the employees were old men and that he assumed these men were members of various organizations. Other witnesses, members of the unions, testified that they had been employees of complainant in the previous fall. It is thus probable that members of the local unions were looking forward to employment when complainant should resume full operation, and even though they were not ex-employees within the Clayton Act, they were directly interested in the wages which were to be paid.

Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains and action may be maintained therefor in proper cases, but to make it applicable to local labor unions, in such a case as this, seems to us to be unreasonable.

The elements essential to sustain actions for persuading employees to leave an employer are first, the malice or absence of lawful excuse, and, second, the actual injury. The effect of cases cited as authority must be determined by an examination of the pleadings and facts to see how the malice or lack of lawful excuse was established, and whether there was not illegality present in the means used.

Cases were then cited and distinguished from the present case, among them that of *Hitchman Coal & Coke Co. v. Mitchell* (245 U. S. 229, 38 Sup. Ct. 65, Bul. No. 246, p. 145), and the Duplex case (Bul. No. 290, p. 174), and the opinion concluded:

The Hitchman case was cited in the Duplex case, but there is nothing in the ratio decidendi of either which limits our conclusion here or which requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment. For this reason, we think that the restraint from persuasion included within the injunction of the district court was improper, and in that regard the decree must also be modified. In this we agree with the circuit court of appeals.

The decree of the circuit court of appeals is reversed in part and affirmed in part and the case is remanded to the district court for modification of its decree in conformity with this opinion.

Mr. Justice Brandeis concurs in substance in the opinion and the judgment of the court.

Mr. Justice Clarke dissents.

LABOR ORGANIZATIONS—STRIKES—PICKETING—OPEN-SHOP DISPUTE—INJUNCTION—*Marks Arnheim, (Inc.) v. Hillman et al., Supreme Court of New York, Appellate Division (July 25, 1921), 189 New York Supplement, page 369.*—Action was brought by Marks Arnheim (Inc.) against Sidney Hillman individually and as general president of the Amalgamated Clothing Workers of America and others for a permanent injunction to restrain the defendants from picketing the plaintiff's place of business, for the dissolution of the defendant associations, and for money damages. A motion was made for a temporary injunction pending the outcome of the litigation. From an order denying this motion the plaintiff appealed to the appellate division of the supreme court. The lower court was reversed and the motion for an injunction granted, Judge Greenbaum stating the opinion of the court, in part as follows:

It is apparent that the court is not in a position upon the record before it to determine whether the defendant Amalgamated Clothing Workers of America is a mischievous, disloyal, and un-American organization. The proper forum for threshing out the matter of its character and aims would be upon the trial of the action. We shall therefore, on this appeal, disregard the serious accusation against the Amalgamated Clothing Workers of America, and assume that it is a loyal American association, and consider the question before us upon other features of the case.

Upwards of 40 affidavits were submitted by plaintiff, which, read in connection with the opposing affidavits, disclose a persistent and organized campaign of unlawful acts of assault, abuse, threats, and

intimidation towards the employees of the plaintiff, and also towards the contractors to whom plaintiff was sending the work. The moving affidavits set forth with sufficient detail the matters to which they refer, and in a large number of cases the names of those who are charged with lawlessness and misconduct are given. There were 6 convictions for assault.

The answering affidavits indicate clearly that troublous incidents occurred, in which the plaintiff's employees and members of the defendants' union were involved. The defendants admit the methods pursued by them in visiting the various shops of plaintiff's contractors for the purpose of ascertaining whether they were engaged in doing work for the plaintiff.

Direct proof of a conspiracy is rarely available. Conspiracies are ordinarily hatched in secret. The incriminating circumstances surrounding the acts of conspirators, the cumulative testimony of many witnesses, who have no apparent reasons for inventing occurrences or falsely testifying, and the strong probabilities that the incidents narrated took place, justifying the conclusion that the members of defendants' union were guilty of many acts of lawlessness and unjustifiable interferences with the plaintiff's business, and that the picketing was not peacefully nor legally conducted.

The order denying the motion for an injunction pendente lite should be reversed, with \$10 costs and disbursements, and the defendants enjoined from further picketing in front of the plaintiff's place of business, and from interfering with the conduct of the free dispatch of the plaintiff's business, or in any manner hampering, hindering, or harassing plaintiff's employees.

LABOR ORGANIZATIONS—STRIKES—PICKETING—REINSTATEMENT OF DISCHARGED EMPLOYEE—INJUNCTION—*Walter A. Wood Mowing & Reaping Machine Co. v. Toohey et al.*, *Supreme Court of New York, Special Term (January 24, 1921)*, 186 *New York Supplement*, page 95.—The plaintiff company discharged Toohey, one of its union employees. The union, holding that Toohey's discharge was an unjust discrimination against him, called a strike of the union employees of the plaintiff company for the purpose of compelling his reemployment. Picketing was indulged in to prevent nonunion men from working for plaintiff. No acts of violence, threats, or intimidation were indulged in. The employer sued for an injunction and was granted a temporary injunction which the defendant union members now seek to vacate. In annulling the injunction the court said in part:

If discrimination was the reason why the men went out the strike was lawful, for a labor union has a right to strike "to secure the reemployment of a member they regard as having been improperly discharged." (*Nat. Pro. Assn. v. Cumming*, 170 N. Y. 315, 63 N. E. 370, 58 L. R. A. 125, 88 Am. St. Rep. 648.) Workingmen have an absolute right to strike. That is settled beyond peradventure in this

State. They may state their reasons or not, just as they please, and their reasons, if they do state them, "may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop."

And laboring men not only have the right to strike—that is, to quit work—but they have the right to persuade others to strike and to attempt to persuade others not to take their places. In order to do this the strikers must, of course, be permitted to talk to their fellow workmen and to the men who are about to take their places; otherwise there could be no persuasion, for how can one man persuade another unless he talks to him? The strikers must not, however, resort to violence or intimidation; for the nonunion man has as much right to work as the union man has to strike. These are axioms. They are principles which have long been embedded in the law.

The strikers are accused of "picketing"; in fact, that is the one great grievance set forth in the complaint. But suppose they are picketing. What of that? They have as much right to picket as to strike, providing that they do not resort to threats or violence. Picketing simply means standing along the highways of approach, or near the entrances to the plant, in time of strike, for the purpose of observing who is working and of attempting to persuade them to quit. Nonunion laboring men have a right to work and to go to and come from the shop unmolested, and corporations have a right to employ them, and any attempt on the part of strikers to interfere with these rights by coercion or intimidation, or by blockading the roads, or by compelling the nonunion men to run the gauntlet, is unlawful; but I find nothing here which amounts to any such condition.

It is the law of this State, so far as the question has been settled, that strikers may employ persuasion and peaceable means to keep nonunion men from taking their places; and the fact that the plaintiff is irreparably damaged as an incident of the picketing, and that it has no adequate remedy at law, does not deprive the defendants of the right to picket, providing there is no malice and no violence. This rule, which must, I believe, at last everywhere prevail, has just recently been firmly planted in the statutes of the United States. In other words picketing has been legalized by Congress. The right to picket is, therefore, no longer a debatable question in the Federal jurisdiction. The Clayton Act, so called, enacted October 15, 1914, in section 20 (U. S. Comp. St. sec. 1243d), provided that no injunction order "shall prohibit any person or persons, whether singly or in concert, from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceable means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of * * * peaceably persuading any person to work or to abstain from working; * * * nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

In an evenly balanced, bitter, long-drawn out labor struggle, an edict of the court, leveled at the strikers, shakes the morale of the workingmen. This is not the purpose of an injunction, although it

is frequently, and perhaps generally, the purpose of the employer who seeks it. The function of an injunction order in a labor dispute is to restrain lawlessness, when there is lawlessness, and when this is likely to cause irreparable damage. When there is no lawlessness, and no proper grounds to apprehend it, there should be no injunction. The courts do not take sides in this ceaseless struggle between capital and labor. They stand indifferent. They intervene only when the law is trampled upon. They interpose the arm of authority only to restrain those who invade the rights of others.

LABOR ORGANIZATIONS—STRIKES—PICKETING—REINSTATEMENT OF DISCHARGED EMPLOYEES—INJUNCTION—*Benito Rovira Co. (Inc.) v. Yampolsky et al., Supreme Court of New York, Special Term, New York County (March 21, 1921), 187 New York Supplement, page 894.*—The Benito Rovira Co. (Inc.) conducted a factory for the manufacture of cigars and employed between 200 and 250 employees. Owing to lack of work it laid off from 200 to 235 employees on December 17, 1920, but upon receiving some orders reemployed 50 of them on January 15, 1921. When the employees were laid off they agreed not to return to work unless all of them were reemployed. Therefore when only 50 were reemployed they declared a strike on plaintiffs' plant and proceeded to picket it. The plaintiff brought suit for an injunction to restrain the picketing and was awarded judgment. The decision is in part as follows:

Immediately a number of the defendants gathered in front of plaintiff's premises and began picketing, and a number of employees who were anxious to work were assaulted and a number of arrests were made, resulting in the police magistrate finding such aggressors guilty, and it is not denied that the defendant Yampolsky and some of the defendants were in court at the time. Plaintiff claims to have an open shop, and no question of unionism is involved. The defendants do not claim any authority from any organization, but are acting as a committee of the employees of plaintiff. A number of the employees who were desirous of working have been threatened and assaulted, as appears by their affidavits. There is no claim that the plaintiff attempted to discriminate against anyone belonging to a union, nor is there any evidence that any attempt to reduce wages was made. The evidence is clear that the object of the strike is to force plaintiff to employ more people than it feels that the present condition will warrant. This act on the part of the defendants is illegal. While picketing may be lawful under certain circumstances, it becomes unlawful when the purpose is to interfere with another's business or vocation.

The motion will be granted to the extent of preventing the defendants from picketing in front of plaintiff's place of business or instigating others to do so, or from directing or coercing anyone attempting to enter plaintiff's premises without its consent. Settle order on notice.

LABOR ORGANIZATIONS — STRIKES — PICKETING — SECONDARY BOYCOTTS — INJUNCTIONS PROHIBITED — CONSTITUTIONALITY OF STATUTE —
Truax et al. v. Corrigan et al., United States Supreme Court (December 19, 1921), 42 Supreme Court Reporter, page 124.—Truax and others owned and maintained a restaurant in the city of Bisbee, Ariz. In April, 1916, a dispute arose between them and the local cooks and waiters' union concerning the terms and conditions of employment of members of the union. They could not agree, and as a result the members of the union employed in the restaurant were ordered to strike. Truax and the other plaintiffs asked for a temporary and a permanent injunction against the cooks and waiters formerly in their employ, and against the labor union and the trades assembly of which they were members. In their complaint to the court they state that the defendants, to win the strike and to coerce and compel the plaintiffs to comply with the demands of the union, entered into a conspiracy to boycott and injure plaintiffs in their restaurant business, by inducing plaintiffs' customers and others theretofore well and favorably disposed to cease to patronize or trade with the plaintiffs. The method of inducing included picketing, displaying banners, advertising the strike, denouncing plaintiffs as unfair to the union, and the circulation of handbills containing abusive and libelous charges against plaintiffs, their employees, and their patrons, and intimations of injury to future patrons. The defendants relied for immunity on paragraph 1464 of the Revised Statutes of Arizona of 1913, which is in part as follows:

No restraining order or injunction shall be granted by any court of this State, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person, to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means so to do. * * *

The plaintiffs alleged that this paragraph, if it made lawful the defendants' acts, contravened the fourteenth amendment of the Constitution of the United States by depriving plaintiffs of their property without due process, and by denying to plaintiffs the equal protection of the laws, and was therefore void and of no effect. The defendants demurred to the complaint, stating that no cause of action was set forth and that the complaint on its face showed a want of equity. The complaint was dismissed in the superior court and this judgment was affirmed by the Supreme Court of Arizona. The plaintiffs brought the matter to the Supreme Court of the United States. That court held section 1464 invalid and reversed and remanded the case for further proceedings not inconsistent with the opinion of the court. The bench was divided five to four. Mr. Chief Justice Taft gave the opinion of the court. Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Pitney wrote separate dissenting opinions. Mr. Justice Clark, dissenting, concurred with the latter. The opinion of the court is in part as follows:

Plaintiffs' business is a property right, and free access for employees, owner, and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful. Intention to inflict the loss and the actual loss caused are clear. The real question here is: Were the means used illegal? The above recital of what the defendants did can leave no doubt of that. It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. It was compelling every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of \$50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy.

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the fourteenth amendment.

The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the fourteenth amendment is intended to preserve,

and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.

It is to be observed that this is not the mere case of a peaceful secondary boycott as to the illegality of which courts have differed and States have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury. In such a case the many have a legal right to withdraw their trade from the one, they have the legal right to withdraw their trade from third persons, and they have the right to advise third persons of their intention to do so when each act is considered singly. The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong. But here the illegality of the means used is without doubt and fundamental.

This brings us to consider the effect in this case of that provision of the fourteenth amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due-process clause, and it is customary to consider them together. The due-process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. The framers and adopters of this amendment were not content to depend on a mere minimum secured by the due-process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.

The guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction.

To sustain the distinction here between the ex-employees and other tort-feasors in the matter of remedies against them, it is contended that the legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a State, the legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty.

But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort been sustained.

Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual.

It is urged that this court has frequently recognized the special classification of the relations of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. This is undoubtedly true, but those cases [cases cited], as we have already pointed out in discussing the due process clause, were cases of the responsibility of the employer for injuries sustained by employees in the course of their employment. The general end of such legislation is that the employer shall become the insurer of the employee against injuries from the employment without regard to the negligence, if any, through which it occurred, leaving to the employer to protect himself by insurance and to compensate himself for the additional cost of production by adding to the prices he charges for his products. It seems a far cry from classification on the basis of the relation of employer and employee, in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee on the business and property right of the employer.

The provisions of the Arizona statute under consideration correspond to those of section 20 of the Clayton Act. Adverting to this fact, Chief Justice Taft said:

It is urged that in holding paragraph 1464 invalid, we are in effect holding invalid section 20 of the Clayton Act. Of course, we are not doing so. In the first place, the equity clause of the fourteenth amendment does not apply to congressional, but only to State, action. In the second place, section 20 of the Clayton Act never has been construed or applied as the Supreme Court of Arizona has construed and applied paragraph 1464 in this case.

The application of the Clayton Act to "picketing," in the case *American Steel Foundries v. Tri-City Trades Council*, page 181, was noted and contrasted.

The construction put upon the same words by the Arizona Supreme Court makes these clauses of paragraph 1464 as far from those of section 20 of the Clayton Act in meaning as if they were in wholly different language.

We conclude that the demurrer in this case should have been overruled, the defendants required to answer, and that if the evidence sustain the averments of the complaint, an injunction should issue as prayed.

Mr. Justice Brandeis in his dissenting opinion said:

The Supreme Court of Arizona having held as a rule of substantive law that the boycott as here practiced was legal at common law, and that the picketing was peaceful, and hence legal under the statute (whether or not it was legal at common law), necessarily denied the injunction, since, in its opinion, the defendants had committed no legal wrong and were threatening none. But even if this court should hold that an employer has a constitutional right to be free from interference by such a boycott, or that the picketing practiced was not in fact peaceful, it does not follow that Arizona would lack the power to refuse to protect that right by injunction. For it is clear that the refusal of an equitable remedy for a tort is not necessarily a denial of due process of law. And it seems to be equally clear that such refusal is not necessarily arbitrary and unreasonable when applied to incidents of the relation of employer and employee.

Mr. Justice Pitney also wrote a dissenting opinion from which the following is quoted:

Paragraph 1464 does not modify any substantive rule of law, but only restricts the processes of the courts of equity. Ordinary legal remedies remain; and I can not believe that the use of the injunction in such cases—however important—is so essential to the right of acquiring, possessing, and enjoying property that its restriction or elimination amounts to a deprivation of liberty or property without due process of law, within the meaning of the fourteenth amendment.

Secondly, it is said that paragraph 1464, Arizona Civil Code, denies to plaintiffs in error the "equal protection of the laws"; but it seems to me evident that it does not offend in this regard. Examination shows that it does not discriminate against the class to which plaintiffs belong in favor of any other. It applies not only to cases between employers and employees, irrespective of who is plaintiff and who is defendant, but to cases between employees, and between persons employed and those seeking employment. And it applies equally to all persons coming within its reach.

Mr. Justice Holmes dissented, stating his reasons, in part as follows:

The dangers of a delusive exactness in the application of the fourteenth amendment have been adverted to before now. Delusive exactness is a source of fallacy throughout the law. By calling a busi-

ness "property" you make it seem like land, and lead up to the conclusion that a statute can not substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have a pecuniary value, and commonly is protected by law against various unjustified injuries. But you can not give it definiteness of contour by calling it a thing. It is a course of conduct, and like other conduct is subject to substantial modification according to time and circumstances, both in itself and in regard to what shall justify doing it a harm. I can not understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statute by courts with whom I agree. (See *The Hamilton*, 207 U. S. 398, 404, 28 Sup. Ct. 133.) In this case it does not even appear that the business was not created under the laws as they now are.

I think further that the selection of the class of employers and employees for special treatment, dealing with both sides alike, is beyond criticism on principles often asserted by this court. And especially I think that without legalizing the conduct complained of the extraordinary relief by injunction may be denied to the class. Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases.

I must add one general consideration. There is nothing I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

LABOR ORGANIZATIONS—STRIKES—PICKETING—STRIKE TO COMPEL CONTINUANCE OF A DEPARTMENT OF EMPLOYER'S BUSINESS—INJUNCTION—*Welinsky v. Hillman et al.*, *Supreme Court of New York, Special Term (December 17, 1920)*, 185 *New York Supplement*, page 257.—Max Welinsky decided to abandon the manufacturing department of his establishment. When he had done so the employees in other departments of his business went on a strike to compel him to continue the abandoned department. In the course of the strike the strikers resorted to picketing and materially interfered with Welinsky's business. He thereupon brought proceedings to secure an injunction. In granting the injunction the court rendered the following decision:

It is quite clear from the papers, and I do not understand it to be disputed, that the purpose of the strike and of the picketing and other interference with plaintiff's business is not to secure any advance in wages or any improvement in working conditions, but to induce the plaintiff to continue the manufacturing department of his establishment, which he has determined to abandon. Of course,

the right of the employees in other departments of the business to cease work for this or any other reason can not be questioned; but neither they, nor the other employees, nor the union to which they belong, can be permitted to take affirmative action injurious to the plaintiff's business, for the purpose of compelling him to continue a department of the business which he wishes to abandon. To hold otherwise would be to sanction coercion in support of a demand which the employees had no right to make. I am not insensible of the hardship to old employees thus suddenly thrown out of work, or of the loyalty of their fellow workers, who seek to come to their rescue; but I see no justification under the law for their present attempt, or the attempt of their union, to compel the plaintiff to continue their employment.

Such situations may very well suggest doubts and problems to the student of social science, but in the present state of our law, which is adapted to prevailing conceptions of individual rights, I think there is no doubt about the decision which must be given here. I think it sufficiently appears from the complaint that the injuries complained of are such that the remedy at law would not be adequate.

The motion for an injunction will be granted, upon the plaintiff giving an undertaking in a sum to be fixed on settlement of the order. Settle order on notice.

LABOR ORGANIZATIONS—STRIKES—PICKETING—STRIKE TO RENEW CONTRACT—INJUNCTION—*Cooks', Waiters' and Waitresses' Local Union et al. v. Papageorge et al., Court of Civil Appeals of Texas (May 11, 1921), 230 Southwestern Reporter, page 1086.*—The owners of the Mecca Café instituted this action to restrain the appellant union from picketing their place of business. The Mecca Café had been conducted under a "closed-shop" agreement which fixed the wages and hours of work, but expired on June 21, 1920. The union demanded a renewal of the contract on the same terms, but was refused. The union ordered a strike and placed pickets about the café. The pickets carried signs and verbally attempted to influence patrons. The owners of the café were granted an injunction, and the union appealed to the court of civil appeals. Judgment was affirmed by that court, taking the decision of *Webb v. Cooks', Waiters' and Waitresses' Union No. 748, 205 S. W. 465 (Bul. No. 258, p. 125)*, as a guiding precedent. This decision went against the same organization, which was now acting "in absolute contempt of the law as applied to them directly" by the supreme court. It was also said that the union "acted in the face of direct statutes on the subject of trusts in this State, articles 7796-7799." The following extracts are taken from the opinion:

No power exists in our Government to curtail the liberty of speech or of the press, and no such attempt was made in this case. It

is recognized that every person has the absolute right to express his opinion and speak his mind on any subject, and no one has the authority to declare what any man may think or speak. It is recognized by every American that without freedom of speech the Government could not exist as a people's government. But, as said by the supreme court in *Ex parte George Tucker*, 110 Tex. 335, 220 S. W. 75:

"Equity will protect the exercise of natural and contractual rights from interference by attempts at intimidation or coercion. Verbal or written threats may assume that character. When they do, they amount to conduct, or threatened conduct, and for that reason may * * * be restrained."

The Constitution grants to every man, under the protection of the American flag, the right to make contracts for his personal services, free from hindrance or obstruction by his fellow men, and he has the inalienable right to freely use his hands for whom he pleases, upon such terms as he pleases. These rights include both the right to sell and the right to purchase labor, and no law would be upheld that would deprive the laborer and employer of the right to contract with one another. Whenever these rights are sought to be invaded, a court of equity will restrain such unlawful acts.

LABOR ORGANIZATIONS—STRIKES—PICKETING—UNLAWFUL ACTS—INJUNCTION—*United Traction Co. v. Droogan et al.*, *Supreme Court of New York, Special Term (June 27, 1921)*, 189 *New York Supplement*, page 39.—The United Traction Co. brought this action against Joseph S. Droogan individually and as president of Division 148 of the Amalgamated Association of Street and Electric Railway Employees of America and others, to continue a temporary injunction pending the outcome of litigation. The court granted the motion for the reasons set forth in the opinion of Judge Hinman, which is in part as follows:

The present injunction restrains only unlawful acts which the courts have thoroughly condemned in the conduct of a strike, and this strike has been attended by such prolonged and notorious and general disorders of the character sought to be restrained that the necessity for the exercise of the restraining power of the court is plainly indicated.

The sole question is as to whether responsibility should attach to the defendants. This, however, becomes relatively unimportant, since this injunction restrains only that which is unlawful. It is not apparent, therefore, why its vacation or substantial modification would be of any benefit to the defendants. I am unwilling to believe that, in their desire to embarrass the plaintiff, the members of these unions, except, perhaps, a comparatively small percentage of them, desire to commit such acts as will subject themselves to prosecution for violation of the criminal laws. It is a matter of common knowledge and popular significance that, since the issuance of the present restraining order against the unions and the other defendants, the lawlessness complained of has practically ceased. If such a result

can be obtained out of respect for the authority of a court of equity seeking to preserve the rights of both parties by enforcing lawful conduct, it is much better, much kinder, more humane, than to resort to the club of the policeman or the bayonet of the militia, or to resort to criminal prosecution only after the commission of the offense and after the injury has been done.

It can not be denied that the notorious conditions of lawlessness which had existed had been carried on to further the purpose of the unions and the strikers, whether committed by the strikers or by lawless strangers who gathered to look on, to sympathize, and to aid. It was an incident of the strike which they were conducting. Several newspaper clippings have been presented to me by counsel for the unions in an attempt to show that McLoughlin, president of the Troy union, urged the members to refrain from lawless acts; but the only one containing any date reveals a date subsequent to the time when this court undertook to exercise its powers in behalf of law and order. If they did not exercise their influence or power to correct the irregularities or disavow the acts until such action of the supreme court, when overt acts practically ceased, that, considered with what defendants did do, confirms the conclusion that the lawless acts were within the control of the defendants, even if not done with their authority.

I have no doubt whatever that the great majority of strikers involved here are worthy, well-disposed, law-abiding citizens; but unlawful acts of any of the members of either union were committed for the purpose of carrying out successfully the object of the union—that is, to secure a successful strike—and every member of the unions is responsible for the acts of the others, and particularly for the acts of any officer.

LABOR ORGANIZATIONS—STRIKES—REINSTATEMENT OF DISCHARGED EMPLOYEE—INJUNCTION—*Mechanics' Foundry & Machine Co. v. Lynch et al., Supreme Judicial Court of Massachusetts (November 30, 1920), 128 Northeastern Reporter, page 877.*—Thirty of the plaintiff's employees went on a strike over a controversy concerning shop conditions. During the strike Lynch, one of the striking employees, took a prominent part and eventually he and the company's manager "became personal" in their discussion. The shop conditions were satisfactorily adjusted and the employees went back to work. A few days later Lynch was discharged for the attitude assumed by him when the strike was under discussion. Thereupon the other employees again struck—this time to compel the reemployment of Lynch by the plaintiff. The plaintiff brought an action for an injunction to restrain the strike and was granted a decree. From this decree the defendants appealed. In affirming the decree awarding plaintiff an injunction Judge Carroll declared that the second strike was for an illegal purpose. The decision is in part as follows:

Every person has a legal right to dispose of his own labor as he wishes, and to work for whom he pleases. He may refuse to work

with another because that person is distasteful to him, or for any other reason. (*Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011.)

While the individual employee may refuse for any cause to continue in the plaintiff's service, the defendants could not conspire and combine to quit and enforce a strike because the plaintiff refused employment to a fellow workman. The plaintiff had the right in law to do what he did, and the combination of employees to bring about a strike for the cause alleged is unlawful in the end it sought, even if no illegal means were used to carry it into effect. (*Pickett v. Walsh*, supra; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085.) A strike because a fellow workman is discharged stands on the same ground and is governed by the same principle, and while a body of men may lawfully strike to better their conditions, the mere refusal to continue the employment of one of their number is not such a condition as to justify them in combining to enforce a strike.

When Lynch was discharged there was no dispute about wages or hours of labor, the dispute concerning working conditions had been settled to the satisfaction of all the parties; and the only reason for the strike was the discharge of Lynch and the refusal to employ him. As the strike was for an unlawful purpose, it was properly restrained.

Decree affirmed.

LABOR ORGANIZATIONS—STRIKES—RESTRICTION—CONSTITUTIONALITY OF STATUTE—*People, by Keyes, Att. Gen. v. United Mine Workers of America*, Dist. 15, et al., *Supreme Court of Colorado* (April 4, 1921), 201 *Pacific Reporter*, page 54.—This suit was brought by the people to enjoin coal miners from going out on strike before or during the consideration of their grievances by the industrial commission. The bill was based upon section 30 of chapter 180 of the Acts of 1915, which provides:

It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior to or during an investigation, hearing, or arbitration of such dispute by the commission or the board, under the provisions of this act. Provided, that nothing in this act shall prohibit the suspension or discontinuance * * * of any industry or of the working of any persons therein which industry is not affected with a public interest.

The defense set up by the miners was that the act violated the provisions of the constitutions of the State of Colorado and the United States. The lower court dismissed the bill, for the reason that coal mining was not an industry "affected with a public interest," and therefore was not within the terms of the act. The people brought the matter before the supreme court, where the judgment of the district court was reversed. Judge Denison in the course of his decision said:

Unless coal mining may be said to be affected with a public interest, its regulation by statutes to the extent attempted by said chapter is unconstitutional. The words "affected with a public interest" were

no doubt used by the general assembly to keep the statute within constitutional limits. It becomes necessary, then, not only in order to construe the statute, but to decide whether it is constitutional, to determine whether coal mining is so affected, and it seems self-evident that it is. We must take judicial notice of what has taken place in this and other States, and that the coal industry is vitally related not only to all other industries, but to the health and even the life of the people. Food, shelter, and heat, before all others, are the great necessities of life, and, in modern life, heat means coal.

There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason. There is not even prohibition of strike. The only thing forbidden is a strike before or during the commission's action.

It is objected that section 33 of the act in question, forbidding incitement to lockout or strike, violates article 2, sec. 10, of the State constitution, concerning freedom of speech; but, if the legislature has power to forbid anything, it has power to forbid incitement thereto. See R. S. 1908, sec. 1620, on accessories.

The judgment should be reversed.

LABOR ORGANIZATIONS—STRIKES—STREET MEETINGS—CONSTITUTIONALITY OF ORDINANCE—PERMITS—*City of Duquesne v. Fincke*, Supreme Court of Pennsylvania (December 31, 1920), 112 Atlantic Reporter, page 130.—A strike was in progress in the city of Duquesne, Pa., and various factions within the ranks of the employees were unable to agree. It was desired to hold a public meeting in the streets to address the workmen in an effort to influence their actions. An ordinance of the city required that before a meeting such as this could be held a permit must first be obtained from the mayor. A permit was applied for, but the mayor, for reasons of his own, refused to take action one way or another, neither refusing nor granting the permit. Fincke accordingly proceeded to hold the meeting notwithstanding the fact he had no permit. He was arrested, charged with a violation of the ordinance, and convicted. From this conviction he appealed, declaring that under the fourteenth amendment to the Constitution of the United States and section 7 of the bill of rights of Pennsylvania he had full legal right to hold the meeting. The conviction was affirmed. The opinion is, in part, as follows:

A strike was on which divided even the workingmen into opposing factions and thus gave to those agitators who are the enemies of all government the opportunity, which they eagerly seized, to stir up strife and disorder by distributing anonymous and seditious pamphlets throughout the city; and hence, as the mayor was responsible for the maintenance of peace and good order, he was justified, if he believed the public good required it, as he says he did, to refuse an open-air meeting at this particular time. This being so, a courteous reply so stating would have removed all just cause of complaint, for

it would have sent the applicant to the courts for redress if he still thought he was being discriminated against. Though not so designed, the failure to reply tended to bring the administration of the law in the city of Duquesne, and through it our entire system of government by law, into disfavor. In all matters our public officials, from the highest to the lowest, but especially the executives of our municipalities with whom the citizens most frequently come in contact, should carefully avoid even the appearance of favoritism lest a semblance of justification should be given to the untrue statement, now too often heard in the centers of population, that our Government (as well as those of the Old World) is being administered for the advantage of the few and not for the benefit of all.

So far as the fourteenth amendment is concerned the Supreme Court of the United States—whose judgments are final in the interpretation of the Federal Constitution—has expressly ruled against the claim now made by appellant, in *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. 731.

Our bill of rights no more prevents regulation in the use of the streets than does the fourteenth amendment to the Constitution of the United States; and as these questions were the only ones argued before us we might well close our opinion at this point.

It follows that defendant and those associated with him had no right, upon any ground, to hold a meeting in the streets without a permit. If they thought the city had power to authorize the meeting, but the mayor was acting arbitrarily in refusing the permit, their remedy was not by violating the ordinance, but by mandamus to compel a proper obedience to it, in which proceeding the courts would have overturned "arbitrary and intentional unfair discrimination in the administration of the ordinance."

What has been said covers all the questions within the line of appellant's claim and we only need add, in order to avoid any misunderstanding as to the scope of the opinion, that it is limited to the negation of the contention that he had any constitutional, inherent, or statutory right to hold a meeting in the streets of the city; all other matters which may arise under the statute and ordinance are beside this inquiry and will be determined when, if ever, they reach us on appeal.

LICENSING OF OCCUPATIONS—BARBERS—SYSTEM OF EXAMINATION—CONSTITUTIONALITY—*Timmons v. Morris, Sheriff, United States District Court, Western District of Washington (February 14, 1921)*, 271 *Federal Reporter*, page 721.—Frank Timmons, who had practiced his trade as barber for 17 years, was imprisoned for practicing without a license. Habeas corpus proceedings were brought against the sheriff to obtain his discharge from such imprisonment. The petition attacked the constitutionality of the law of Washington requiring a person to obtain a license. The law had been upheld in previous cases in the Supreme Court of the State of Washington on the ground that it was a health measure. The board of examiners acting under the statute had made the following system of grading

in examination: Haircut, 24; shaving, 24; cleanliness, 8; razor honing, 12; condition of tools, 8; deportment, 6; time, 10; written examination, 8. Of this system of marking the court said:

If it be conceded that, in this method of examination and scale of rating upon such examination, the written examination provided for has solely to do with matters affecting the public health, and that such regulation was made under that subdivision of section 10 requiring the board to examine and determine whether the applicant had sufficient knowledge concerning the common diseases of the skin to avoid the aggravation and spreading thereof in the practice of his trade, it comes to this: That, in the ratings provided for, only 24 points out of 100 have to do with the public health.

It is possible, under this scale, for a man to pass and be licensed, though he has only got 4 points out of the 24 in those subjects affecting the public health, provided he is excellent in the nonessentials, in so far as health is concerned; while the applicant who is perfect in so far as matters affecting health are concerned, and yet "poor" in deportment, razor honing, and time taken in work—matters that can in no sense be held to touch the public health or safety—would be deprived of the right to practice barbering.

The court held the regulations unconstitutional in the following language:

The effect of the foregoing is not only to aver the unconstitutionality of the statute, but the arbitrary exercise by the board of barber examiners created by it of the power conferred upon them under the act. Regulations and examinations of the board must be restricted within the limits of that having to do with health and safety; it can not be and it has not been contended that the public morals are affected by such trade.

The court is convinced that, in so far as the practice of barbering is concerned, the public welfare and comfort—outside of, and beyond what is included in its health and safety—are so insignificant as not to lend color to any right claimed under the police power of the State.

It is therefore palpably clear that these regulations have no real or substantial relation to the public health, but are rather designed to defeat those statutory provisions in the barber law for the protection of the public health, to subordinate essentials to nonessentials, and to allow the board scope for purely arbitrary action. Under these regulations, any purpose to protect the public health, manifestly, has become so highly attenuated "that nothing lives 'twixt it and perfect silence."

MINE REGULATIONS—WASHHOUSE—EMPLOYER'S LIABILITY FOR CLOTHING DESTROYED THEREIN—*Prince v. King Coal Co.*, *Supreme Court of Oklahoma* (February 8, 1921), 198 *Pacific Reporter*, page 293.—Section 1 of chapter 125 of the Session Laws of Oklahoma for 1913 made it mandatory upon any corporation or company owning or operating or operating as lessee any mine wherein 10 or more min-

ers were employed to provide a washhouse. Section 2 of this act provided a penalty for failure to comply with the provisions of section 1. The defendant company supplied a washhouse, but it was destroyed by fire which was negligently permitted to be communicated from a waste dump near by while the miners were in the mine. Clothes to the value of \$1,246.42 were destroyed, and by agreement Prince made his case a test of the right to recover. The court below had held that no right of recovery was shown, but the supreme court held that the plaintiff had a good cause of action.

Section 2 of chapter 125 reads:

No person, corporation or company, its agents, officers or representatives, maintaining such a bathhouse at * * * its mines as required in section 1 hereof, shall be legally liable for the loss or destruction of any property left at or in said bathhouse.

But this provision was held subject to construction in connection with sections 998 and 2845 of the Revised Laws, which respectively provide that:

Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

Judge Johnson in his opinion said that section 2 of chapter 125 "was only intended to grant relief from liability for the loss or destruction of any property left at or in such bathhouse not occasioned through the act or omission of such firm, association, corporation, person, or parties required to perform the duties of maintaining such bathhouse," and did not operate to relieve the company where it had negligently permitted a fire that "destroyed the plaintiff's property situated where it had a right to be."

STATE ENGAGING IN BUSINESS—CONSTITUTIONALITY OF STATUTE—CEMENT MANUFACTURE—"PUBLIC PURPOSE"—*In re Opinion of the Judges, Supreme Court of South Dakota (December 29, 1920)*, 180 *Northwestern Reporter*, page 957.—The Legislature of South Dakota passed a law, chapter 324, Acts of 1919, relating to the manufacture, distribution, and sale of cement and cement products by the State. The law authorized the issuance and sale of \$250,000 bonds to provide funds for the enterprise. The governor, Peter Norbeck, being in doubt as to the constitutionality of the act and desiring to have this point settled before he issued the bonds, called upon the judges of the

supreme court of the State to give their opinion as to its validity. The following is the concluding portion of the opinion of the judges, after disposing of other points:

There remains one constitutional inquiry and that is whether the purpose of chapter 324, Laws 1919, is a public purpose. In view of the provision of const. art. 11, sec. 2, that taxes shall be levied and collected for public purposes only, it might have been doubtful whether the purpose of said chapter 324 was a public purpose if that act had rested upon legislative definition alone. But, in the language of the immortal Lincoln, ours is a government "of the people, by the people, and for the people." When, therefore, the people of this State, by solemn amendment to the constitution, declared that "the manufacture, distribution, and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the State may engage" (const. art. 13, sec. 10), we are of the opinion that the taxation authorized by said chapter is for a public purpose, and that it is not open to the courts to say otherwise.

Thus far we have considered your inquiry in the light of the provisions of our State constitution. It might be urged, as was urged in *Green v. Frazier*, 253 U. S., 233, 40 Sup. Ct. 2, 499, 64 L. Ed. 233, that the act in question violates the fourteenth amendment to the Federal Constitution. From a careful study of the decision in that case we are of the opinion, and we believe that the Supreme Court of the United States would be of the opinion if the question came before it, that the act in question does not violate such fourteenth amendment.

No other grounds occur to us upon which the bonds in question might be assailed as unconstitutional.

SUNDAY LABOR—SERVILE LABOR—MOVING PICTURES—*State v. Smith, Criminal Court of Appeals of Oklahoma (June 16, 1921)*, 198 *Pacific Reporter*, page 879.—Clint Smith was charged with the crime of Sabbath breaking because he performed certain servile labor; that is, he sold tickets for a moving-picture performance, on a Sunday. He admitted the facts as alleged to be true, but declared that he was not guilty under the law. The section of the law under construction reads as follows:

SECTION 2405 (as amended). The following are the acts forbidden to be done on the first day of the week, the doing of any of which is Sabbath breaking.

First. Servile labor, except works of necessity or charity.

* * * * *

The criminal court of appeals sustained the order of the court below dismissing the action, after reaching the conclusion that the operation of a moving-picture show is not "servile labor" and not prohibited by the law.

The opinion concludes:

At the time our legislature amended the Sunday law of this State (act of May 17, 1913), adding to the prohibitions then existing, horse

racing, hunting, and gaming, and providing that the public selling of commodities should be restricted, moving-picture shows were flourishing in all parts of the State, and in many places moving-picture exhibits were being held on Sunday. We think it is fair to assume that if it was the desire of the legislature to prohibit such exhibitions on Sunday it would have then said so in specific terms.

WAGES—COMPENSATION IN ABSENCE OF SPECIFIC AGREEMENT—CONCURRENT EMPLOYMENTS—*Demonstration Plantation Co. v. Kearney, United States Circuit Court of Appeals, Third Circuit (February 14, 1921), 270 Federal Reporter, page 772.*—Kearney was employed as an assistant bookkeeper by the Alvarado Construction Co., a New Jersey company engaged in promoting banana raising in Mexico. Two of the men, Roberts and Bain, who owned and controlled this company, also controlled the Demonstration Plantation Co., which was an Alabama corporation engaged in selling farms in that State. The offices of both companies were located in Pittsburgh—the former on Fourth Avenue and the latter on Fifth Avenue. Mr. Roberts, who represented the defendant company, called Kearney over from the Alvarado office and told him he wanted him (Kearney) to put some system into the defendant's books, which were poorly kept, and keep them. Roberts explained that the company was poor at the time, but that the matter of compensation would be fixed later. At Kearney's request Roberts called Bain at the Alvarado office and informed him of the arrangement. Kearney took the defendant's books to the Alvarado office and reruled them and kept them for two years, performing during this time the duties of a bookkeeper for both companies with their knowledge and consent. The defendant refused to pay Kearney for his work on the books, and he brought suit for \$75 per week, or the aggregate amount of \$7,800. He recovered a verdict of \$1,818.66, and the employer brought error. In affirming the decision of the district court the following opinion, in part, was rendered:

The defendant further contends that the verdict should not stand, because the plaintiff was acting in a dual capacity, as a servant of two separate employers. A servant may not recover double compensation from two employers, except upon clear proof of the consent of both employers to double compensation. (*Pennsylvania Railroad Co. v. Flanigan*, 112 Pa. 558, 4 Atl. 364.) According to plaintiff's testimony, the dominant officers of both corporations knew of his services, to be rendered to the defendant, and consented to the terms thereof; that for two years, while it was being performed, no objection was raised. The court submitted this question under proper instructions to the jury, which found for the plaintiff, and his testimony, which must have been believed by the jury, was sufficient, if believed, to establish consent. The plaintiff also testified

that it was the understanding and agreement between him and the Alvarado Co. that he was not to devote his entire time to its work, but that he was to keep the books of that company only; that he kept the books as above stated, and that with the knowledge of, and without objection by, the Alvarado Co., he carried on several lines of business outside of his employment with that company are admitted in the testimony of said officers of both companies.

The verdict of the jury settled the fact that W. A. Roberts employed the plaintiff to keep the books, not for himself and on his own account, as defendant contended, but for the defendant company. The fact of the employment, however, is raised here, and not the authority of Mr. Roberts. The verdict of the jury has settled the fact, and the defendant corporation, having had the benefit, may not now repudiate the burden of plaintiff's services.

WAGES—MINIMUM WAGE LAW—CONSTITUTIONALITY—HEARINGS—FORM OF ORDER—VALUE OF ROOM AND BOARD—*Spokane Hotel Co. v. Younger et al.*, *Hotel Co. of Tacoma v. Same*, *Supreme Court of Washington* (December 11, 1920), 194 *Pacific Reporter*, page 595.—The Industrial Welfare Commission of Washington, pursuant to authority granted to it by law (ch. 174, Acts of 1913), determined what in its judgment the minimum wage of female cooks, bus girls, waitresses, chambermaids, and other female hotel workers should be, and issued an order declaring among other things that said minimum wage should be \$13.50 per week. After holding three public hearings and conducting separate investigations by questionnaires, the commission issued another order on June 20, 1920, fixing the minimum wage at \$18 per week, or \$3 per day or 37½ cents per hour, and fixing the value of board and lodging when supplied by the employer. The plaintiffs brought action for injunctions against the members of the commission and upon their dismissal by the trial court appealed. In affirming the decision dismissing the suits the supreme court said in part:

The appellants argue that the statute under which the industrial welfare commission acted is unconstitutional: (1) Because it violates section 3, article 1, of the constitution of this State, and section 1 of the fourteenth amendment of the Constitution of the United States; (2) because public hearings were not held by the commission; (3) because the commission was without authority to fix a weekly wage of six days or to fix a rate of room and board. We shall consider these points in the order stated.

The appellants argue that this statute is void because it violates the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law." In *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037 [Bul. No. 258, p. 145], the constitutionality of this act was attacked. The provisions of the act are there summarized, and need not be repeated here. It was there held that the act was a valid act.

The act in question by sections 6, 9, 10, and 11 authorizes the industrial welfare commission to ascertain the facts and based thereon to specify the minimum wage and conditions of labor for women and minors and thereupon by writing notify the employers of such labor. In short, the legislature, instead of fixing the minimum wage and the conditions of labor for women and minors as it would clearly have the right to without any notice whatever to persons affected thereby, has authorized a commission to examine into and determine the facts upon which the act may become operative. This, we are satisfied, may be done without any notice, unless notice is required by the act governing the commission. If the legislature may pass a law fixing a minimum wage and labor conditions for women and minors, it follows as a matter of course that the legislature may authorize the commission to determine the facts upon which such law may become operative. If personal notice must be given to employers before a minimum wage and working conditions for women or minors may be established by the legislature or by a commission appointed for that purpose, then such law could not be made, because it would be almost if not utterly impossible to notify every employer of such labor within the State. We are of the opinion that employers have no vested right to employ women or minors, and therefore are not entitled to notice as a matter of right.¹ The legislature in the exercise of its police power may take away whatever rights the employer has in that respect.

It is next argued that public hearings were not had, as required by section 9 of the act. It is sufficient to say upon this question that the record shows that at least three public hearings were had before the order of the industrial welfare commission was made. One of these hearings was a conference attended by three representatives of hotels, by three employees, and by three representing the public. Counsel who now represent appellants were present at all of these hearings. It is true the commission made independent inquiries through letters in form of questionnaires, which the commission clearly had a right to do.

Appellants argue that the commission exceeded its authority by fixing a weekly wage rate at six days. The statute at section 11 provides that the commission shall specify the minimum wage and standard conditions for labor for women. This is clearly broad enough to justify the commission in fixing six days a week as a standard condition.

Appellants finally argue that the commission was without authority to say what amount should be deducted for room and board. We think that question is not in the case, because it does not appear that appellants are interested in it. But, assuming they are interested in it, that paragraph of the order numbered 8 leaves the matter wholly discretionary to the parties. The employer may or may not, as he chooses, furnish room and board at the prices stated. If he does not so agree, the straight wage schedule shall prevail.

We find no error in the record. The judgment of the lower court is therefore affirmed.

¹ But see *State v. Allyn*, p. 209.

WAGES—MINIMUM WAGE LAW—CONTRACT OF EMPLOYMENT—STATUTE FORBIDDING DISCHARGE—CONSTITUTIONALITY—*Poye v. State, Court of Criminal Appeals of Texas (October 13, 1920), 230 South-western Reporter, page 161.*—J. Poye was convicted of discharging an employee, a Miss Lee, because she testified before the industrial welfare commission regarding the terms and conditions of her employment, and he appealed to this court, claiming that the act under which he was convicted was unconstitutional. The court held that the law making this act a misdemeanor did not violate the due process of law clause or impair the obligation of contract, and was valid. In affirming the lower court, Judge Lattimore said in part:

It must be borne in mind that every contract entered into between our citizens includes, as necessary part thereof, the written law of the land; and that such contracts are viewed and construed as embodying not only the expressed will of the parties, but also the provisions of such laws.

We have no doubt that the passage of such laws for the welfare and betterment of the conditions of working men, women, and children is matter well within the province of the legislature; and there seems to us to be nothing of difference except degree, in the exercise of such power by direct legislation for such purpose and the exercise thereof in the creation of agencies which shall investigate, aid, and assist in the accomplishment of such purpose. Eight-hour laws have been upheld. Pure food laws have been upheld. Child labor laws have been upheld, and many others which affect the character of contract which parties may make, but such laws do not impair the obligation of contracts.

On motion for rehearing the decision was reversed and the cause dismissed because, pending the decision, the law under which prosecution was had, was repealed. The Penal Code exempts from punishment all persons who have been prosecuted for violating the terms of any law which has been repealed, provided the case against such offenders is pending at the time of the repeal of the law.

WAGES—MINIMUM WAGE LAW—CRIMINAL PROSECUTION—PUBLICATION OF ORDERS—*State v. Allyn, Supreme Court of Minnesota (October 14, 1921), 184 Northwestern Reporter, page 787.*—George W. Allyn was convicted in the municipal court of the city of Mankato, Minn., of employing a minor of ordinary ability as a clerk in a mercantile business at a weekly wage of less than \$10.25 in a village of less than 5,000 population, contrary to an order of the minimum wage commission of the State. He appealed to the supreme court from an order denying his motion for a new trial. Chapter 547, Laws of 1913, created a minimum wage commission. The statute provides for an investigation by the commission of wages paid to women and minors and the making of an order fixing a

minimum wage to be effective 30 days after issuance, making the wages thus determined the minimum wage in said occupation throughout the State. Sec. 6 provides in part as follows:

A copy of said order shall be mailed, so far as practicable, to each employer affected; and each such employer shall be required to post such a reasonable number of copies as the commission may determine in each building or other work place in which affected workers are employed.

On July 5, 1919, the commission issued order No. 10, fixing the minimum wage for women and minors of ordinary ability in any occupation; while order No. 11, defining learners and apprentices, fixed the minimum wage for such employees, and determined who was a worker of ordinary ability. The trial court was reversed because of errors in admission of evidence, and a new trial granted. Judge Quinn speaking for the court, said:

Upon the trial copies of the orders referred to were placed in evidence by the prosecution, but no proof as to any investigation or other acts of the commission was offered. There was no showing that such orders were ever published or copies thereof mailed to parties affected thereby. Defendant offered proof that he had never received copies of either of such orders, or heard of the same either by mail or otherwise. These offers were objected to and excluded. Without notice of such orders an employer could hardly know of the wages thus established, much less post copies thereof in his place of business. While the law presumes that public officials properly perform their official acts in connection with their duties, yet such presumption may be rebutted by competent proof. The presumption of due receipt of a letter may be rebutted by evidence that it was not in fact received. (16 Cyc. 1070.) The proof should have been received.

The purpose of the statute seems clear. No other mode of publication is provided for. The order, when considered in connection with the statute, amounts in effect to a penal law. To enforce such an order without notice would be to subject every employer to prosecution, though innocent of any intent to evade the law. Such was not the intent of the legislature. We hold that under this statute the orders referred to do not become effective until 30 days after issue by the commission and the mailing of copies thereof, so far as practicable, to the employers affected. To render the orders admissible to evidence, compliance with the provisions of section 6 must be affirmatively shown. Courts will not take judicial notice of such orders. It then becomes the duty of such employer to post copies thereof as determined by the commission. The statute is mandatory as to the mailing and posting of copies of such orders.

The statute is silent as to the power of the commission to determine and define who shall be deemed workers of ordinary ability. It leaves those matters for the courts, especially in a criminal proceeding like this. It was therefore error on the part of the trial court to exclude the testimony bearing upon that phase of the case. For these reasons a new trial should be granted. Reversed.

WAGES—MINIMUM WAGE LAWS—INJUNCTION TO RESTRAIN ORDERS OF INDUSTRIAL COMMISSION—*Northwestern Telephone Exchange Co. v. Workmen's Compensation Bureau et al., Grand Forks Steam Laundry Co. et al. v. Same, Supreme Court of North Dakota (March 21, 1921), 182 Northwestern Reporter, page 269.*—In 1919 the legislature passed a workmen's compensation law (ch. 174) by which a minimum wage department was created. In accordance with the requirements of the law the minimum wage department issued several orders fixing the minimum wages, among others, in telephone exchanges and in laundries. The industries thus affected brought suits challenging the validity and constitutionality of the orders, and the regularity of the proceedings in issuing them. Pending the trial of the case, a temporary injunction to stay the operation of the orders was asked for and granted. The complainant companies were required to put up bonds in various amounts pending the result of the trial of the case on the merits. The minimum wage department appealed from the order entering a temporary restraining order against the going into effect of the orders. In affirming the decision granting the injunction the supreme court said in part:

The issues in these cases, as appears from the pleadings, present important and far-reaching principles and questions of law, the determination of which will affect many kinds and classes of employers and employees.

The questions are not only of transcendent importance, but are in this State presented for the first time. As will be seen by the compensation act, it is of very recent origin.

What has been done by and under authority of that law, by the minimum wage department, as well as by the commissioners of the bureau, is presented in those cases for consideration, and the legality thereof in many respects is directly challenged.

As we view the matter, the issues and matters involved in these cases should not be discussed in this opinion, as it seems to us any such discussion here would be merely obiter dicta. The lower court, in continuing the restraining orders, took precaution to protect the interested parties. It would seem the plaintiffs were required to, and did, execute bonds which the trial court thought sufficient for the protection of employees interested or affected, or which might become affected, by a determination in favor of the defendants. Precaution was also taken to provide for additional bonds in case necessity should require.

The only real question presented in this appeal is: Did the lower court abuse its discretion in continuing in force the temporary restraining orders, until the final disposition of the cases upon their merits in the trial court?¹ This question, in all the circumstances of these cases, we are certain, must be answered in the negative.

¹ No trial on the merits was ever had. The question being purely jurisdictional, the matter was disposed of by calling new conferences and issuing a new set of orders in proceedings of unquestioned regularity.

In the circumstances of these cases, it is unnecessary to cite authority for the conclusion at which we have arrived. This opinion is intended to, and does, dispose of the appeal in each of said cases above entitled, so far as the questions presented in those appeals are here presented. We refrain entirely from expressing any opinion with reference to the merits of either case.

The order appealed from is affirmed.

WAGES—MISUSE OF FUNDS BY CONTRACTOR—CONSTITUTIONALITY OF STATUTE—*People v. Holder, District Court of Appeal of California (June 3, 1921), 199 Pacific Reporter, page 832.*—W. H. Holder, a contractor, entered into a building contract with each of two lot owners for the construction of a house. Certain sums were advanced as parts of the stipulated contract price, but instead of expending the money for labor and materials, Holder appropriated it to the payment of his own debts. He was convicted of embezzlement under amendments of 1907 and 1919 to section 506 of the Penal Code which, respectively, provide that:

Any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement.

The payment of laborers and material men for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied.

Holder appealed from the judgment on the ground that the statute under which he was convicted was unconstitutional; also from an order denying his motion for a new trial. He was sustained in his contentions by the district court, in the following language:

Since the money, when paid to him, was paid to and received by him under his contract with the lot owner—it was so stated, without contradiction, by the witnesses on both sides—the money was not property intrusted to him or in his control “for the use of any other person.” By his contract with each lot owner he did, it is true, expressly agree to “pay all claims of all persons performing labor upon, or furnishing materials for, said work or buildings.” And at the time when the several sums were paid to him he orally agreed to use them in the payment of labor and material bills. But there is no claim that appellant procured the payment of these sums by fraudulent misrepresentations.

Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of section 15 of Article I of the constitution of this State, which expressly inhibits imprisonment for debt except in cases of fraud.

The sole remaining theory upon which the people may attempt to justify appellant's conviction is that, by reason of the amendment of 1919, the statute itself so enters into and becomes a part of every

building contract, that, the provisions of the contract to the contrary notwithstanding, the absolute, unconditional title to money paid to the contractor under his contract does not pass to him, but is received by him in trust for certain uses. A statute that consummates such a result abridges the privileges of citizens of the United States and deprives them of property without due process of law.

It is well settled that the police power can not be made a cloak under which to overthrow or disregard constitutional rights. It is only when the general welfare, the interests of the public as distinguished from those of individuals, will be protected that the right of contract may be limited by a general exercise of the police power. In view of this principle, impreguably established in our jurisprudence, it can not successfully be contended that the amendment in question is a valid police regulation. The payment of debts that may be due laborers or material men is not calculated to conserve the safety, health, or general welfare of the community. There can be nothing so injurious to the public welfare in the failure of a debtor to pay his just debts as to require an exercise of the police power. In all free governments the good sense of mankind, since the day when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties.

For these reasons we hold that the amendment of 1907 is an unwarranted invasion of the rights guaranteed by our State and Federal constitutions, and that therefore the clause added to section 506 by the amendment of 1919 is void and wholly ineffective.

WAGES—MONTH TO MONTH EMPLOYMENT—BONUS OFFER—GRATUITY—*Russell v. H. W. Johns-Manville Co. of California, District Court of Appeal of California (July 16, 1921), 200 Pacific Reporter, page 668.*—The defendant company on October 15, 1918, notified its employees that the company would give a 20 per cent bonus to all salaried employees who had been in the employment of the company for the calendar year 1918. Samuel P. Russell had been a salaried employee from January, 1918, to November 16, 1918, when he was discharged without cause. His salary was paid in full up to November 30, 1918. He thereafter commenced a suit to recover \$600 alleged to have become due by virtue of the notice. In the trial court judgment was given in favor of Russell, and the company appealed to the district court of appeal. This court reversed the decision of the lower court on the grounds that there was no consideration to render the employer's offer binding in law. Judge Richards, speaking for the court, said:

We are unable to perceive upon what theory this judgment in the plaintiff's favor can be sustained. The written notice issued to its salaried employees was in form and upon its face a voluntary gratuity to such of said employees as might be in its service during the entire year 1918. It did not purport to change the terms of their

past, present, or future employment, nor in the case of month-to-month employees did it purport to bind the corporation issuing it to a different term of employment than that already existing; nor did it exact or require of such employees that they should make any surrender of their right to quit the corporation service at the close of any month thereafter. The respondent himself does not here contend that he was either required to make, or did in fact make, any such surrender, his utmost claim and proof being that he was willing to remain, and did in fact remain, in the employ of the defendant after receipt of said notice and up to the time of his discharge; but he neither pleaded nor testified, nor did the trial court find, that he was legally bound to so remain or that he in so remaining, did anything other or further than that which he was willing to do and would have done if such notice had never been issued by his employer or received by himself.

WAGES—OVERTIME PAY—CONTRACT OF EMPLOYMENT—*Robinette v. Hubbard Coal Mining Co., Supreme Court of Appeals of West Virginia (April 26, 1921), 107 Southeastern Reporter, page 285.*—John H. Robinette entered into an agreement to work for defendant company as manager of one of its plants. The plants generated electricity for the mines and the mining village near by. He was to work 8½ hours a day and receive \$130 per month as wages. His duties, however, required him to work 12 hours a day. As a result of a proposed enlargement of his contractual duties, which he declined to perform, he was discharged. Robinette brings this action to recover for the overtime he worked during the 17 months he was employed. The lower court decided he was not entitled to the amount claimed and was upheld by the supreme court in an opinion given by Judge Lynch, which reads in part as follows:

Undoubtedly there are circumstances under which a person employed to perform services for a stated remuneration during a specified period may be entitled to recover extra compensation from his employer for additional services rendered at the request of the latter. But the right to enforce such a claim depends upon the existence of a contract therefor, either express or implied.

Here no express contract for additional remuneration was proved, or even attempted to be proved, and plaintiff's right, therefore, if any, depends upon the existence of an implied contract created by the very circumstances of the case.

Ordinarily, when one requests another to perform services for him, there is an implied promise to render reasonable and just compensation therefor. But the application of this rule generally is limited and restricted, subject to an exception hereafter to be noted, to situations where the person performing the service was not already in the employ of the one requesting it. If he is already employed by the latter, the mere request for the additional service, in the absence of an express special agreement in regard thereto, generally does not justify the inference of an offer to pay anything in addition to the compensation specified in the contract of employment, it being as-

sumed that the extra services were requested and performed under such contract as an incident thereof.

Where an employee voluntarily continues in a position under such conditions, known to him from the first day he undertook the work, receives the compensation agreed upon as a monthly salary, wholly fails to insist upon a definite understanding with regard to additional remuneration for such overtime, and protests but weakly against it, he will be deemed to have treated such overtime work as a mere incident of his usual duties, and to have waived any right to demand additional remuneration therefor.

WAGES—PENALTY FOR NONPAYMENT—DEMAND—ATTORNEY'S FEE—
Marrs v. Oregon Short Line Ry. Co., Supreme Court of Idaho (May 21, 1921), 198 Pacific Reporter, page 468.—Dock Marrs brought an action against the defendant company to recover wages as an employee and recovered a judgment for wages, attorney's fees, and a statutory penalty. Marrs had made a written demand for \$33.90. The company admitted that \$24.01 was due. The company appealed from the decision to the supreme court, which reversed the decision of the lower court and remanded the case with instructions to modify the judgment so as to eliminate the item for the attorney's fee, because Marrs had demanded more than was found to be due as wages. The statute on this point provides for an allowance of an attorney's fee if a proper demand is made of an amount not in excess of the amount found due. (C. S., sec. 7380.)

Marrs had recovered his wages and a penalty under section 7381, C. S., which requires the payment on demand of the wages due an employee, under penalty of a continuance of the wages for a term not exceeding 30 days, the court holding, one judge dissenting, that the demand of an amount in excess of the sum actually found due did not invalidate the right to the penalty.

After reviewing several opinions Judge Rice speaking for the court said:

The statute we are considering is designed for the protection of laborers and mechanics and to prevent the necessity of their being delayed in the collection of wages due upon ceasing their employment and the consequent loss of time while awaiting settlement for services rendered. It provides that, upon failure of an employer on demand to pay any wages or salary due to his employee under a contract of employment, he shall be liable as therein provided. The liability arises, not from failure to pay the amount demanded but from failure to pay any wages or salary due upon demand. (*Hindman v. O. S. L. R. Co.*, 32 Idaho, 133, 140, 178, Pac. 837, 839.)

We think the statute is within the police power of the State and is constitutional, even though the claimant demand a greater amount than is due, unless the circumstances are such as to excuse a tender

of the correct amount. In the case at bar the record does not indicate that an offer to pay the amount actually due would have been refused.

WAGES—PENALTY FOR NONPAYMENT—FEDERAL RAILROAD CONTROL—*Missouri Pacific R. Co. et al. v. Ault, United States Supreme Court (June 1, 1921), 41 Supreme Court Reporter, page 593.*—H. A. F. Ault had been employed by the Pacific Railroad Co. in Arkansas at the rate of \$2.50 per day. On July 29, 1918, he was discharged. On this date \$50 wages was due him but remained unpaid for some time thereafter. Ault brought suit before a justice of the peace against the Missouri Pacific Railroad Co. for wages due and a penalty for nonpayment. A statute of Arkansas provides that whenever a railroad company, or a receiver operating a railroad, shall discharge an employee, with or without cause, it shall pay him his full wages within seven days thereafter, and that if payment is not duly made "then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ at the same rate until paid." Ault recovered judgment by default. The company appealed to the circuit court, and there made a motion to substitute the Director General of Railroads. Substitution was refused, but the director was joined as defendant and judgment rendered against both for \$440. The Supreme Court of Arkansas affirmed this judgment. The Supreme Court of the United States on writ of error reversed the judgment of the lower court. Justice Brandeis, for the court, said that the corporations were completely separated from the control and management of their railroads, and therefore the application of the railroad to be dismissed from this action should have been granted. On the question of the liability for the penalty the court said:

The purpose for which the Government permitted itself to be sued was compensation, not punishment. The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment. Congress has not given its consent that suits of this character be brought against the United States. The judgment against the director general, so far as it provided for recovery of the penalty, was erroneous.

WAGES—PENALTY FOR NONPAYMENT—PLACE OF CONTRACT—*Klaffki v. Kaufman et al., District Court of Appeal of California (March 24, 1921), 198 Pacific Reporter, page 36.*—Roy H. Klaffki brought this action upon his own claim and certain other claims assigned to him by his fellow laborers, for wages due for work performed for the defendants. He did not allege in his pleadings where

the contract of employment had been made, where the work had been performed or where he was discharged. He claimed a penalty for the nonpayment of wages under a statute of California in substance as follows: When discharged an employee's wages become due at once and in case of nonpayment within 5 days after they become due, they continue from the date due until paid but not more than 30 days. Judgment was in favor of plaintiffs and the defendants appealed. The district court of appeals reversed the judgment and remanded the cause to the superior court with directions to allow the plaintiff to allege facts showing his right to recover penalties under the California statute. The court said in part:

An actionable wrong, to be redressed by the recovery of a penalty, depends upon the law of the place where the work was contracted for or where it was made payable, or possibly, upon the law of the place where the work was performed, or where the employee quit or was discharged.

In cases arising under the act of 1911 there are two substantive rights. There is the employee's common-law right to the wages earned by him under his contract of employment; and there is also the employee's statutory right to the unearned wages which the statute awards him as a penalty for his employer's conduct in continuing to withhold his earned wages after they are due. So also there are two separate and independent wrongs. There is the wrongful violation of the employee's right to receive, when due, the wages earned by him; and there is also the statutory wrong, visited by the imposition of a penalty, which consists in the continued withholding of the wages after the expiration of the five days.

WAGES — RATES — RAILROADS — CONTROL BY STATUTE — UNITED STATES RAILROAD LABOR BOARD—*St. Louis Union Trust Co. v. Missouri & N. A. R. Co., United States District Court, Eastern District of Arkansas (Feb. 21, 1921), 270 Federal Reporter, page 796.*—The Missouri and North Arkansas Railroad was built in 1907. From that date up to the present time the road never paid dividends and never even paid interest on its bonds. It was placed in the hands of a receiver, who found the condition of the road so deteriorated as to be unsafe for operation. The court authorized the issuance of receiver's certificates to the extent of \$2,000,000. The road was unable to earn the interest on these certificates and more had to be sold to pay the interest. It has been found practically impossible to dispose of any more of the receiver's certificates at any price. On February 1, 1921, after a consultation with the judge, the receiver reduced the scale of wages of all the officers and employees to the basis in effect April 30, 1920. Certain employees through their representatives protested against the reduction and asked the receiver to establish the scale of wages existing by direction of the United States Railroad Labor

Board in its decision No. 2, which became effective May 1, 1920. The receiver petitioned the court for instructions and advice. The determinations of the court are in part as follows:

Courts must be just as honest as corporations and individuals, and if it incurs a debt, it must see its way clear to be able to pay at least the interest on it. To do otherwise would be practicing a fraud on the lenders. For this reason to attempt to borrow money on additional receiver's certificates, assuming they could be sold, is out of the question.

Only one of two remedies is left: To stop the operation of the road, or to cut down expenses wherever it is possible. To cease operating the road ought only to be resorted to, if no other remedy is left. Industries have been established along the road in reliance on the operation of the railway. These industries are entirely dependent on this road, to obtain raw material and to ship to the market the finished material. Without this road being operated, the investments in these industries would be absolutely destroyed. Many of the farmers residing along the road, and large numbers of others who have purchased lands and settled along the road, have planted valuable apple orchards and have no other means of sending their product to market except this road. To deprive them of the means of marketing the fruit means the destruction of the orchards. The court would therefore not be justified to stop the operation of the road, if it is at all possible to continue its operation. Therefore the only other remedy left is to reduce the salaries and wages of the employees at the same time, if it can be done without reducing them below a level which will enable them to provide for themselves and their families. The salary of the receiver, who is also the general manager of the road, has been reduced by the court 20 per cent, and has been accepted by the receiver.

The important question is whether, in view of these facts which are indisputable, the receiver would be subject to punishment under the provisions of section 312 of the transportation act of February 28, 1920, c. 91, 41 Stat. p. 473. It may be conceded that the act is a constitutional exercise of the powers granted by the Constitution to Congress. But it is not conclusive that a carrier, whose earnings are insufficient to pay the wages established by the Railroad Labor Board, and unable to obtain by loans the money necessary to comply with its order, can be punished for failing to comply with the order.

To require it to continue in business at a loss is beyond the power of Congress or a State. In *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396, 40 Sup. Ct. 183, the act of the State of Louisiana requiring a carrier to continue the operation of a road at a loss was held to be unconstitutional, as depriving the carrier of its property. While the opinion fails to state that the invalidity is by reason of the fourteenth amendment to the Constitution of the United States, it could rest on no other ground.

In this case, the transportation act having been enacted by Congress, the fourteenth amendment would not apply; but the fifth amendment to the Constitution does apply to acts of Congress. As the language used in both of these amendments is the same the same rule of construction must be applied to one as to the other.

In the instant case some of the employees have quit work, and others are protesting against the reduction of their wages. But the places of those who have declined to continue their employment have been filled by others equally competent and efficient, who are willing to receive the wages offered by the receiver; and, should the other employees see proper to quit, the receiver assures the court that he can fill their places, having many applications from competent men who are willing to accept employment at the wages offered.

In the opinion of the court the receiver is authorized and directed to pay the wages in force prior to April 30, 1920.

WAGES—RATES—RAILROADS—EFFECT OF STATUTE—POWERS OF RECEIVER—STATUS OF EMPLOYEES ON STRIKE—*Birmingham Trust and Savings Co. v. Atlanta, B. & A. Ry. Co., United States District Court, Northern District of Georgia (March 26, 1921), 271 Federal Reporter, page 731.*—This was a suit in equity in which a receiver had been appointed for the defendant railway company. On February 28, 1921, the receiver reported to the court that he had money available to pay the current pay roll, but that he would be unable to meet another similar pay roll; that the railway was not earning operating expenses; that the payment of greater wages than were earned by the company would be to take property without due process of law; and that the wages of unskilled labor should be reduced. An order of the court authorizing a reduction in wages was granted, to take effect March 1. N. H. Evans and others for themselves and as representatives of several unions made a motion to rescind the order, claiming also that under the transportation act only the Labor Board could reduce wages. The court modified its previous order by excepting therefrom train employees, but did not concede the jurisdiction of the Labor Board. The court, in its decision, speaking through Judge Sibley, said in part:

The existence in this case of some sort of contracts between the railway company and the labor unions is referred to in the pleadings, but the contracts are not themselves exhibited nor put in evidence. Since the order of the court authorizing the receiver to operate the railroad expressly provided that no contracts of the company were to be considered adopted by him without authority from the court; and, since the receiver's action on the matter of wages was taken within three days of his appointment, there can be no contention here that these contracts, whatever they were, had been adopted. Being unhindered by contracts the receiver made a showing, the accuracy of which has not yet been contested, which indicated that only by reducing his wage scale could he escape suspension of operation. Thereupon he was authorized to establish a reduced scale of wages and salaries, whereby all persons of all ranks should receive compensation on a basis of their pay December 31, 1917, plus one-half of increases since made, with the right to any and all employees to be heard on application.

Where an administrative order may affect numerous persons not parties to the cause, it is a common practice to grant such order as appears to be proper, with leave to bring on a hearing thereafter.

Receivers are not expressly mentioned in the portion of the transportation act establishing the Labor Board, but its definition of the carriers dealt with as including "any carrier by railroad, subject to the interstate commerce act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation" (41 Stat. 469), is sufficiently broad to cover a receiver operating an interstate railroad.

But where, as is the case here, there is no dispute as to conditions of employment, nor as to the just and reasonable wage normally to be paid, but only a question as to the ability of the receiver to pay the wage that has been established, without violating the Constitution, it is not seen how a decision of the Labor Board would be helpful.

Moreover, in this case the Labor Board has apparently held itself without jurisdiction of the subject-matter.

Section 9 of the Newlands Act [requiring hearings after 20 days' notice, before a reduction of wages] seems to restrict its application to those actually engaged in train operation and train service, and indicates that they were persons only who are "employed upon or in cars." The common meaning in railroad circles of "train operatives" and "train-service men" includes only engineers, firemen, conductors, switchmen, train hands, and porters, and these alone are intended to be covered by this act.

The "employees of such employers" therefore clearly includes all persons operating the railroad trains at the time receiver takes charge, and a reduction of their wages is clearly dealt with by section 9. It must be held, therefore, that the order of February 28th, as to employees dealt with by the Newlands Act, was in violation of said act and to that extent illegal.

As a statute of procedure in Federal courts it is justified by the constitutional power of Congress to establish inferior courts with the implied power to define their jurisdiction and regulate their exercise of it. But if it be admitted that in practical operation it fixes wages for 20 days, a law so doing in avoidance of strikes, even where a classification is made of the employees, is a valid regulation of commerce.

It is urged that, when a wage is compelled to be paid even for 20 days, which is beyond the power of the road to earn, the statute can not be constitutionally applied, because it would take property without due process of law and for public purposes without just compensation. As a last resort the operation of the road might have been stopped for the period, since it could not be constitutionally compelled. It does not sufficiently appear in this case that the application of the statute necessarily would have been confiscatory.

The order of February 28 was therefore modified so as to except employees engaged in operating trains.

The contention is made that the petitioners here have no standing in the court, because they are no longer employees, having on March 5th voluntarily ceased to work. It appears from the evidence that

after the order of February 28th was acted upon by the receiver, and his purpose of paying reduced wages to all employees after March 1st was announced by him, the employees at first continued at work under protest. This action on their part prevented any contention that they had agreed to the reduction, and, so long as they continued at work, those affected by the Newlands Act were entitled, notwithstanding the receiver's action to claim the compensation previously paid them. Unquestionably they have a substantial interest in the correction of the court's order, which would otherwise operate to control the receiver in his payments to them; and by the express terms of the order all employees, whether protected by the Newlands Act or not, had a right to make a showing to the court upon the question of reduction. Their present showing did not cover the necessity of the reduction or any matter of fact, but did properly bring in question the exclusive jurisdiction of the Labor Board. All these parties had a standing in court to make the points they did under the express provisions of the order and in protection of their rights during the period that they continued at work.

WAGES—SEAMEN—DISEASE DUE TO VICE—*Franco et al. v. Seas Shipping Corporation (Inc.)*, U. S. District Court, District of Maryland (April 15, 1921), 272 Federal Reporter 542.—The libelants were alien seamen who were employed as part of the crew of the American steamer *Robin Hood*. On arrival in the United States each of them was found to be suffering from a venereal disease. They were ordered to a hospital in compliance with the act of December 26, 1920 (41 Stat. 1082), and were there treated. Upon their discharge from the hospital they demanded their full wages, but the ship insisted upon deducting the hospital expenses. In this libel they seek to recover their wages without deduction and also a penalty for delay in payment. The district court decided that, under the law, the seamen were entitled to their full wages but not the penalty, saying in part:

It is suggested on behalf of the ship that the act in question is nothing but an amendment to the earlier immigration act of 1917 (Comp. St. 1918; Comp. St. Ann. Supp. 1919, sections 959, 960, 4289½-4289¾), which was by its terms limited to passenger vessels, which the *Robin Hood* was not. I can see nothing in the terms of the act of December 26, 1920, to sustain this contention. It is true that, without explanation of the reasons for such legislation, it may seem unfair for the Congress to impose upon the owners of ships the duty of paying hospital bills to cure alien seamen of diseases due to their own vices, but the courts may not substitute their judgment for that of Congress.

The act declares that all expenses connected with the hospital treatment, as well as some other things, shall be borne by the owner, agent, consignee, or master of the vessel "and not to be deducted from the seamen's wages." Such language is too clear to require construction.

On the other hand, in this case, the imposition upon the ship of what is in fact a penalty for delay in payment would be a hard measure for the vessel owner. The requirement that it, rather than the seamen, should pay such charges naturally seems to it against common right. The Shipping Board itself has officially held that a limited construction should be put upon the statute.

Under such circumstances, the owner, before making payment, was justified in asking for a judicial determination. It united with the libelants in bringing the question to the attention of the court at the earliest possible moment.

WORKMEN'S COMPENSATION—ACCIDENT—DEATH FROM PNEUMONIA—*Delso et al. v. Crucible Steel Co. of America, Supreme Court of New York, Appellate Division (February 28, 1921), 187 New York Supplement, page 66.*—Delso while working in the employ of the Crucible Steel Co. received during the course of his employment a heavy blow upon his chest as he was reeling and drawing wire. The next day, Thursday, he became incapacitated for work and went home and to bed. On the following Sunday evening he died from pneumonia. Proceedings were brought for compensation and the industrial commission allowed an award on the theory that the accident caused the pneumonia. The employer appealed, but the award was affirmed. The decision is in part as follows:

A reading of all the evidence in the case leaves in the mind a strain of uncertainty; but there was competent evidence that the injury was the inciting cause of the pneumonia; there was a sudden development and a quick termination in the progress of the disease after the injury. There are many circumstances corroborating the opinion of those experts who trace the pneumonia to the injury. The commission has found that the injury was the cause of the pneumonia. This court is not at liberty, under the evidence and the rules which govern in these cases, to interfere with this finding.

WORKMEN'S COMPENSATION—ACCIDENT—DEATH FROM PNEUMONIA—*Dumbluskey v. Philadelphia & Reading Coal & Iron Co., Supreme Court of Pennsylvania (March 7, 1921), 112 Atlantic Reporter, page 745.*—Dumbluskey was employed in the defendant's coal mine. While engaged in putting in place a heavy piece of timber known as a collar he was squeezed or bumped by the collar. He immediately complained to his fellow workmen of pain and left the mine. He went to his home and found a doctor who found a slight abrasion like a scratch, a discoloration of about 2 or 3 inches in diameter. The illness continued and developed into pneumonia, from which he died. His widow brought proceedings for compensation, and hearings were held before a referee, who found that:

The injury that decedent sustained on February 24, 1920, while in the course of his employment, decreased the vitality and resisting

power of the pleura and lung tissue; that pneumonia and influenza developed as a secondary infection which caused his death. We find here a direct connection between the injury to the man and his death.

The commission approved the finding and made an award of compensation, which on appeal was affirmed by the court of common pleas. The employer appealed again, but the award was again affirmed. The opinion of the State Supreme Court is in part as follows:

The question before us is the sufficiency of the testimony to sustain the findings. During the illness of deceased four doctors were called from time to time. The family doctor was of the opinion the injury received by deceased caused traumatic pleurisy which later developed into pneumonia. All the physicians agree that death was the result of pneumonia which followed either traumatic pleurisy or influenza, the latter being prevalent at the time. None, however, testified that the development of traumatic pneumonia from an injury such as was indicated by the mark on the body of deceased was improbable or impossible.

The testimony before the referee and compensation board, referred to above, was clearly competent and ample to sustain the findings of fact and conclusions of law set out in the award.

WORKMAN'S COMPENSATION—ACCIDENT—FIGHTING FIRE—COMMON HAZARD—FROZEN NECK—*Savage et al. v. City of Pontiac, Supreme Court of Michigan (July 19, 1921), 183 Northwestern Reporter, page 798.*—Ray Savage was a fireman in the employ of the city of Pontiac. On January 31, 1920, he was called out to fight a fire at 9 a. m., and he remained on duty until about 3.30 p. m., during which time he attended two fires. It was very cold and a high wind was blowing, which sent sprays of water over the firemen. A layer of ice an inch thick had formed on his neck behind his right ear. He was confined to his bed till February 21, 1920, the date of his death. Amy Savage and others brought proceedings under the workmen's compensation act and received an award. The supreme court on writ of certiorari reviewed and reversed the award made by the industrial accident board, two justices dissenting. The supreme court held that the death was not due to accidental injury, even though there was expert evidence that the ice which froze on his neck had injured his spinal cord by pressing on the vertebræ. It held further that injury received in the course of employment through natural causes where the employee was no more subject to the injury than others similarly employed was not compensable under the Michigan statute, sustaining the contention of the city "that the wetting and exposure received by deceased at the fires was an incident which, from the very nature of the employment, every fireman is subjected to in Michigan during the severe winter weather," so that there was no accident. In other

words, it would seem that if injury is only sufficiently probable, no compensation will be paid under the construction of the law by the Supreme Court of Michigan.

WORKMEN'S COMPENSATION—ACCIDENT—FREEZING OF HANDS—*Quick v. Fred E. Illston Ice Co. et al., Supreme Court of New York, Appellate Division (March 2, 1921), 186 New York Supplement, page 690.*—Henry Quick was employed by the Fred E. Illston Ice Co. in a hazardous occupation, and during the course of his employment he suffered injuries to his hands from freezing. He brought proceedings for compensation under the workmen's compensation act and was granted an award. The employer appealed but the award was affirmed. The decision is, in part, as follows:

The claimant suffered injuries to both his hands while engaged in floating ice by the aid of a pike pole on the 31st day of January, 1920. The thermometer at the time of the injury registered 14 degrees below zero, and the accident is found to have been due to the necessity of holding onto the pike pole in such a manner as to expose the claimant to an added hazard. His fingers were frozen, and the commission has allowed an award for a period of 10½ weeks. This court is committed to the proposition that the freezing of one's hands while engaged in a hazardous employment is an accident within the meaning of the statute.

WORKMEN'S COMPENSATION—ADMIRALTY—DRIVER OF TRUCK INJURED BY BARGE—*McBride v. Standard Oil Co. of New York, Supreme Court of New York, Appellate Division (May 4, 1921), 188 New York Supplement, page 90.*—William McBride, the husband of claimant, was employed as chauffeur for the defendant company which was engaged in distributing petroleum and its products. The State industrial commission gave an award, because of the death of McBride, to the claimant, stating:

While standing on the side of the barge, while making the barrels safe at the end of his truck, the brake on said truck was released, and car slid back and caught the left leg of deceased between the tail of truck and side of boat.

The company appealed alleging that the death was a tort of a maritime nature and that the industrial commission had no jurisdiction. The appellate court affirmed the finding of the commission. Judge Cochrane, in stating the opinion of the court, said:

The appellant says in its report of injury that the occupation of McBride, "when injured," was that of a chauffeur. The duties of a chauffeur in the nature of things pertain to the land and not to water. The work of the deceased at the barge was merely incidental to his

general duties as such chauffeur, and had nothing otherwise to do with the barge. His employer had nothing to do therewith, except to receive its merchandise therefrom.

If there was any tort in this case, it consisted in negligently permitting the brake on the truck to be released. That was the initial wrong, if there was a wrong. No tort or wrongful act was committed on the barge. The fact that McBride was standing on the side of the boat while securing the loaded gasoline on the truck was merely an incident, and quite insufficient to confer jurisdiction on a court of admiralty, nothing having occurred on the barge or in connection therewith to contribute in any way to the accident.

WORKMEN'S COMPENSATION—ADMIRALTY—EMPLOYERS' LIABILITY—DOUBLE COMPENSATION—*Rorvik v. North Pacific Lumber Co. et al., Supreme Court of Oregon (January 25, 1921), 195 Pacific Reporter, page 163.*—Captain Rorvik was in the employ of a steamship company and at the time of the accident was engaged in superintending the loading of the Steamship *Klamath*, which was lying in the Willamette River, Oreg., at the wharf of the North Pacific Lumber Co. The steamship company was a California corporation. A portion of a pile of lumber on the wharf was suddenly shoved forward striking Captain Rorvik and knocking him from the wharf against the side of the ship and thence upon some logs lying in the river. The fall broke his back and he died shortly afterwards. His widow brought proceedings in California against the steamship company for compensation under the workmen's compensation act and recovered an award of \$5,000. This award was contested and repeatedly appealed from by the steamship company so that the widow, one year and a half after the death of her husband, had received no money. She also brought suit against the North Pacific Lumber Co. for damages under the Oregon employers' liability act and recovered a judgment for \$12,500. The lumber company appealed from this decision but the judgment was affirmed. The opinion is in part as follows:

The theory has been advanced that the tort was a maritime tort, for the reason that Rorvik was engaged in a maritime contract. The test for determining whether a tort is a land or maritime tort is not the same as the test for determining whether a contract is a land or a maritime contract. The character of a tort is determined by the locality of the act; and consequently the fact that a person is injured while performing a maritime contract does not necessarily determine the character of the tort.

Thus it appears not only that we can not say as a matter of law that the tort was a maritime rather than a land tort, but it also appears that the defendants themselves concede, and, indeed, insistently contend, that it was a land tort; and consequently we must agree

with the contention of the defendants that we can not say that the tort was a maritime tort. From this conclusion it follows as a natural sequence that there was nothing in the character and nature of the tort to prevent the workmen's compensation act of California (St. 1913, p. 279) from operating. By the same token we must also conclude that there was nothing in the character or nature of the tort to prevent the plaintiff from invoking our employers' liability act or to deprive the trial court of authority to award damages, unless some reason, other than the character of the tort, can be pointed out. (See *The Albion* (D. C.), 123 Fed. 189; *The Strabo*, 98 Fed. 998, 39 C. C. A. 375.) In short, the character of the tort does not render the California compensation act inoperative, nor does it prevent the enforcement of our employers' liability act.

The second point urged by the defendants involves the contention that the award made under the provisions of the workmen's compensation insurance and safety act of California precludes the plaintiff from prosecuting or maintaining this action.

It affirmatively appears from the uncontradicted testimony of the plaintiff that the California proceeding has been sufficiently stayed to prevent her from obtaining any money. No payments have been made to her, for thus far she has not been able to compel any payment; and, moreover, the defendants have made no attempt to show that the award made by the California industrial accident commission is final so that it is even now enforceable.

The status of the California award, however, can not affect the judgment rendered in the Oregon action, for in our view the result is the same whether we treat the record as a proceeding which is still pending or as an enforceable finality.

We may assume for the purposes of the discussion that the plaintiff can not have two satisfactions, one in California and another in Oregon; and hence a satisfaction of the Oregon judgment would operate as a satisfaction of the California award.

WORKMEN'S COMPENSATION — ADMIRALTY — STEVEDORING — LONGSHOREMAN'S RIGHTS UNDER ELECTIVE LAW—*Berry v. M. F. Donovan and Sons (Inc.) et al.*, *Supreme Judicial Court of Maine* (November 10, 1921), 115 *Atlantic Reporter*, page 250.—M. F. Donovan and Sons (Inc.), a stevedoring corporation, contracted to discharge a cargo of railroad ties from a vessel tied to a Portland wharf. Isaiah W. Berry, a longshoreman, was employed by them to assist in the unloading. In performing his duties, the plaintiff stood on a platform on the wharf. A sling operated by a traveling derrick on the vessel in bringing one of its loads of ties from the vessel knocked Berry from the platform to the wharf, incapacitating him temporarily for work. The company was an assenting employer under the workmen's compensation act. The employee believing himself to be within the act made an application for an allowance of compensation. An award was granted, from which an appeal was taken. The supreme judicial court dismissed the appeal and affirmed the

award. Judge Dunn wrote the opinion of the court from which the following is quoted:

The power of Congress to legislate respecting maritime contracts is paramount.

Admiralty and maritime jurisdiction, as these terms are used in this country, extend not only to all things done upon and relating to the sea, to transactions relating to commerce and navigation, to damages and injuries upon the sea, and all maritime contracts, torts, and injuries, but still beyond the high seas to waters navigable therefrom.

It seems almost superfluous to say that a State may neither broaden nor narrow the limits of maritime law and admiralty jurisdiction. State laws can not exclude a maritime contract from the domain of admiralty jurisdiction; they can not alter the limits of that jurisdiction. A State can only authorize the enforcement of rights by common-law remedies, "or such remedies as are equivalent thereto." Under the judiciary act it is open to a suitor to proceed in rem in the admiralty or in personam in the same jurisdiction, or, at his election, in the stead of going into admiralty, he may resort to his common-law remedy either in the Federal or in the State courts. Of course, he may not for the one thing properly prevail in both jurisdictions. But personal suits on maritime contracts or for maritime torts are maintainable in the State courts. If, as a general proposition, no remedy is sought against the vessel itself, the case is not within the exclusive jurisdiction of the Federal courts, but the State courts, administering common-law remedies, have concurrent jurisdiction.

In the case in hand, the plaintiff is not assuming to enforce a suit in rem against the vessel, nor is he attempting to prosecute a suit in personam against her master or her owner; nor to extend a contractual relationship born of State legislation beyond an immediate party, or the insurance carrier of the immediate party, to the contract. His attitude is that he and his employer, enjoying constitutional freedom to contract, voluntarily put aside rights and obligations otherwise vouchsafed them, and therefore substituted the new form of compensating industrial injuries which the legislature of their State has provided. Having done this and injury having befallen the plaintiff out of and in the course of his employment, he insists that this court make their contract to square with the demands of real justice and plain common sense, that his rights in the dual citizenship of State and nation may not be unjustly infringed, and that the remedial legislation out of which the contract sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal, and full.

The presented situation, as we see it and understand it, is this: First, a contract between a stevedoring corporation and a vessel to discharge her cargo; the contract being of maritime nature. Next, a contract between that stevedoring corporation and the plaintiff, having to do with his employment in the unloading; this too may be regarded as a maritime contract. Finally, between the same stevedore and the same longshoreman, a contract about the contract that

they already had made; the latest contract touching the employer's responsibility for possible injuries to the employee. This contract arose out of and by force of the State's statute, immediately upon the consummation of that contract made next before, but not without the express assent of the one and the implied assent of the other of the contracting parties. The contract relates to a maritime contract. It springs from an existing maritime contract. Plainly, if the longshoreman were entitled to enforce against his employer an action of tort for personal injuries, it would seem that a common-law remedy in personam would be available, whether the accident happened on the high seas or near shore in the navigable waters of the State. As also admiralty would have jurisdiction. The stevedore and its longshoreman, when the making of their original contract of hire was complete, must be held to have voluntarily agreed that if, in the course of the latter's employment, disabling or fatal injury should come to him, a compensation would be made in manner and amount as defined by a statute of their State to the exclusion of liability therefor otherwise. Without such voluntary adoption the statute would be of no effect between the parties. Such voluntary adoption afforded a peculiar remedy, entitled to recognition only in the State granting it, though it might apply to injury occurring elsewhere. No reason is perceived why it would not be quite as competent for them to fix upon a mode for determining when, where, and the extent to which money relief or compensation should be forthcoming in the event of accident, as it would be for them, after the happening of an accident, amicably to make adjustment of damages or to submit the question to the determination of a common-law arbitration, or for the injured one to waive his right to damages, or for the other to make him an award therefor—no legal liability existing. There is neither change, nor attempt to change, the contract to which the vessel is party; that remains the same in every court, maritime or common-law. Employer and employee mutually substitute for rights and liabilities which the law would imply from the contract of hiring other rights and liabilities made effective by a State-sanctioned contract of their own making, entered into to remove the uncertainties of possible lawsuits. In this rigorous climate, where the winds of common sense blow free and strong, that contract seems anchored secure within a safe legal haven.

The prevailing opinion in the case of *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438 [Bul. No. 290, p. 302], is advanced by the defendants as of relation to the issue as presented here. The light to be got from that decision of the highest court in the land, speaking the last word on the question involved, is that the Congress exceeded its power to legislate in attempting, as against the owner of a barge, and in defiance of that owner's will, to permit the application of a compulsory compensation law of New York State to injuries sustained within the admiralty and maritime jurisdiction, by the owner's employee, on the theory that such legislation is destructive of the essential harmony and uniformity that it was meant in the adoption of the Constitution that the Federal Government should provide and preserve in the rules concerning matters maritime. The decision must be accepted as conclusive. But that decision does not indicate the course of the present case. Under a

compulsory statute, the rights and liabilities of parties arbitrarily arise from the law. Under an elective statute they come into existence from contract. The distinction and the difference are too clear for exposition. And, what is the more, undoubtedly an independent contractor might be liable to his own employee, regardless of whether the vessel or her owner would be or not. A State legislature has no power to modify or abrogate the maritime law; that being of the law of the United States. (*Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212.) The legislature of the State of Maine has not presumed to encroach or trench upon a power which the people of the United States conferred upon the nation. The legislature has confined itself to the enactment of a law intended to operate only in those instances where its provisions are voluntarily contractually adopted, and operative solely by the procedure of the statute on which the adoption is bottomed. A contract founded on that law is of right entitled to the rights of a contract universally.

The Doey case [224 N. Y. 30, 120 N. E. 53], and the concomitant ones from New York, involve the question of a State legislature assuming to read a compensatory contract into another contract, whether the contracting parties of their volition would or not. Upon the contractual phase of the situation, the final arbiter of Federal questions has not yet said. Until it shall say otherwise, if, indeed it ever shall, our ideas of the nature of contracts readily lead us to the conclusion that the decision of the chairman of the accident commission in this plaintiff's case is invulnerable to attack.

WORKMEN'S COMPENSATION—ALIEN BENEFICIARIES—EQUAL PROTECTION OF THE LAWS—*Vietti et al. v. George K. Mackie Fuel Co., Supreme Court of Kansas (May 7, 1921), 197 Pacific Reporter, page 881.*—Victor Vietti was employed as a miner for the defendant company. During the course of his employment a rock fell from the roof of the mine, resulting in instant death. The only question that arose was as to the amount of the damages. The plaintiffs, dependents of deceased, are aliens but reside in Kansas. The contention is on the following provision of the compensation law:

* * * And provided, however, that if the workman does not leave any dependents, citizens of and residing at the time of the accident and injury in the United States or the Dominion of Canada, the amount of compensation shall not exceed in any case the sum of \$750.

The lower court upheld an award of \$3,435.12 by substituting the word "or" for "and" before the word "residing." The supreme court affirmed the finding of the lower court, but on different grounds, stating in part:

Sometimes the word "and" in a statute may be construed as "or," but the substitution is not permissible unless the manifest intention of the legislature requires it. Nothing in the context of the act nor in the reason or spirit of it appears to warrant such robust treatment.

Referring to the treaty between the United States and Italy, which calls for equal treatment of nationals, the following is quoted from the opinion:

The treaty is not only binding on the contracting parties, but must be regarded as a part of our own law, effective and binding upon legislatures and courts.

If there is a conflict between the treaty and the statutory provision in question, the treaty must control, and the statute give way during the existence of the treaty. It will be observed that the treaty plainly purports to place citizens of the two nations upon an equality in respect to their persons and property rights where citizens of one country are domiciled in the other, and there is also a stipulation that the relatives and heirs of an injured party shall be given a right of action which shall not be restricted on account of the nationality of such relatives or heirs.

Regarding the constitutionality of the provision, the court said:

It may be added that the statutory limitation is also in contravention of the fourteenth amendment of the Federal Constitution, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Aliens lawfully resident in the State are within the protection of this clause. The plaintiffs were lawful inhabitants of Kansas, and therefore had a right to invoke the protection of the amendment. The equality clauses of the amendment, it has been determined, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of equal laws is a pledge of the protection of equal laws." (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064.)

WORKMEN'S COMPENSATION — AWARDS — APPORTIONMENT — LUMP SUMS—REVIEW—*Texas Employers' Ins. Assn. v. Bourdreaux et al.*, *Commission of Appeals of Texas* (June 1, 1921), 231 *Southwestern Reporter*, page 756.—Israel Bourdreaux was an employee of the Gulf Production Co., which company was a subscriber to the employers' liability act and carried a policy of insurance with the Texas Employers' Insurance Association. Bourdreaux while employed by the company sustained injuries which resulted in his death, leaving a wife and two minor children. The industrial accident board found that the wife and two children were entitled to compensation and made an award. This was fixed on a weekly basis, and made a percentage allowance to the claimants' attorneys. The insurance company contested the award, which was set aside and a new award made, of a lump sum, the court holding the case to be a special one, warranting commutation. One-third of the award was to be paid to the attorneys, and two-thirds to the beneficiaries. One-half of the two-thirds was to be paid to the widow of the deceased employee and the other half to the two children in equal parts.

The case was then taken to the court of civil appeals on the ground that the lump sum was not justifiable, nor was the award properly distributed. However, the award was affirmed, the court of appeals holding that it had no power to inquire into the propriety of a lump sum award on an appeal. The insurance association again contested the case, claiming error on both points. Chief Justice Phillips of the supreme court adopted and entered as the judgment of the court the judgment recommended in the report of the commission of appeals. The decision affirmed the lower court on the method of distributing the compensation, but reversed the decision of the court of appeals in so far as it held that the findings of the trial court upon the issue of a lump-sum settlement were not subject to review in the court of appeals. The decision is in part as follows:

The statutes of descent and distribution furnished one rule for distributing the community estate of a deceased husband to his surviving wife and children, and another for distributing among them his separate estate. (Article 2469 and 2462, R. S. 1911.) The compensation awarded in this case is neither the community nor separate property of the deceased. It does "not pass to the estate of the deceased to be administered upon," but is payable directly to those to whom it is awarded.

The compensation provided by the act arises out of the contractual relation between the employer and the deceased employee. When awarded for death of the employee, it is in substitution for damages ordinarily recovered by statute because of the death of the employee due to the negligence of the employer. (*Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556.) It is measured by the current wages of the deceased, and is to all practical purposes to supply to his beneficiaries the means of support which were afforded by his wages prior to his death. Its payment is provided for "from week to week as it accrues," except in special cases. The right of the deceased to have compensation paid his beneficiaries in case of his death was acquired by him during coverture. His wages flowing from his contract of employment under which he was working at the time of his death were community property. The compensation measured by his community wages and having its source, as it were, in the same contract of employment, partake more nearly of the nature of community than of separate property; and it should be distributed, in our opinion, according to the statute of descent and distribution applicable in distributing community property. Under this statute the apportionment provided is one-half to the wife and one-half to the children. (Article 2469, R. S. 1911.) Only two of the children being beneficiaries, the proportion should be, as between the wife and children, one-half to the former and one-fourth each to the latter.

The conclusion that this apportionment of the compensation should be made was reached by the industrial accident board, the trial court and the court of civil appeals, and we concur therein.

Were the findings of the trial court with respect to whether the case was one calling for a lump sum settlement subject to review by the court of civil appeals?

The trial court heard the case de novo, and made its findings upon all the issues, including the issue with respect to a lump-sum award. We see no reason why these findings are not subject to the same character of review on appeal to which findings upon other fact issues are subject. The court of civil appeals, in our opinion, has power to review, and should review, the findings upon the issue of a lump sum settlement.

We recommend that the judgment of the court of civil appeals be reversed, and that the cause be remanded to that court for a review of the findings and conclusion of the trial court with respect to whether the case was one calling for a lump sum award, and for further orders.

WORKMEN'S COMPENSATION—AWARDS—BASIS—BUSINESS CONDITIONS—*Capone's case, Supreme Judicial Court of Massachusetts (July 5, 1921), 132 Northeastern Reporter, page 32.*—Dominick Capone brought proceedings under the workmen's compensation act against the A. & J. M. Anderson Mfg. Co., his employer, and the insurance carrier, for compensation for injuries. The industrial accident board granted an award of two-thirds of the difference between the salary formerly earned and his salary at the time of the award. The superior court affirmed the finding, but upon appeal to the supreme court the case was recommitted to the industrial accident board for further hearing. Judge Carroll said:

When the employee was injured his work was that of operating a milling machine. If on December 3, 1920 (from which time he was found to be partially incapacitated for labor), he was in fact able to operate such a machine and could secure employment at this work, then there was no incapacity to labor resulting from the injury. But if his injured finger prevented his pursuing his former employment, or if by reason of business conditions he could not secure work at this occupation and his ability to labor in other pursuits was impaired by his injuries, this circumstance was important in determining the amount of wages he could earn and should be taken into account in deciding what compensation should be awarded him because of his diminished capacity to work. Reduction in earning capacity occasioned by general business conditions and not due to the injury could not be considered. The statute contemplates that compensation is to be paid for diminished capacity to earn wages; and the employee, in common with others, must bear the loss resulting from business depression. (*Durney's case*, 222 Mass. 461, 111 N. E. 166 [Bul. No. 224, p. 228].) If, however, the employee could not return to his former employment because of business conditions and sought for or secured employment elsewhere which he could perform, if it were not for his inability because of his injury, his earning power and labor efficiency were lessened within the meaning of the statute, and he was entitled to the compensation provided. (*Sullivan's case*, 218 Mass. 141, 105 N. E. 463 [Bul. No. 169, p. 241]; *Duprey's case*, 219 Mass. 189, 106 N. E. 686 [Bul. No. 169, p. 268].) In *Barry's case*, 235 Mass. 408, 126 N. E. 894, it was found that the em-

ployee was no longer able to do the work at which he was employed when injured; that in the general labor market his capability to earn wages was diminished; and the decree awarding compensation on this ground was affirmed. (Septimo's case, 219 Mass. 430, 107 N. E. 63 [Bul. No. 189, p. 290].) In the case at bar it has been found that because of the employee's injury his earning capacity was reduced; but the record does not show that he failed to secure work at his former employment, or that his efficiency in that work was in any way impaired. In our opinion the case should be recommitted to the industrial accident board for further hearing on this point.

WORKMEN'S COMPENSATION—AWARDS—BASIS—EARNINGS—*Centralia Coal Co. v. Industrial Commission et al., Supreme Court of Illinois (April 21, 1921), 130 Northeastern Reporter, page 725.*—Ernest Sundermeyer was injured while employed as a miner by the Centralia Coal Co. in its mine. His injuries rendered him permanently wholly incapacitated for work. Previous to his injury Sundermeyer, who had been paid 80 cents per ton for digging and loading coal, had been assigned to a driving room where the coal lay beneath a roof of slate 3 feet thick. In order to get at the coal he was required to devote much time and effort to removing the slate. This resulted in materially reducing the rate of his earnings. In awarding him compensation the industrial commission computed his average weekly wages, not on the basis of his actual earnings, but, owing to the circumstances of his case, on the basis of the average earnings of other miners in the company's employ. The employer objected to this method of computation and appealed. The circuit court affirmed the award and the employer again appealed, but the decision was affirmed and the award allowed to stand as rendered. The opinion in part is as follows:

Section 10 of the workmen's compensation act provides the basis for computing the compensation provided for in sections 7 and 8 of the act. Paragraph (a) of section 10 provides that the compensation shall be computed on the basis of the annual earnings which the injured person received as salary or wages if in the employ of the same employer during the year next preceding the injury. Employment by the same employer is, by paragraph (b) of said section, defined as "employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." Paragraphs (d) and (e) provide for the method by which the daily and weekly basis of the year's work is computed. Paragraph (f) provides for compensation for certain employees not subject to the preceding paragraphs.

It can not be doubted in this case, from the facts shown in the evidence, that Sundermeyer did not earn during the year preceding the accident in question as much as the average miner employed in this mine. It is also evident from the testimony that this was not

due to any lack of industry or capability on his part, but was due to the condition of the room in which he was required by his employer to work. There appear to be no cases in this State where this exact question has been presented, nor have counsel referred us to any cases in other jurisdictions, and upon investigation we have been unable to find any cases directly in point on the matter.

If Sundermeyer was unable to earn the average amount earned by miners in the mine of plaintiff in error by reason of his own inability or lack of industry, he is not entitled to have his compensation computed upon a basis of the average earnings of miners in that mine. To hold him so entitled would be to place a premium upon idleness and inefficiency. The case is different, however, where his inability to earn as much as the average miner in the mine is not due to his fault, or to the fact that he is below an average miner, but is due to a condition under which he is put to work by his employer, which is not a normal and recognized incident of the employment. In such case it would appear to have been the intention of the legislature that such employee should be entitled to compensation based upon the average wage of the adults employed in said mine in the same class or grade of employment, i. e., that of miner.

We are of the opinion that the legislature intended by paragraph (f) of section 10 to provide for cases of this character. The circuit court therefore did not err in confirming the award.

The judgment of the circuit court will therefore be affirmed.

WORKMEN'S COMPENSATION—AWARDS—DEDUCTIONS—VOLUNTARY PAYMENTS—*Mercury Aviation Co. v. Industrial Accident Commission of California et al.*, Supreme Court of California (June 28, 1921), 199 Pacific Reporter, page 508.—George C. Freeman, employed as a mechanic for the Mercury Aviation Co., received an injury to his right arm while cranking an aeroplane motor in the course of his employment. He was totally disabled for five weeks, at the end of which time he returned to work. Because of his injuries he performed only light work, but at the same rate of pay until discharged six months later. After his discharge he was awarded compensation. The commission deducted from its award the money paid Freeman for four of the five weeks he was sick, but did not give the employer credit for the difference in salary between a mechanic's wages and a "light-work" worker. The Mercury Aviation Co. brought the award before the supreme court for review on the ground that a larger credit should have been allowed them on account of the 100 per cent weekly payments it made to the employee continuously from the date of injury to the time of discharge. That court, through Judge Lennon, affirmed the award of the industrial accident commission, holding:

An employer can not escape the payment of compensation for a permanent partial disability solely upon the ground that the em-

ployee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury.

The reemployment of the injured employee was entirely optional with petitioner, just as it was optional with the employee to continue working, and likewise the amount of wages was a matter for the determination of the parties. Inasmuch as petitioner chose to continue full payments during the period of total disability in the absence of any agreement and thereafter to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, it is not entitled, as a matter of legal right, to insist upon the deduction of the payments from the amount of the award.

WORKMEN'S COMPENSATION—AWARDS—IMPAIRED FUNCTION—LOSS OF USE OF EYE—PARTIAL LOSS OF USE—"MEMBER"—*Chiovitte v. Zenith Furnace Co., Supreme Court of Minnesota (February 25, 1921), 181 Northwestern Reporter, page 643.*—Tony Chiovitte, while engaged in the performance of his duties, sustained an injury to his right eye, which resulted in permanently impairing the sight of that eye to the extent of 68 per centum of its usefulness. He was unable to work for 8 weeks and received the maximum weekly compensation of \$15 per week for this period. He then returned to work, earning higher wages than before he was injured. Chiovitte, after bringing the necessary proceedings, was granted an award by the district court of \$15 per week for 60 additional weeks. This award was made on the theory that as the schedule provided a fixed compensation of 100 weeks for the loss of the sight of an eye, and as Chiovitte had lost 68 per cent of the sight of his eye, he should be given 68 per cent of the compensation for the total loss of the vision of the eye, or payments for 68 weeks. The defendant company brought a writ of certiorari to the supreme court to review this decision, contending that this was not an injury properly coming under the schedule in the workmen's compensation law, and as Chiovitte was earning more money than he did before his injury he was not entitled to further compensation. The court affirmed the award and decision of the district court in an opinion of which the following is a part:

The compensation for the loss of one eye is a specified weekly payment for a period of 100 weeks, but the compensation for the partial loss of the sight of one eye is not specifically stated in the schedule. The compensation for the total loss of the sight of both eyes is a specified weekly payment for the period of 550 weeks, but the compensation for the partial loss of the sight of both eyes is not specifically stated in the schedule.

Defendant contends that as the compensation for partial loss of the sight of an eye is not specifically stated in the schedule, the case is governed by the clause which provides that—

"In all other cases of permanent partial disability not above enumerated the compensation shall be sixty-six and two-thirds per centum of the difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition," and that consequently plaintiff is not entitled to further compensation as he is receiving higher wages than he received at the time of the injury.

The statute contains a lengthy schedule specifically prescribing the compensation to be paid for the loss of various members of the body therein named, and recognizes the loss of any such member as constituting a permanent partial disability. For the injuries enumerated in the schedule, the prescribed compensation is to be paid, and the liability therefor is made absolute and is not dependent upon an actual decrease in earnings. After prescribing the compensation for the injuries specifically named, the statute further provides that—

"In cases of permanent partial disability due to injury to a member, resulting in less than total loss of such member not otherwise compensated in this schedule, compensation shall be paid at the prescribed rate during that part of the time specified in the schedule for the total loss of the respective member, which the extent of injury to the member bears to its total loss."

This provision recognizes that an injury which results in less than total loss of a member constitutes a permanent partial disability to the extent which the "injury to the member bears to its total loss." and prescribes as compensation therefor a like proportional part of the compensation allowed for such total loss. (*State ex rel. v. District Court*, 136 Minn. 147, 161 N. W. 391.) The obligation to pay the prescribed compensation for such partial disability is not dependent upon an actual decrease in earnings but is made absolute.

The compensation for the loss of one eye is a specified weekly payment for a period of 100 weeks. Plaintiff lost 68 per centum of the sight of one eye and therefore became entitled to the specified weekly payment for a period of 68 weeks. The trial court correctly so held, and, as plaintiff had received compensation for only 8 weeks, awarded it to him for the remaining 60 weeks.

A question is raised as to whether an eye is included in the term "member" as used in the statute. An examination of the various statutory provisions relating to the eye and of the manner in which the term "member" is used in the statute leaves no doubt that this term was intended to refer to and include the eye as well as the other integral parts of the body named in the schedule.

WORKMEN'S COMPENSATION—AWARDS—LOSS OF SEVERAL FINGERS—
METHOD OF COMPUTATION—*North Beck Mining Co. et al. v. Industrial Commission of Utah*, Supreme Court of Utah (July 27, 1921), 200 Pacific Reporter, page 111.—Arvid Erickson while employed as a miner for the North Beck Mining Co. was injured, resulting in the

amputation of the first three fingers of his right hand. The industrial commission made an award, and the mining company had the record transmitted to the supreme court for review. The principal question involved was the correctness of the award. The plaintiffs argue that the compensation for the loss of each individual finger should be added, which would amount to 55 weeks' instead of 75 weeks' compensation as awarded by the commission.

The supreme court through Judge Weber affirmed the award for the following reasons:

It is a matter of common knowledge that if one finger on a hand is amputated the adjoining fingers begin to function for the missing member, and soon acquire the power, to a great extent, of taking the place of the lost finger. It follows that the loss of two adjoining fingers must necessarily be something more than the sum of the loss of each finger separately. If all the fingers of a hand are amputated, it would not amount to the total loss of the use of the hand, because the palm of the hand would still be of some use. But it would not be fair, and we do not think it was intended by the statute as amended in 1919, to compensate for the loss of all the fingers by adding the scheduled benefits for the loss of each finger. In 1919 the law was amended by adding to the schedules for specific losses this provision:

"Any other disfigurement, or the loss of bodily function not otherwise provided for herein, such period of compensation as the commission shall deem equitable and in proportion to compensation in other cases not exceeding two hundred weeks."

It seems plain and clear to us that this amendment was adopted for the express purpose of providing fair and adequate compensation in cases like the one before us. The majority of the commission in making the award based it on the idea that where several fingers are lost it is the loss of a "bodily function not otherwise provided for" in the schedule, and that, therefore, the compensation must be awarded in proportion to the loss of use, to be ascertained by evidence, which the loss bears to the total loss of the hand.

To allow for the decreased usability of the hand when more than one finger is lost is, in our opinion, a fair method of compensation, and is also the method contemplated by the legislature when in 1919 it amended the industrial act.

WORKMEN'S COMPENSATION—AWARDS—PERMANENT PARTIAL DISABILITY—LOSS OF USE OF ARM—TEMPORARY PARTIAL DISABILITY—*Wrenn v. Connecticut Brass Co. et al., Supreme Court of Errors of Connecticut (February 21, 1921), 112 Atlantic Reporter, page 638.*—While working for the Connecticut Brass Co., Maurice Wrenn sustained a fracture of his left arm which left it in a twisted and unnatural position. This injury occurred on March 6, 1915. Surgeons believed that the arm could be restored to normal by means

of a bone graft. The operation was accordingly performed, but unfortunately it proved unsuccessful and a suppurative process persisted, so that on June 26, 1916, all hope of restoring the arm to normal was abandoned. The compensation commissioner held that the arm was not finally determined to be useless until June 26, 1916, and that the employee was entitled to compensation for the period from the date of the injury (March 6, 1915) to the date the arm was finally found to be useless, in addition to the specific compensation for permanent partial disability resulting from the loss of the use of the arm. The employer appealed to the superior court, which dismissed the appeal and affirmed the award and the employer again appealed. In affirming the award in favor of Wrenn the court said, in part:

All reasonable efforts should be used to save an injured arm or limb, and thus prevent the necessity for its amputation, or its complete loss of usefulness. Until the time for such effort has passed professional skill should be directed to the attempt to effect a cure. When competent professional opinion upon fair examination reaches the conclusion, or should reach the conclusion, that it is not reasonable to expect to cure or improve the injured arm, it can then be said for the first time that the loss of this member has occurred. Then, unless something further must be done to improve or heal the member, there exists the condition described in the statute, "the complete and permanent loss of the use of one arm," and the specific compensation provided by statute is then due. But this does not compensate the injured employee for the period between the date of injury and the date of determination of the complete loss of use. The incapacity during this period may have been total or partial and our act provides compensation for this period of incapacity as well as for the complete and permanent loss of the use of the arm.

The loss of the arm through amputation occurs when the amputation takes place. The complete and permanent loss of the use of the arm occurs when no reasonable prognosis for complete or partial cure and no improvement in the physical condition or appearance of the arm can be reasonably made. Until such time the specific compensation for the loss or for the complete and permanent loss of the use of the arm can not be made.

In this case the treatment of the arm was continued up to August 1, 1916, and as we understand the finding, ceased and the wound in the arm finally healed at this time. Not until then did the period of incapacity for which the injured employee was entitled to compensation cease and the condition of a complete and permanent loss of the arm exist.

WORKMEN'S COMPENSATION—AWARDS—PROXIMATE CAUSE—EVIDENCE—SURGICAL OPERATION NOT REQUIRED BY INJURY—*Dulac v. Proctor & Bowie Co. et al.*, *Supreme Judicial Court of Maine (July 8, 1921)*, 114 *Atlantic Reporter*, page 293.—Joseph Dulac while in the employ of the defendant company was injured, causing an epigastric

hernia. When the physician operated Dulac employed him independently to operate, under the same anesthetic, for an inguinal hernia of long standing. The operation resulted in death from postoperative surgical shock. Mrs. Joseph Dulac brought proceedings under the workmen's compensation act and obtained an award of compensation. The employer and insurance carrier appealed. The supreme judicial court sustained the appeal and dismissed the petition, because the evidence left it uncertain whether the servant would have died from the shock of the operation for the epigastric hernia alone. Judge Spear speaking for the court said in part:

Inasmuch as the evidence fails to show that the injury affected the inguinal hernia at all, the plaintiff then leaves it to uncertainty or conjecture whether the decedent would have died from the shock of the ventral hernia, and can not then recover, because she must prove that fact. In *Westman's case*, 118 Me. 138, 106 Atl. 535, it is said: "It is undoubtedly true, and has been frequently so held, that the burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under the compensation act."

In *Mailman's case*, 118 Me. 182, 106 Atl. 606, it is said: "There must be some competent evidence. It may be 'slender.' It must be evidence, however, and not speculation, surmise, or conjecture."

Both operations were performed. The patient did not survive. The evidence leaves it in doubt whether the postoperative shock of the ventral hernia caused the death, but without any doubt that the operation upon the inguinal hernia contributed thereto. Under the plaintiff's legal contention, therefore, that the postoperative shock of both operations contributed to the death, for one of which the defendant was not responsible, it still remains in the realm of surmise, guess, or conjecture whether the accident, which did not affect the inguinal hernia, was the direct cause of the decedent's death.

WORKMEN'S COMPENSATION—AWARDS—REMARriage OF WIDOW—CHILD'S RIGHTS—SUBSEQUENT LEGISLATION—*Riggs v. Lehigh Portland Cement Co.*, *Appellate Court of Indiana* (May 31, 1921), 131 *Northeastern Reporter*, page 231.—Fred Riggs on November 15, 1918, while in the employment of the cement company received an injury that resulted in his death. The industrial board of the State approved of an agreement made on January 22, 1919, between Ida Riggs, wife of the deceased, and the cement company, by the terms of which the cement company agreed to pay the widow, for herself and child, compensation at the rate of \$13.20 per week for 300 weeks, which, however, would terminate in case the mother remarried, in accordance with the terms of the workmen's compensation law. At the 1919 session of the legislature the law was changed, providing that the marriage of a widow shall terminate her own dependency but not the dependency of her child. After the amendment became effective the widow remarried. After the marriage the board, on application

of the cement company, ordered that compensation cease from and after the marriage. Ida Riggs Todd, as the next friend of her child, Lelia Irene Riggs, filed an application for the payment of compensation notwithstanding her marriage. The board ordered that the child would take nothing. From this order the case was appealed. The appellate court held that the amendment of 1919 was of no effect, saying that "legislation should be given a prospective, rather than a retroactive effect" and further:

It is the duty of the industrial board, when making an award, to fix the rights of the parties in accordance with the law as it existed at the time of the injury to the workman.

We are of the opinion that the rights of all concerned were fixed by the act under which the award was made, and may not be modified by subsequent legislation. If the legislature may increase awards, it may also decrease awards. To permit subsequent legislation to increase or diminish the compensation specified in awards would be to strike down vested rights. Then no one would be secure. The resulting uncertainty, distrust, and confusion would destroy the compensation plan itself. To give to the amendment the effect desired by appellant would be to confer on the child a substantive right which she did not possess at the time of the injury and death of her father, and to impose on the employer a burden not imposed by the law at that time, and would be giving an unwarranted retroactive effect to the amendment.

WORKMEN'S COMPENSATION—AWARDS—REVIEW—CHANGE IN CONDITION—*Lambert et al. v. Powers, Appellate Court of Indiana (June 9, 1921), 131 Northeastern Reporter, page 420.*—An agreement between Milton Powers, an employee of Edwin M. Lambert, for compensation for personal injuries was approved by the industrial board and a judgment had been rendered against the employer in accordance with such agreement and compensation was paid for a time. The employer and the insurance carrier applied for a review on account of changed conditions, in the meantime terminating payments. The industrial board ordered the award on the basis of permanent partial disability, and made an order denying the employer's and insurance carrier's petition for review, holding that there had been no change in conditions. The appellate court affirmed the award, with the penalty fixed by statute, in an opinion by Judge McMahon in part as follows:

The provision of the statute is that no application for a review on account of change of conditions shall be filed by either party after the expiration of one year from the termination of the compensation period fixed by the original award. Time for filing such application does not run from the date of the award as claimed by appellee, but from the end of the compensation period fixed by the award.

Appellee also contends that this cause should be dismissed for the reason that the agreement for compensation and the award of the

board approving the same have been merged into a judgment by the Grant circuit court.

The right of the board to change or modify an award is expressly recognized, and when an award is modified by the board, it becomes the duty of the court on proper application to modify the judgment theretofore rendered so as to correspond with the award as modified by the board.

A decision of the questions thus presented requires that we weigh conflicting evidence. This we have refused to do so often that it would seem that employers and insurance carriers should realize that when there is any evidence to support the award, it does not show proper respect for the law to prosecute an appeal when the only question involved requires the court to weigh conflicting evidence. This record also shows a striking illustration of the disposition of employers or insurance carriers, or both, not only to prosecute needless appeals, but also an utter disregard of their agreement to pay compensation and the award of the board, by arbitrarily stopping the weekly payments of compensation according to the award without first filing their application for a review on account of change in the employee's condition. At the time appellants filed their application herein, they were owing appellee approximately \$750, and the same was not paid until they were compelled to make such payment or be denied a hearing on their application, and when they made their payment it was at a time when they were over two years in default. The time has come when employers and insurance carriers should understand that they are entitled to no consideration when they are in default in payment of compensation.

The award is affirmed with the penalty as fixed by statute.

WORKMEN'S COMPENSATION — AWARDS — REVIEW — DISCOUNT FOR EARLY PAYMENTS — REFUSAL TO SUBMIT TO OPERATION — *Western Indemnity Co. v. Milam*, Court of Civil Appeals of Texas (April 7, 1921), 230 Southwestern Reporter, page 825. — Henry M. Milam, an employee of the Rutt Home Builders, sustained an injury on January 17, 1919, while in the course of his employment. The Rutt Home Builders had a policy with the Western Indemnity Co., which policy insured the employees of the subscribers against injuries under the workmen's compensation act of Texas. The industrial accident board made an award in favor of Milam, and the Western Indemnity Co. filed a suit to set aside the award, but judgment was rendered in favor of the defendant. The court increased the amount of the payments by correspondingly decreasing the number of weeks. The Indemnity Co. appealed to the civil court of appeals which affirmed the lower court. The decision upheld the action of the lower court on the change in the plan of payments on testimony that showed that Milam had a wife and seven children and did not have an independent income. The court reformed the judgment of the lower court so as to allow a discount as in the case of a lump sum settlement. In

referring to Milam's refusal to submit to a surgical operation the court said that he was justified in doing so, as he acted under the advise of the skillful physicians who were treating him, and therefore he did not refuse "to accept or receive" medical treatment.

WORKMEN'S COMPENSATION—AWARDS—REVIEW—EFFECT OF SUPERVENING INSANITY—*Ward v. Heth Bros. et al., Supreme Court of Michigan (Dec. 31, 1920), 180 Northwestern Reporter, page 245.*—Herbert Ward sustained an injury to his right ankle while in the defendant's employ. He made an agreement with defendant and its insurer whereby he was to receive \$7.425 per week for total disability. Later when the disability ceased to be total and was yet partial another agreement was made whereby he was to receive \$3.425 per week during disability. Both agreements were approved by the industrial accident board. About two years after this last agreement Ward became insane and was committed to an asylum. The employer and its insurer petitioned to be relieved from making further compensation payments by reason of Ward's insanity. The petition was denied and defendants appealed. In affirming the decision denying the petition and in upholding the award the court said in part:

We doubt if defendants really claim that, simply, the intervening insanity would relieve them from liability. We understand their real position to be that the disability from which claimant has suffered since April 23, 1919, was due to disease and not the injury of February 12, 1916.

However, we are of the opinion that the position of claimant upon that subject is fully sustained by the authorities cited. In other words, that the supervening insanity of the claimant does not justify defendants in stopping payment of compensation.

The order of the board in denying defendants' petition is affirmed, with costs.

WORKMEN'S COMPENSATION—AWARDS—REVIEW—REFUSAL TO PERMIT SURGICAL OPERATION—*Strong v. Sonken-Galamba Iron & Metal Co., Supreme Court of Kansas (May 7, 1921), 198 Pacific Reporter, page 182.*—William J. Strong received an injury, resulting in hernia, that totally incapacitated him from work. An arbitrator awarded plaintiff \$500.26 as the amount due up to the time of the award and a weekly payment for 8 years thereafter on the same basis, namely, \$10.65 per week. Defendant company paid the lump-sum amount and on the same day filed a petition to review the award. The district court stated that Strong should submit to an operation, having all expenses paid, and in case of refusal, his compensation would be cut down to \$7.50 per week for 25 weeks. Judgment was rendered accordingly and the plaintiff appealed. In the supreme court the

judgment was affirmed, the court, speaking through Judge Marshall, saying in part:

If misfortune overtakes [a man] in any way, and that misfortune detracts from his ability and renders him less able to work, mentally or physically, and the effect of the misfortune can be removed, it is his duty to do the thing that will restore him, even if there is pain and danger. There is no law to compel a man to perform any of these duties, but nevertheless they exist.

The plaintiff has been injured. The injury can be remedied, and he can be restored to his former condition. It is his duty to do whatever is necessary to restore him. If he refuses to perform that duty, he should not ask the State nor any person to assist him in that refusal. He can not be compelled to undergo an operation, but he can be told that if he refuses he shall not receive compensation for that which he voluntarily continues.

The reasonableness of the refusal of an injured employee to submit to an operation has been considered in most, if not all, the cases where he has been denied compensation on account of such refusal. That reasonableness has been disposed of in those cases as a question of fact. It is a question of fact that must be determined by the trier of facts, and when he has determined it, and his conclusion is supported by evidence, that conclusion is binding on this court the same as the determination of any other question of fact. In the present case the district court tried the fact of the reasonableness of the refusal of the plaintiff to permit an operation. The court in substance found that the plaintiff's refusal was unreasonable.

Compensation for total disability, \$10.65 a week, was awarded. The court found that there was no total disability, and that the plaintiff was entitled to recover \$7.50 a week during partial disability. This amounted to a finding that the award of the arbitrator was grossly excessive, and brought the proceeding within the statute authorizing a review of the award by the district court.

WORKMEN'S COMPENSATION—CASUAL EMPLOYMENT—PURPOSE OF EMPLOYER'S TRADE OR BUSINESS—*Oliphant v. Hawkinson*, *Supreme Court of Iowa* (June 25, 1921), 183 *Northwestern Reporter*, page 805.—Jacob Wachal was a retired farmer. He owned a farm 2 miles from Walker, Iowa, which was leased to a tenant. On July 25, 1916, he hired Hawkinson, a carpenter, to build a corncrib on this farm. In measuring some work on the foundation Hawkinson went behind a fellow workman who was drawing a nail with a pinch bar, and the end of the bar flew back, striking Hawkinson in the right eye, destroying the sight. It is for this injury that compensation is claimed. The industrial commission made an award to Hawkinson, which on appeal to the district court was affirmed. Jacob Wachal died, and the executor of his estate prosecuted an appeal to the supreme court. That court reversed the judgment of the district court, holding that the employment was purely casual and not for the purpose of the

employer's trade or business. Judge Faville in the course of his opinion said:

It is claimed, however, that a corncrib was a necessary adjunct to the successful operation of the farm, that the owner received "pecuniary gain" by having the same constructed, and therefore causing the corncrib to be built was part of his "business." As before stated, we do not believe the legislature ever intended any such interpretation should be placed upon this act, and we so hold. But if we should accept the construction contended for, then we are at once brought face to face with the provisions of section 2477m, which declares that the act "shall not apply to any household or domestic servant, farm, or other laborer engaged in agricultural pursuits."

If Wachal was engaged in any "trade or business" at all, it was the care, upkeep, and improvement of his farm. If this is to be denominated "a business" or "pursuit," it was more nearly an "agricultural pursuit" than anything else. If the building of the corncrib was necessary for the proper conduct of the "business" of operating the farm, then it may be said with much plausibility that it was an "agricultural pursuit."

WORKMEN'S COMPENSATION—CHOICE OF REMEDIES—EFFECT OF SUIT FOR DAMAGES—*Hutton v. Link Oil Co., Supreme Court of Kansas (January 8, 1921), 194 Pacific Reporter, page 925.*—The foreman and another workman of the Link Oil Co. were removing some iron casings from an oil well. They were using a derrick made of iron pipes to which were attached three guy ropes. Only two ropes were fastened, however, and during the course of the work the derrick fell across the back of a horse which was being used to hoist the casings. C. V. Hutton, a bystander, was called upon by the foreman to aid in removing the derrick from the horse's back and while doing so he broke his leg. Hutton thereupon brought an action on two counts, first, he asked for compensation under the compensation law, and, secondly, he asked for damages under the common law for his injuries sustained by reason of defendant's negligence. He was awarded a verdict of damages, and the employer appealed, claiming that there was a misjoinder of causes of action and that Hutton was required to elect under what remedy he would proceed. The court affirmed the decision in favor of Hutton, finding the defendant negligent in failing to have the third guy rope fastened, and saying in part:

There is no merit in the contention that it was the duty of the court to require plaintiff to elect between the first and second causes of action. In the first count of his petition, plaintiff stated facts which, if established, would entitle him to recover under the workmen's compensation act. But even though he was not able to show that he was within the provisions of the compensation act, he claimed that he was injured by negligence of the defendant, and that under

the facts stated defendant was liable. There was no misjoinder of causes of action.

Suppose that the plaintiff had been in defendant's employ, but was unable to prove that the latter had the specified number of employees, and for that reason the provisions of the compensation act did not apply, the fact that plaintiff had elected to begin his action under the compensation law would not bar an action under the common law. The plaintiff was not obliged to assume any risk about the matter, but was entitled to state in his petition the facts as he claimed they were, and maintain his action under the statute, if that were applicable, and, if not, then under the common law. The verdict is a denial of his right to recover under the compensation law. (Laws 1911, c. 218, as amended by Laws 1913, c. 216.) The court submitted both causes of action, but the jury rendered a verdict in his favor for damages.

WORKMEN'S COMPENSATION—CHOICE OF REMEDIES—RIGHTS STRICTLY CONSTRUED—*Poe v. Continental Oil & Cotton Co. et al., Commission of Appeals of Texas (June 1, 1921), 231 Southwestern Reporter, page 717.*—C. C. Poe, while in the employ of John Guitar, doing business as the Continental Oil & Cotton Co., sustained personal injuries on October 8, 1915, because of the negligence of the company. Ten months later the attorneys for Poe made their first attempt to obtain an adjudication before the accident board. A decree was handed down on January 17, 1917, releasing the defendants because Poe had not filed his claim within six months after the accident occurred. Poe filed this action for damages, but the trial court abated the suit because of the decision of the industrial accident board. On appeal the court of civil appeals affirmed the judgment of the lower court and Poe appealed to the supreme court. The principal contention of the company was that the doctrine of election of remedies applied, and that Poe's claim for compensation barred a suit for damages. Chief Justice Phillips adopted the judgment recommended in the report of the commission of appeals as the judgment of the supreme court. This judgment, reversing the lower courts, is in part as follows:

In disposing of the case, the court of civil appeals found that Guitar had not given Poe the notice that his industry was being operated under the workmen's compensation act, as required by articles 5246x and 5246xx, Vernon's Sayles' Revised Civil Statutes of Texas; that said notice was essential if Poe was to be denied the right to sue for and recover damages for personal injuries, based upon common-law liability; that the want of such notice can be waived by the injured employee at his option. We think the court of civil appeals is correct in all its rulings set out above.

Applying the above authorities to the instant case, we find that, at the time Poe's attorneys wrote their first letter to the accident

board, he had no valid or enforceable remedy there. It had been barred by the statute of limitation for almost four months. Therefore Poe can not be said to have elected a remedy he could not, under the law, enforce.

We think what we have said should dispose of the controlling point in this case; for it is equally as illogical to hold that a man would waive a valid remedy for a nonenforceable one as it would be to say that he elected an unenforceable remedy and waived a valid right. To so charge a man is to reflect upon his sanity. Such a waiver, if made at all, was at a time when it would have been without any consideration.

It is more reasonable to assume that Poe was willing to hold his common-law suit in abeyance until he could ascertain the possibility of getting an equitable adjustment before the accident board. He probably thought such a settlement could be had promptly. If the accident board can be said to be useful in any respect, it is largely as an administrative board where interested parties can reach amicable adjustments quickly. It is a field for compromise. The Supreme Court of Texas held that the board is not a court.

We are heartily in accord with the court of civil appeals at San Antonio in its statement that "laws depriving citizens of rights possessed by them should be strictly construed."

Not only was there no express waiver by Poe of his common-law rights but in two instances, when agreeing upon dates for the hearing before the board, he reserved in writing the following: "This agreement is made without prejudice to any rights, claims, and defenses of any party."

We think Poe still had his right to prosecute his common-law suit against Guitar, if the want of notice is still apparent upon another trial.

WORKMEN'S COMPENSATION — CLAIM — VOLUNTARY PAYMENTS — MEDICAL AID—*Petraska v. National Acme Co. et al., Supreme Court of Vermont (May 3, 1921), 113 Atlantic Reporter, page 536.*—Mike Petraska, the claimant, was injured May 2, 1916, while in the employ of the defendant corporation. A partial hearing was had before the commissioner November 9, 1917, but no order given. A hearing on October 22, 1919, resulted in the order appealed from. Petraska never made a claim for compensation. The supreme court set aside the order and dismissed the proceeding because of the provisions of the statute requiring claims to be made within six months after the date of the injury, unless payments of compensation have been made voluntarily.

The court said in part:

The whole scheme of the workmen's compensation act is designed to work out a speedy adjustment and payment of claims for industrial accidents in a summary and simple manner. To this end the common law and statutory rules of procedure and evidence are done away with in hearings before the commissioner. And the provisions of the act are to be liberally construed. But we can not overlook

the fact that the rights of employers as well as the rights of employees are safeguarded by its provisions; that the rights of both are designed to be protected by it; and that the provisions of the law, as written, must be given force.

Full performance of the conditions of the act being essential prerequisites to the jurisdiction of the commissioner, his authority, and the statutory limitations upon the exercise of it, can not be enlarged, diminished, or destroyed by express consent, or waived by acts of estoppel.

The insurance company paid all or part of the claimant's medical expenses during the first 14 days of his disability. The defendants were required by statute to pay such expenses, not to exceed \$100. Moreover, such payments are not compensation in the sense in which the term is used in this act. The payments shown did not, therefore, constitute "payments of compensation * * * made voluntarily."

It not appearing that claim for compensation was made, or that payments of compensation were made voluntarily, the commissioner was without jurisdiction, and should have dismissed the proceedings.

WORKMEN'S COMPENSATION—COMPULSORY APPLICATION TO COAL MINES—TAKING PROPERTY WITHOUT COMPENSATION—CONSTITUTIONALITY—*Lower Vein Coal Co. v. Industrial Board of Indiana et al.*, U. S. Supreme Court (February 28, 1921), 41 Supreme Court Reporter, page 252.—The State of Indiana passed a workmen's compensation law in 1915 which was elective and left to employers and employees the option of rejecting its terms with certain restrictions. By an amendment made in 1919 the privilege of election was withdrawn from coal mines and employees therein, and the acceptance of the law was made compulsory as to them. The Lower Vein Coal Co. decided, notwithstanding this amendment, to reject the law and brought this proceeding to restrain the industrial board, the governor, and the attorney general of the State from enforcing the law as against it on the ground that the law was unconstitutional under both the Constitution of the United States and that of Indiana. The District Court of the United States for the District of Indiana dismissed the bill and the company appealed. In affirming the decision of the district court Mr. Justice McKenna delivered the opinion of the court, in part, as follows:

There are facts of especial pertinence that make the principle apply in the present case and justify the legislation of the State. That coal mining has peculiar conditions has been quite universally recognized and declared. It has been recognized and declared by this court and is manifested in the laws of the States where coal mining obtains. There is something in this universal sense and its impulse to special legislation—enough certainly to remove such legislation from the charge of being unreasonable or arbitrary exercise of power.

The action of the coal company indicates that it considered the coal business distinctive. Other business, though according to the coal company's assertion as hazardous as coal mining, accepted the law, the coal company and other coal companies rejected it. To this, of course, the coal companies were induced by comparison of advantages, but the inducements to reject the legislation might well have been the inducement to make it compulsory. At any rate, there is, taking that and all other matters into consideration, ground for the legislative judgment expressed in the amendment of 1919 under consideration; that is, section 18 as amended. And the fact is to be borne in mind that there are 30,000 employees in the State engaged in coal mining.

The coal company further contends that the law includes within its terms all the company's employees whether engaged in the hazardous part of its business or not so engaged. In other words, it asserts that the conditions of those who work underground may justify the law, but do not justify its application to those who work above ground. The contention has a certain speciousness, but can not be entertained. It commits the law and its application to distinctions that might be very confusing in its administration and subjects it and the controversies that may arise under it to various tests of facts, and this against the same company.

The contention only has strength by regarding employers' liability acts and workmen's compensation acts as practically identical in the public policy respectively involved in them and in effect upon employer and employee. This we think is without foundation. They both provided for reparation of injuries to employees, but differ in manner and effect, and there is something more in a compensation law than the element of hazard, something that gives room for the power of classification which a legislature may exercise in its judgment of what is necessary for the public welfare, to which we have adverted, and which can not be pronounced arbitrary because it may be disputed and "opposed by argument and opinion of serious strength."

WORKMEN'S COMPENSATION—DECEDENT WITHOUT BENEFICIARIES—INDUSTRIAL REHABILITATION FUND—STATE AND FEDERAL COOPERATION—CONSTITUTIONALITY—*Watkinson v. Hotel Pennsylvania et al.*, Supreme Court of New York, Appellate Division (February 28, 1921), 187 New York Supplement, page 278.—Watkinson was employed as a bell boy by the Hotel Pennsylvania. His hours of duty were from 12 midnight to 7 a. m. On the morning of May 23, 1920, he was sent to room 1529 and later returned his card for this call. At 12.50 a. m. he was given another card to room 824, but he never returned from this call. The passenger elevator of shaft No. 8 was closed at 1 o'clock and left at the fourth floor; it should have been left at the main floor. Upon Watkinson's disappearance a search for him was instituted and at 1 p. m. of the same day he was found dead

at the foot of shaft No. 8 with a mark upon his head indicating that he had received a blow. He left no dependents. Compensation was awarded by the State industrial commission in amounts of \$100 for funeral expenses, \$100 for the special fund for second injuries, and \$900 for the industrial rehabilitation fund, in accordance with the provisions of chapter 760, Acts of 1920. The employer and its insurer, the Travelers Insurance Co., appealed on the ground that the last two awards were unconstitutional and void. The court in affirming the awards said in part:

We have in the evidence, from established facts and fair inference, the framework of a valid claim under the workmen's compensation act (Consol. Laws, c. 67). It appears that Watkinson met his death in the course of his employment; that the injury arose out of his employment; and it is a fair inference, from the known facts, that his was an accidental injury. The award was justified.

The award is \$100 for funeral expenses, and to the State treasurer of the State of New York: (1) \$100, pursuant to the provisions of subdivision 7 of section 15 of the workmen's compensation law; (2) \$900, pursuant to the provisions of subdivision 8 of section 15 of the workmen's compensation law, as added by Laws 1920, c. 760, sec. 1. No question is raised as to the award for funeral expenses, or the award under subdivision 7 of section 15, which is valid. (*Industrial Commission v. Newman*, 222 N. Y. 363, 118 N. E. 794 [Bul. No. 258, p. 223], etc.)

The \$900 award under subdivision 8 is attacked upon two grounds:

(1) The rehabilitation law (Laws 1920, c. 760, sec. 2), adding a new article (47) to education law (Consol. Laws, c. 16), conflicts with article 3 of the State constitution, secs. 1 and 17, and subdivision 8 falls with it.

(2) Subdivision 8 of section 15 conflicts with article 1, sec. 6, of the State constitution and the fourteenth amendment of the Federal Constitution. Considering the second criticism first:

Article 1, sec. 6, of the State constitution, is the bill of rights, and the due process of law clause and the just compensation clause are invoked. Under the fourteenth amendment the equal protection law clause is invoked. No question is open under the provisions of the State and Federal constitutions, invoked after the decisions above cited (particularly in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 [Bul. No. 224, p. 252], and *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247 [Bul. No. 224, p. 232]), except whether or not the amount fixed in the statute is unfair or unreasonable. There may be an extravagant and arbitrary amount fixed. Is the amount here fixed such? All reasonable presumptions are in favor of the validity of the act, and the burden of proof and argument is upon those who seek to overthrow it. The sum fixed in the statute is not great, is not larger than could readily be awarded had the deceased left dependents. There is no evidence in this case showing that the sum fixed is so extravagant or arbitrary as to constitute an abuse of power. The court can not say that \$900 is an unfair or unreasonable sum for the purposes intended.

Then taking up the rehabilitation law, the court said:

The attack upon this law is formulated in this manner: The whole chapter (the rehabilitation law) is built around section 1210. This is void, because based on the acceptance of the Federal statute, and the whole act falls with section 1210.

This position is untenable. In the sections of the chapter prior to section 1210 funds in this State are provided. The uses to which these funds are put are defined, and a board is appointed for administering these funds, in compliance with the instructions in the statute. Here is a complete act, entirely separable from section 1210, maintainable and operative without it, and I can conceive no reason why the legislature would not have wished the statute to be enforced with section 1210 rejected.

We conclude that chapter 760, Laws of 1920, without section 1210 thereof, provides a complete and valid law for raising a rehabilitation fund in this State and administering that fund for the purpose therein declared; that section 1210 provides for acceptance and administration of the Federal fund only, in accordance with the act of Congress; and that such provision does not offend against our constitution and is valid.

The award should be affirmed.

WORKMEN'S COMPENSATION—DECEDENT WITHOUT BENEFICIARIES—
PAYMENT TO SECOND INJURY FUND—CONSTITUTIONALITY—*Salt Lake City v. Industrial Commission of Utah, Supreme Court of Utah (June 11, 1921), 199 Pacific Reporter, page 152.*—Proceedings were brought under the workmen's compensation law by the father and mother of Asa H. Hancock, who was accidentally killed in the course of his employment as a member of the fire department of Salt Lake City. The industrial commission found that Salt Lake City was an employer and self-insurer, and that the deceased left no dependents. The commission ordered that the city pay into the State treasury the sum of \$750, and reasonable funeral expenses not exceeding the sum of \$150. The case was brought to the supreme court, which affirmed the action taken by the commission and held the following provision of law constitutional:

If there be no dependents, the employer or insurance carrier shall pay the burial expenses of the deceased, as provided herein, and shall pay into the State treasury the sum of \$750, unless the employer is insured in the State insurance fund. Such payments shall be held in a special fund for the purposes provided in subdivision 6 of this section. The State treasury shall be the custodian of this special fund and the commission shall direct the distribution thereof.

The act provides that the purpose of these payments is to provide a fund to compensate employees suffering a second injury, for the combined consequences of the two injuries.

The court decided that the statute was not a denial of the equal protection of the laws as discriminating in favor of the State insurance fund and the employers insured thereby as against other insurance carriers and employers within the act, that it was not a taking of property without due process of law, and that inasmuch as the State had the power to require all employers to insure in the State insurance fund and not leave it optional, as under the workmen's compensation law, an employer exercising the option of private insurance can not complain of the conditions upon which the option is granted as being unconstitutional because discriminatory.

WORKMEN'S COMPENSATION—DEPENDENCY—CHILD LIVING APART FROM DIVORCED FATHER—*Stephens v. Stephens et al.*, Appellate Court of Indiana (November 29, 1921), 132 *Northeastern Reporter*, page 747.—Shirley Stephens married the mother of Edith Stephens on May 22, 1909. Edith was born in 1910. The parents of Edith were divorced in 1911, and she was placed in the custody of her mother. The mother was granted \$100 as alimony and for the support and maintenance of the child, which was paid. For five years after the divorce was granted, Shirley Stephens made no contribution for the support of the child. From 1916 to 1921 he contributed to the support of Edith, but not exceeding \$50 per year. While employed by the Essenbee Mines Co., he met his death. Following an application therefor an award to Edith Stephens was denied, and she appealed, contending that she must be conclusively presumed to be wholly dependent for support upon her deceased father. The workmen's compensation act provides:

The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * *

(c) A child under the age of eighteen years upon the parent with whom he or she is living at the time of the death of such parent.

(d) A child under eighteen years upon the parent with whom he or she may not be living at the time of the death of such parent, but upon whom, at such time, the laws of the State impose the obligation to support such child. (Acts 1919, p. 165.)

The appellate court affirmed the decision of the industrial board denying the claim, using in part the following language:

Appellant contends that there are a number of statutes in this State which impose a legal obligation upon a father to support his minor child, and therefore she was entitled to share in the award of compensation made in this case by reason of the death of her father, as stated in the finding of facts, by virtue of said subdivision (d). We can not agree that the mere fact of the existence of the statutes to which appellant refers imposes an obligation upon a parent to support his child, so as to bring said subdivision (d) into operation

in every instance, where such parent meets his death under such circumstances as to warrant an award of compensation against his employer. If such were the case, there would be no occasion for the limitations found in said subdivisions (c) and (d), but a general provision that every child under the age of 18 years shall be conclusively presumed to be wholly dependent for support upon his or her parent, would have sufficed, and no doubt would have been employed. We therefore conclude that the limitations found in said subdivisions are significant.

While it is true, as appellant contends, that the several statutes of our State impose a legal obligation on a father to support his minor child, the existing facts may be such as to so far suspend such obligation that a failure to support such child will create neither a legal nor a criminal liability against him. In such event said subdivision (d) would have no application.

The facts fail to show that the laws of this State imposed any obligation upon said Shirley Stephens to support said appellant, within the meaning of said subdivision (d), at the time he met his death. Circumstances may have existed, notwithstanding such decree and the absence of any modification thereof, under which the law would have imposed such an obligation, but the evidence is not in the record, and its sufficiency to sustain the finding is not challenged.

WORKMEN'S COMPENSATION—DEPENDENCY—MEMBER OF HOUSEHOLD—ASSUMPTION OF GUARDIANSHIP IN GOOD FAITH—*Moore Shipbuilding Corporation et al. v. Industrial Accident Commission et al.*, Supreme Court of California (February 25, 1921), 196 Pacific Reporter, page 257.—The husband of Lola Miller deserted her shortly before the birth of his child, Ida Miller. Albert Bauer, as a friend, undertook to support the child and sent remittances to her for one year, when Lola Miller came to live with him. They lived in adulterous cohabitation as man and wife. The daughter, Ida Miller, was part of the household and was looked after by Bauer as his own child. In the course of his employment with the Moore Shipbuilding Corporation, Bauer was killed and Lola Miller brought proceedings for compensation for Ida Miller as the total dependent of Bauer. The industrial accident commission granted an award of \$3,400, whereupon the employer and its insurer brought a writ of certiorari to the State Supreme Court. In affirming the award of compensation and dismissing the petition, the court said in part:

The power of the legislature to extend the benefits of industrial accident insurance beyond the wage earner himself being recognized it is left to reasonable legislative discretion in the light of the general purposes of these laws to determine what dependents shall become the distributees of the indemnity assessed against the industry, and we do not think we are compelled to look to analogies of the common law, or to the limitations of compensation acts in force at the time our constitutional provision was adopted, to fix the measure of the legislative power thus conferred.

It only remains to determine whether Ida Miller, the claimant here, comes within the terms of the California statute. Section 9, subdivision 11 (1) and (2) of the workmen's compensation act provides that "in case a deceased employee leaves a person or persons wholly dependent upon him for support" such dependents shall be allowed certain indemnity benefits. Section 14 (a) provides that the wife and children under certain conditions are conclusively presumed to be wholly dependent. Section 14 (b) provides that in all other cases the questions of entire or partial dependency and questions as to who constitute dependents, and the extent of their dependency, shall be determined in accordance with the fact, "as the fact may be at the time of the injury to the employee"; 14 (c) provides, that "no person shall be considered a dependent of such employee unless in good faith a member of the family or household of such employee, or unless such person bears to such employee the relation of husband or wife, posthumous child, adopted child, or stepchild, father or mother, father-in-law, mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law, or sister-in-law, nephew or niece."

The two classifications here, one of persons who are in good faith members of the employee's family or household, and the other of persons having specific relations of kinship, are clearly used in the alternative, and are to be separately considered. As Ida Miller belongs to none of these degrees of relationship, either by birth, marriage, or adoption, we are only concerned with the first division.

There are three vital conditions required to establish dependency in this case under the compensation act: First, was Ida Miller actually dependent upon the decedent for her support; second, was she a member of his family or household; third, was the relation or connection sustained in good faith.

It is true the child was too young to entertain either good or bad faith, but if that is a legal obstacle it would apply as well if she had been taken into the household as a homeless and abandoned waif. We think that Ida Miller was a member in good faith of Bauer's household. The courts should not be called upon to visit the iniquities of the parents upon the children, beyond the penalties inherent under natural law.

The petition is denied.

WORKMEN'S COMPENSATION—DEPENDENCY—METHOD OF MEASUREMENT—*Harris et ux. v. Calcasieu Long Leaf Lumber Co., Supreme Court of Louisiana (October 31, 1921), 89 Southern Reporter, page 885.*—A compensation award was made in favor of the parents of one Harris, who was killed while in the employ of the defendant lumber company. He was under 21 years of age and was the eldest of plaintiff's seven children. His average weekly wages were \$26.14, but his contribution to the support of the family was approximately \$44 a month. The compensation allowed amounted to 55 per cent of the weekly wages for 300 weeks. The lumber company appealed from the award on the ground that the amount was excessive, as the cost

of maintenance was \$22 a month for each of the family of nine, and only one-half of the \$44 contributed went to the support of the other members of the family. The supreme court held that the statute arbitrarily fixed the liability at 53 per cent of the weekly wages for 300 weeks if the parents "were actually dependent on the deceased employee to any extent for support." For this reason the award was affirmed, the extent to which the parents were dependent being held immaterial.

WORKMEN'S COMPENSATION—DEPENDENCY—WHEN DETERMINED—*Employers' Mutual Insurance Co. et al. v. Industrial Commission of Colorado et al., Supreme Court of Colorado (July 5, 1921), 199 Pacific Reporter, page 483.*—James A. Powell was killed January 28, 1920, by an accident arising out of and in the course of his employment. He left minor children, among whom was Beverly L. Powell, who was legally adopted on April 10, 1920, by one Galley, and is now known as Beverly L. Galley. An award was made to all the minor children, including Beverly. The district court affirmed the award. The Employers' Mutual Insurance Co. took the decision to the supreme court for review, claiming that Beverly was not a dependent child, but it was again affirmed, Judge Denison giving a brief decision, in part as follows:

"The question as to who constitute dependents and the extent of the dependency shall be determined as of the date of the accident to the insured employee and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions." [S. L. 1919, c. 210, sec. 57.]

Section 58 prescribes the conditions on which the right to death benefit shall lapse, but the adoption of a minor dependent is not among them.

The arguments that the adopted child has ceased to be dependent, and that he would collect two death benefits at the same time if his adopted father should be killed by accident in the course of employment, would be forceful if addressed to the legislature, but the statute is explicit, and we can not add to or take from it.

WORKMEN'S COMPENSATION—DEPENDENCY OF PARENTS—TEST—*Hancock et al. v. Industrial Commission, Supreme Court of Utah (May 5, 1921), 198 Pacific Reporter, page 169.*—R. J. Hancock and wife brought proceedings under the workmen's compensation act to obtain compensation for the death of their son. There was an award denying compensation because the facts showed that the deceased was 45 years of age, unmarried, and had boarded away from his parents' home for 10 years; that the parents owned their own home; that he gave them provisions and gifts of money often but not at regular

stated intervals. The applicants brought an original proceeding to have the findings of the commission annulled, but the court affirmed the findings of the commission saying in part:

The question of dependency is, in the very nature of things, one of fact. In a case such as this, however, where there is no dispute as to the facts, manifestly the legal rights deducible or inferable from such proven facts are questions of law.

The test seems to be whether the contributions made by the deceased to the dependents were necessary and needed to maintain the claimants in the station in life in which they had been accustomed.

Alleged dependents, such as the plaintiffs, are required to show facts upon which such dependency exists. The statute makes the wife and certain minor children presumptively dependents. But dependency in other cases must be based upon proof of facts creating such dependency. It is settled in this State, and the same is supported by the authorities, that an occasional gift or contribution made at the convenience or pleasure of the donor does not authorize an inference of dependency.

WORKMEN'S COMPENSATION—DEPENDENCY OF SISTER—TEST—*Driscoll v. Jewell Belting Co. et al.*, *Supreme Court of Errors of Connecticut* (June 1, 1921), 114 *Atlantic Reporter*, page 109.—Mary E. Driscoll brought proceedings under the workmen's compensation act against the Jewell Belting Co. to recover compensation for the death of her brother, one Randall, who contributed \$6 per week to the support of his sister. On the question of dependency the supreme court stated the test to be "whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent." Chief Justice Wheeler, speaking for the court, said:

The purpose of the compensation act is to provide support to dependents of one injured in industry. A dependent is one who has relied upon the decedent for support and who has a reasonable expectation that such support will continue. (28 Ruling Case Law, sec. 65.) A legal obligation can not be construed to be the equivalent of a present support. When it has been enforced it becomes such for the time. It does not follow that it will continue. A condition of dependency presupposed contributions made to and relied upon by the dependent. Such condition under our law could be found only when contributions had been in fact made, and there was a reasonable probability that these would be continued, and that the contributions so made and to be made were relied upon by the claimant-dependent. If no contributions had been made, or if there was no reasonable probability of the continuance of the contributions, the basis of dependency would be absent.

Contributions having been actually made and relied upon, the superior court was said not to have erred in affirming the award of the compensation commissioner.

WORKMEN'S COMPENSATION—DISABILITY—IMPAIRED FUNCTION—LOSS OF BOTH HANDS—LOSS OF USE—PERMANENT TOTAL DISABILITY—*Ballou v. Industrial Commission et al., Supreme Court of Illinois (February 15, 1921), 129 Northeastern Reporter, page 755.*—Frank Luther was injured while in the employ of Ballou and others by an accident arising out of and in the course of his employment. Luther was oiling some machinery and while so engaged his jacket was caught by a revolving shaft and his hands were drawn into the machine. As a result of his injuries he lost the use of both of his hands. The industrial commission held that he had suffered the total and complete loss of both hands, although his hands had not been amputated, and allowed him an award for permanent total disability in accordance with the following section of the workmen's compensation act:

For the loss of a hand, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during 150 weeks. * * * The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the compensation fixed by paragraph (f) of this section: *Provided*, That these specific cases of total and permanent disability shall not be construed as excluding other cases.

Paragraph (f) provides: "In the case of complete disability, which renders the employee wholly and permanently incapable of work," certain payments of compensation shall be made, including pension for the life of the applicant.

The employer appealed from the decision of the industrial commission, contending that the loss of use of both hands is not equivalent to the loss of both hands, and that unless the injury should actually amount to the loss of both hands the specific recovery for permanent total disability can not be recovered. The supreme court upheld this contention and reversed the decision of the circuit court, which had upheld the compensation award. The opinion is in part as follows:

Plaintiffs in error contend that under the act of 1915, in order to bring the applicant under the provisions of the statute regarding complete disability rendering the employee wholly and permanently incapable of work, the injury to the hands must be the loss of both hands and not the loss of the use of both hands. While in case of loss of both hands the use of them would, of course, be likewise lost, yet it does not follow that the loss of use of both hands is the same as the loss of both hands. The expressions "loss" and "loss of the use," as used in the law, should be given their ordinary meaning. Incapacity to use a member need not, however, be tantamount to actual severance of that member. It is enough if its normal use is entirely taken away. (*Mark Mfg. Co. v. Industrial Commission*, 286 Ill. 620, 122 N. E. 84.) But it is evident under this act as it existed at the time of the injury, that if there exists in this case a complete disa-

bility which renders the defendant in error wholly and permanently incapable of work it must arise from other sources than those specified in paragraph (e).

Defendant in error argues that as under the provisions of paragraph (e) the specific cases mentioned in said paragraph are not to be construed as excluding other cases he is entitled to the award under paragraph (f), for the reason that the evidence showed that he is, in fact, totally and permanently disabled. It will be clearly seen that situations other than those referred to in said paragraph may arise which might result in total permanent disability.

The injury to the defendant in error was serious, and he should receive the full amount of compensation to which he is entitled under the law; but this court does not make the laws, but must construe them as it finds them. We are of the opinion that there was no competent evidence in the record tending to show that for any cause defendant in error is totally permanently disabled, rendering him wholly and permanently incapable of work.

The judgment of the circuit court must therefore be reversed and the cause remanded to that court, with directions to remand the same to the industrial commission for further proceedings not inconsistent with this opinion.

WORKMEN'S COMPENSATION—DISABILITY—INCAPACITY FOR FORMER EMPLOYMENT—INCREASED WAGES—*Geis v. Packard Motor Car Co., Supreme Court of Michigan (July 19, 1921), 183 Northwestern Reporter, page 916.*—On February 9, 1918, while working for the defendant company in the capacity of a motor tester Henry Geis received a fracture of his upper right arm. This fracture was never mended, and has left his arm practically useless. He was paid compensation under an approved agreement until July 24, 1918, when he returned to work, but, being unable on account of his injury to perform the duties of a motor tester, he was given light messenger work in the testing department, and paid 2 cents an hour more than he was earning at the time of his injury. The defendant company petitioned the industrial accident board to order payment of compensation stopped. The petition was denied and the defendant brought the case to the supreme court for review. That court affirmed the action of the board in a decision by Judge Wiest, in part as follows:

Defendant asks us to place a meaning upon the occupation in which an employee is injured commensurate with ability to turn his skill, training, and knowledge acquired in one employment to use in another closely related thereto. The argument is ingenious but to accede to it would start the thin edge of the wedge to arriving of the clear terms of the statute and open the field to equitable and conjectural considerations now closed by the statute. We must stick to the statute and leave defendant to present the equity of its position to the legislature.

The defendant contends that plaintiff was not entitled to additional compensation from February 9, 1918, the date of his injury, to December 19, 1919. On July 24, 1918, plaintiff returned to work, and was rated by defendant as a motor tester, but was not such in fact, as he was given only light messenger work on account of his injury. Defendant concedes that plaintiff was unable to perform the duties of a motor tester, but says that rather than have him idle and drawing compensation of only \$10 a week under the agreement, it philanthropically employed him in his old position, giving him only light messenger work to do, and paid him his former wage and 2 cents per hour added, or \$24 per week.

Again we must hold that this raises an equitable question barred from consideration as the law now stands, and we can not hold that it was error for the board to award him compensation on the ground that from the time of the accident he was wholly incapacitated from earning any wages in the employment in which he was engaged at the time of the accident.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—*Stammers v. Banner Coal Co. et al.*, Supreme Court of Michigan (June 6, 1921), 183 Northwestern Reporter, page 21.—On April 29, 1920, while working as a miner for the Banner Coal Co., Henry Stammers met with an accident resulting in injury to his left eye. It became infected, and an ulcer developed, resulting in a permanent scar, which left the eye with only 5 per cent vision. Stammers returned to work, taking up the same employment, and earning as much as before the accident. The industrial accident board made an award of compensation, and the employer appealed from its decision, contending that Stammers had not lost the sight of his eye within the meaning of the statute, and that in any case, credit for compensation advanced should be given in the award for the injury to the eye. The court, speaking through Judge Wiest, affirmed the award, using the following language:

Has plaintiff lost his eye? The usefulness of the eye for all practical purposes has been lost. A percentage of vision so slight as to be cognizant of strong light only and to merely give impression of large objects and door and window openings can be of no use in industrial pursuits or any other vocation. Without the help of his other eye it would be impossible for him to work at all or to even go about the streets. The injured eye has lent no aid to plaintiff in his work since the accident.

We are of the opinion that appellee has lost his eye within the meaning of our statute (Pub. Acts Ex. Sess. 1912, No. 10), and that compensation was properly allowed during the course of the development of the injury to the permanent result, and the defendants are not entitled to be credited upon the compensation allowed by law for the loss of an eye with the weekly payments advanced from April 29th to July 8th.

WORKMEN'S COMPENSATION—DISABILITY—LOSS OF EYE—USE OF GLASSES—*Butch v. Shaver, Supreme Court of Minnesota (October 7, 1921), 184 Northwestern Reporter, page 572.*—Helen A. Butch was employed by C. H. Shaver as a kitchen servant in a restaurant he operated in Minneapolis. Her duties were to wash dishes, scrub floors, prepare vegetables, wash dish towels, and other kinds of work of this nature. On June 26, 1920, she was directed to wash the dish towels and after doing so she undertook to replenish the laundry stove, and while in the act of breaking a piece of kindling for the fire a splinter struck her right eye "irrecoverably destroying" its sight. In proceedings under the workmen's compensation act a judgment was rendered in her favor by the district court allowing compensation. The employer took the matter to the supreme court and claimed that Mrs. Butch was not entitled to compensation for the loss of an eye because with properly fitted glasses she would have a two-thirds' vision. The court affirmed the finding of the lower court, holding that she was entitled to the full amount allowed by the statute for the loss of an eye and that the compensation would not be diminished by reason of the fact that the disability might in a measure be overcome by artificial means.

WORKMEN'S COMPENSATION—ELECTION—REJECTION OF LAW—DEFENSES ABROGATED—FEDERAL EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE—*Foley v. Hines, Director General of Railroads (Portland Terminal Co.), Supreme Court of Maine (December 8, 1920), 111 Atlantic Reporter, page 715.*—Matthew Foley was employed as a coal trimmer by the Portland Terminal Co. and was set to work in assisting to unload a vessel loaded with coal which had come from Baltimore. The coal was distributed from the dock where it was unloaded, some of it being used in interstate business and some of it in intrastate business. While he was working in the hold of the vessel, the 3,000-pound bucket used in unloading the coal descended and caught Foley by the leg, so injuring it that it later had to be amputated. The employer had failed to accept the Maine workmen's compensation act, so that Foley, in accordance with the terms of that act, brought an action for damages against the terminal company to recover for his injuries. He was awarded a verdict of \$9,120.75. The employer appealed, claiming that Foley's work had been in interstate commerce and was governed by the Federal employers' liability act, and therefore no action could be brought under the workmen's compensation act. It was also claimed that

the damages were excessive. The court affirmed the decision, citing many decisions relative to interstate commerce, and continuing:

Applying these principles and noting the clearly settled distinction, it is obvious that the coal in question at the time of the plaintiff's injury had not become an instrumentality of interstate commerce, and therefore the plaintiff was not employed in that commerce. He was at work assisting in the removal of coal in bulk from the hold to the cars of the consignee or to the general pile on the wharf. No part of it had been appropriated or segregated for interstate use. It might be used for that purpose, or it might be used for intrastate locomotives or for both. At some time in the future some other employee if engaged in coaling an interstate engine from some portion of the stock would be within the act, as in *Armbruster v. Chicago etc. Ry. Co.*, 166 Iowa, 176, 147 N. W. 337, before cited, but that time had not arrived and the plaintiff's work was no more directly and immediately connected with and a substantial incident of interstate commerce than that of a workman loading a railroad car at the mines. The cases so hold.

As the Federal employers' liability act is not involved, the plaintiff has a right of action at common law aided by R. S. c. 50, the workmen's compensation act, so called. The defendant is not an assenting employer, and employs more than five workmen, so that it is deprived of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk.

The jury found negligence on the part of the defendant, and it is the opinion of the court that their verdict on this point is not so manifestly wrong as to require intervention. The plaintiff was set at work by McDonough without any instructions or warnings whatever. This is admitted by the foreman, who also testifies that the other workmen had been instructed by his predecessor. And the plaintiff had not worked sufficiently long to gain the necessary knowledge by experience.

The verdict was \$9,120.75. The plaintiff is 41 years old. The injury consisted of two broken bones of the ankle, the astragalus and the cuboid, with an apparent crushing just below the ankle. Effort was made to avoid amputation, but gangrene set in, and on September 3 the leg was amputated above the ankle. The plaintiff now wears an artificial limb, and his physician testifies that he is and always will be incapable of hard physical labor. Yet he knows no other kind. Lack of education prevents his filling a clerical position, and he must rely for support upon his seriously diminished capacity as a common laborer. His wages at the time of the accident were 56 cents per hour, with 75 cents for overtime. His physical suffering was at times intense. Upon this question of damages the defendant offered no testimony. From the very nature of the case the injury spoke for itself.

After studying the evidence and the situation carefully, and considering all the elements which enter into it, it is the opinion of the court that the damages, although large, are not grossly excessive.

WORKMEN'S COMPENSATION—ELECTION—WRITTEN ACCEPTANCE—TEMPORARY SUSPENSION OF WORK—*McCune v. Wm. B. Pell & Bro., Court of Appeals of Kentucky (June 14, 1921), 232 Southwestern Reporter, page 43.*—Richard McCune, a painter by occupation, had worked at times during an interval of 10 years for Wm. B. Pell & Bro. On May 14, 1917, upon again beginning work for defendants as a painter, he elected to work under the workmen's compensation act and signed the employers' "compensation register declaring such election and purpose." He left his employment on July 13, 1917, and for 16 months continuously thereafter was employed in another State. Upon his return to Kentucky he was employed again by Wm. B. Pell & Bro. under a new contract, different as to the amount of wages from the previous contract, and without then or at any time thereafter signing the "compensation register." While working under this latter contract he fell from a scaffold and was killed. His widow petitioned for compensation for the death of her husband. The workmen's compensation board refused compensation and the circuit court affirmed their action in dismissing the petition, from which decision the claimant appealed. The court of appeals affirmed the judgment of the lower court, and adopted quotations from the opinion of the circuit court as part of its own opinion, some of which are as follows:

It is clear that the constitutionality of the present compensation act is based upon the facts that the acceptance of the act is, under its terms, a purely voluntary matter of election by the employer and employee, and that each and all of the provisions of the act become effective and binding upon employer and employee solely through this voluntary acceptance, which, in effect, when made by both, becomes an agreement or contract between the parties. Without this acceptance by both employer and employee, the act can not, nor can any of its provisions, apply to either.

After the election has been made by both, there are but two methods of withdrawing the election. One is the method provided for in the act itself (section 76), that is, by the written notice therein mentioned, which evidently, so far as the employee is concerned, contemplates the continuance of the relation of employer and employee. The other method is the one that necessarily grows out of the constitutional right of the parties to sever their relation of employer and employee. As the act applies only to those who occupy the relation of employer and employee, it necessarily follows, therefore, that when that relation ceases to exist the act ceases to apply, except in so far as may be necessary to enforce the rights thereof acquired under the act.

He [McCune] could accept the act only in the manner provided by the statute. Neither the act nor any other law of this State gave to him or to the employer any right to waive that important provision of the statute. Therefore any agreement between the parties that their former signatures should be considered as an acceptance under

the last employment was an absolute nullity, and can have no effect in the case. If the requirement of the statute could be waived by an oral agreement in this case, then it could be waived in any other case, and the purpose of the statute concerning the preservation of this important evidence would be destroyed.

WORKMEN'S COMPENSATION—ELECTION OF REMEDIES BEFORE INJURY—CONSTITUTIONALITY—*Industrial Commission et al. v. Crisman*, Supreme Court of Arizona (July 18, 1921), 199 Pacific Reporter, page 390.—James L. Crisman brought an action as a taxpayer to restrain the industrial commission and others from putting into operation the workmen's compensation act of 1921, upon the ground that it violates the State constitution in requiring the employee to elect, before he is injured, whether he will accept compensation under said act or not. An injunction was issued enjoining defendants from putting the act into operation. From this judgment the defendants appealed. The supreme court affirmed the action of the lower court because of section 8 of article 18 of the constitution which reads:

The Legislature shall enact a workmen's compulsory compensation law * * * by which compulsory compensation shall be required to be paid to any such workman by his employer. * * * *Provided*, That it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this constitution.

Section 90 of the compensation act of 1921 provides that if section 60, requiring the employee to elect his remedy before injury, should be held invalid or unconstitutional, the entire act and every section thereof should be invalidated. Chief Justice Ross in his opinion said in part:

We realize that, if the employee may not be required to elect his remedy before injury, it is not possible for the legislature to pass a compensation law such as exists in nearly every State in the Union. If he is permitted by the constitution to postpone his election until after injury, and then elect to settle for compensation or retain his right to sue the employer for negligence, or under the employers' liability law (Civ. Code 1913, pars. 3153-3162), it is not a substitutory remedy, but an additional remedy.

We have, however, come to the conclusion that the decision in the Ujack case [15 Ariz. 382, 139 Pac. 465] is sound; that, as therein stated, the employee may await his injury and then determine if he will accept compensation or retain the right to sue his employer, and that this right of choice is a constitutional right—one the legislature can not take away from him by requiring that he elect his remedy before injury.

Judge Baker (concurring) in his opinion declared:

I can not refrain from saying that it seems regrettable that, owing to its constitutional restrictions, Arizona is barred from adopting

a just and humane compensation law, such as exists in 43 or 44 States of the Union.

Criticising the liability law as tending to increase the evils which "an equitable and just compensation law is well calculated to cure," Judge Baker continued:

While it is unfortunate that the evils referred to must continue to exist and flourish, it is not our function to provide a remedy by judicial legislation. The remedy lies with the people. Both California and New York were compelled to amend their constitutions before they were able to adopt beneficial compensation laws.

Judge McAlister (concurring) also wrote an opinion stating his views, part of which is as follows:

To my mind it is clear that the optional provision in section 8, art. 18, was placed there entirely for the benefit of the injured employee. It was intended to preserve his right to elect his remedy at a time when he could do it to his best advantage. If such construction renders it impossible to enact in this State a compensation law in the true sense of that term, my answer is that the fundamental law is our guide, and where it leads it is the duty of the court to follow. Whatever the consequences may be, the court has no alternative other than to give effect to its plain mandates, and, if this stands in the way of the enactment of a compensation law in harmony with those in other States and it is thought best to have one of that kind, the appeal to remove the barrier should be to the people who made the constitution, and can remake it, and not to the courts, which possess only the power to construe it. I am convinced, therefore, that the act is invalid because it deprives employees of their constitutional right to choose after injury between compensation and other remedies; and, since it is provided in the act itself that in case the election before injury provision can not stand the whole shall fail, I concur in the opinion of the chief justice that the judgment of the trial court should be affirmed

WORKMEN'S COMPENSATION—EMPLOYEE—AGRICULTURAL WORKER—
CONTRACT OF HIRING—*Matis v. Schaeffer et al.*, *Supreme Court of Pennsylvania* (March 28, 1921), 113 *Atlantic Reporter*, page 64.—
The decedent, Matis, was employed as a laborer by Schaeffer to work in his coal yard. Schaeffer also maintained a small farm on which he raised food for his horses used in the coal business. When work became slack at the coal yard it was customary to send the men to the farm to do whatever work was necessary. Matis was sent during a dull period at the coal yard to work on the farm. While at the farm and engaged in pitching oats he suffered from sunstroke and died. His widow brought proceedings for compensation under the workmen's compensation act and secured an award. Upon appeal to the court of common pleas on the ground that Matis's work having been agricultural labor he was not at the time of his injury under the workmen's compensation act, the award was affirmed and the em-

ployer appealed again. The decision of the supreme court of the State in again affirming the award is in part as follows:

(1) Was decedent in the course of his employment at the time of the sunstroke? Not much stress is laid upon this, and, indeed, but little could be, for he was at that time and place doing the work which defendant, as his employer, sent him to do. (2) Was he "engaged in * * * agriculture" within the meaning of the act of June 3, 1915 (P. L. 777; Pa. St. 1920, sec. 21920), which provides that the workmen's compensation act (Pa. St., sec. 21916 et seq.) shall not "apply to or in any way affect any person who, at the time of injury, is engaged in domestic service or agriculture." The board and court below held that this applied to the general character of the contract of hiring only, and did not refer to other casual or incidental work performed at the request of the employer. We think this conclusion is correct, especially as the title of the act is "a supplement to an act entitled 'the workmen's compensation act of 1915,' to exempt domestic servants and agricultural workers from the provisions thereof." This title must be taken into consideration in determining the scope of the act. It would require a distortion of the plain meaning of the words to call decedent an "agricultural worker" merely because he happened to be doing work which "agricultural workers" ordinarily do. We need only add that the workmen's compensation act covers cases of injury or death from sunstroke. (*Lane v. Horn & Hardart Baking Co.*, 261 Pa. 329, 104 Atl. 615 [Bul. No. 258, p. 156].)

The judgment of the court below is affirmed.

WORKMEN'S COMPENSATION—EMPLOYEE—CITY FIREMEN—Krug v. City of New York, Supreme Court of New York, Appellate Division (March 2, 1921), 186 New York Supplement, page 727.—Oscar Krug was a uniformed fireman of the city of New York attached to engine No. 7 of the city fire department. In May, 1918, while helping to extinguish a fire, he wrenched his knee. He was treated for rheumatism and worked off and on until July, 1919, when he underwent an operation upon his knee. He died from the effect of this operation and his wife brought proceedings for compensation under the workmen's compensation act. The industrial commission allowed her an award but provided that it be held in abeyance because she was receiving a pension from the city fire department pension fund; the award was to be paid only if the pension should fail. The city appealed from this award, and in reversing it a decision was rendered in part as follows:

The amendment of the constitution upon which this class legislation depends expressly authorizes the enactment of the statute:

"Provided that all moneys paid by an employer to his employee or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer." (State constitution, art. 1, sec. 19.)

Where there is no business upon which the compensation can become a charge, where there is no opportunity to charge the accidents of the business to the product and thus distribute the burden over the field of consumption, there is no warrant for the legislation. The rule is well established that a proviso, such as is contained in the constitutional provision above quoted, is in deeds and statutes a limitation or exception to the grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. It was the industrial, the essentially dangerous, trades which were to be placed under the provision of the law, and the constitution was amended to permit of this, not to extend the operation to public officers.

We are clearly of the opinion that the decedent was not an employee within the meaning of the statute. The word is defined by the Century Dictionary, cited with approval in *Palmer v. Van Santvoord*, 153, N. Y. 612, 614, 47 N. E. 915, as "one who works for an employer; a person working for salary or wages, applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a government or corporation or to domestic servants," and with all the agitation which preceded the enactment of this statute it can not be presumed that the legislature or the people in amending the constitution used the words in any broader sense than that indicated. Nor can we subscribe to the theory that a fireman in performing a public service is engaged in salvaging buildings or their contents. He is performing a police service for the State, operating for the benefit of the owner of the property, and not in the carrying on of the business of salvaging buildings or property.

The award should be reversed, and the claim dismissed. All concur.

WORKMEN'S COMPENSATION — EMPLOYEE — EMPLOYER'S KNOWLEDGE — VOLUNTEER —*Burke v. Industrial Commission et al.*, *Supreme Court of Colorado* (November 7, 1921), 201 *Pacific Reporter*, page 891.—John B. Chadwick was in the employ of John F. Burke, proprietor of a taxicab line, operating in and about the city of Denver. While Chadwick was driving a party to Colorado Springs, a party of Texas tourists arranged with Burke for a trip to Estes Park and requested that Chadwick be sent as driver. Burke replied that he would try to get Chadwick, but he would not guarantee to do so. That evening because of complaints received by Burke of Chadwick's careless and reckless driving on the trip to Colorado Springs he was discharged and directed to report at the office in the morning for a settlement. The next morning, Chadwick, instead of reporting as directed, took the car he was accustomed to drive and left with the party of tourists for Estes Park without the knowledge or consent of Burke, and directly against his orders. While making the return trip from Estes Park, Chadwick attempted to turn the car out of a rut on a muddy road, when it upset, pinning him underneath, and

resulting in injuries from which he died a few hours later. The passengers were brought to Denver and paid Burke the regular fare for the trip. An award of compensation was granted the widow and minor children of Chadwick. The district court partly affirmed and partly reversed the award. The case was appealed to the supreme court, where the judgment was reversed and the cause remanded on the grounds that Chadwick was not in the employ of Burke. The court, speaking through Judge Bailey, said:

There is no conflict in the testimony upon the fact of Chadwick's discharge, and the question of his reinstatement is strictly one of law and not of fact. The commission found that he was an employee solely upon an alleged ratification by Burke of his act in taking the car, without authority, as above noted. This view was adopted by the district court.

It seems clear to us that the acceptance by Burke of pay for the use of his automobile and equipment could have and did have no effect whatever upon the status of Chadwick. Chadwick was either an employee of Burke at the time of the accident or he was not. If he was not, then we fail to see how any subsequent act of Burke in dealing with third parties could change Chadwick's relations to him. Whatever the law may be upon the subjects of ratification and estoppel, under the circumstances here shown, as applied to third persons, manifestly, as between Burke and Chadwick, upon the undisputed facts, neither the doctrine of ratification nor estoppel has the slightest application, and both the commission and the district court were in error in holding to the contrary. If Chadwick was not in the employment of Burke when injured his heirs have no standing under the workmen's compensation act. (Laws 1919, p. 700.) It conclusively appears that when Chadwick was injured, he had been discharged, and was a mere volunteer, wrongfully engaged in driving the Burke car. The law must leave him where it finds him, for since that situation was brought about by his own willful and deliberate wrong, upon no possible theory is he or are his dependents in position to ask or receive compensation at the hands of Burke.

WORKMEN'S COMPENSATION—EMPLOYEE—EXCLUSION BY AMOUNT OF SALARY—*Kelley's Dependents v. Hoosac Lumber Co. et al.*, Supreme Court of Vermont (May 3, 1921), 113 Atlantic Reporter, page 818.—Simon J. Kelley, while in the employ of and cutting logs for the defendant company was accidentally killed on February 22, 1919. His dependents brought proceedings under the workmen's compensation act to obtain compensation for his death. By the terms of the General Laws of Vermont, section 5758, the act does not apply to a workman whose remuneration exceeds \$2,000 per year, unless the agreement specified in the act is entered into. Kelley had not entered into such agreement. The year previous to his death he actually received as earnings slightly more than \$2,000. There was an

award of compensation and the defendants appealed. In affirming the award the court through Judge Powers said:

The whole question depends upon the construction of the statute. The legislature has not pointed out the proper method of procedure to ascertain the remuneration, and there are no decisions to give much aid to the proper solution of that problem. In these circumstances, we are at full liberty to ascribe to this provision a meaning which, in our judgment, best accords with the general legislative intent, and best carries into effect the beneficent purposes of the act. This requires us to adopt such a construction as will extend its provisions to the largest possible class of employees, and to restrict those excluded from its provisions to the smallest possible class. We ought also to give it such a construction as will make its application as certain as possible, to the end that both employer and workman may know in advance whether it is to regulate their relations or not.

We hold, therefore, that the only employees excluded from the act under this section are those working under a contract the definite term of which is one full year or more, and at a determined or determinable wage amounting to more than \$2,000; and that all other employees, regardless of the total amount earned, are within the act.

WORKMEN'S COMPENSATION—EMPLOYEE—GENERAL AND SPECIAL EMPLOYER—*Knudson et al. v. Jackson*, *Supreme Court of Iowa* (June 25, 1921), 183 *Northwestern Reporter*, page 391.—C. M. Knight was a team contractor in the city of Des Moines. One Jackson was employed by Knight as a driver of one of his teams, receiving \$3.50 a day for his services. A Mr. Knudson was a contractor and builder. He made arrangements with Knight to have a man and team furnished to haul rubbish in connection with his contract work at the rate of \$7 per day. Knudson had nothing to do with the selection of the man or team for the work. Knight sent Jackson to do the work for Knudson, whose foreman was to give Jackson instructions as to the particular work he was to do. Jackson, while doing his duties as directed, received an injury for which compensation was sought. The industrial commission held that Jackson was in the employ of Knight and that Knudson was not his employer. On appeal to the district court this finding was reversed. The supreme court reversed the district court and held that there was no contract of service, express or implied, between Knudson and Jackson, and that Jackson was not entitled to compensation from Knudson under the provisions of the workmen's compensation act. After considering the two lines of authority on this subject, Judge Fayville, speaking for the court, said:

The foregoing cases represent the two lines of decisions. Because of the difference between the statutes, the conflict in these decisions is perhaps more apparent than real. The statutes of New York and of

California differ from the statute in this State, and ours more nearly conforms to the statutes of New Jersey and Massachusetts.

We recognize and adhere to the rule that this statute should be liberally construed. This, however, does not permit us to enlarge the express terms of the act. Our legislature has seen fit to define who is an employer and who is an employee within the meaning of this act. The legislature has expressly said that an employee who is entitled to compensation under this act is "any person who has entered into the employment of or works under a contract of service, express or implied, for an employer." In view of this definition and declaration by the legislature, we can not enlarge the terms and provisions of this statute, and apply to an employer and employee the rules and definitions of the common law as applicable to master and servant. The legislature in enacting this statute was providing a remedy wholly unknown to the common law, and it saw fit to place in the statute definitions to which rules of the common law can have no application. We are therefore in an entirely different situation than the supreme court of California in declaring that the definitions of employer and employee, under the workmen's compensation law of that State, "are broad enough to include both the general and special employer."

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—*Coppes Bros. & Zook v. Pontius, Appellate Court of Indiana (June 29, 1921), 131 Northeastern Reporter, page 845.*—Ambrose Pontius brought proceedings under the workmen's compensation act to obtain compensation for personal injuries. The industrial board awarded him compensation and the employer appealed. The question before the court was whether Pontius was an employee or an independent contractor. Pontius was hired to haul logs and load them on a railroad car. He was to supply his own team and was paid \$7 per thousand feet. He had not contracted to do a particular piece of work as an entirety. The appellant did not actually exercise any control over the appellee, but the clear inference was that it had the right to exercise unlimited control had it seen fit to do so. For this reason the appellate court affirmed the decision of the board, classing him as an employee and not a contractor.

WORKMEN'S COMPENSATION—EMPLOYEE—INDEPENDENT CONTRACTOR—SUPERVISION—*Helton v. Tall Timber Lumber Co. of Louisiana (Inc.), Supreme Court of Louisiana (November 29, 1920), 86 Southern Reporter, page 729.*—The decedent, Helton, was killed by a falling branch while he and other men were at work clearing a right of way for a railroad to be constructed by the defendant company. The work consisted of felling trees and sawing them into logs. Various numbers of men were at work at different times, all working independently of each other. They were paid so much per thousand

feet of the lumber contents of the logs and were provided with saws and axes. They were at liberty to quit work whenever they chose and be paid for the work they accomplished. The right of way was divided into sections of 100 feet. No control over the men was exercised except to indicate what section each man was to work upon. Helton's widow brought proceedings for compensation under the workmen's compensation act (Act No. 20 of 1914, p. 44), but was denied an award on the ground that her husband had been an independent contractor and not an employee of defendant. In affirming the decision the court said, in part:

Though plaintiff's husband's contract was with an independent contractor who had charge of this clearing, the defendant company is liable (under section 6 of said act) if plaintiff's husband was an employee and not, as contended by defendant, an independent contractor.

Under the circumstances, we are clear that plaintiff's husband was not an employee. He had not hired his services (C. C., arts. 164, 2745), but was working as his own master. He was at liberty to do the work when and as he pleased. He was not even being paid wages, but only for whatever work he chose to accomplish. A workman who in the manner of doing his work is under nobody's direction or control but his own can not be classed as an employee, but is an independent contractor.

WORKMEN'S COMPENSATION — EMPLOYEE — POLICEMAN — *Mann v. City of Lynchburg, Supreme Court of Appeals of Virginia (March 17, 1921), 106 Southeastern Reporter, page 371.*—Lee Arthur Mann was employed by the city of Lynchburg as a policeman. He suffered injuries in the course of his employment which resulted in his death, and his widow and minor children brought proceedings for compensation under the Virginia workmen's compensation law. The industrial commission was inclined to grant an award but question arose as to whether the city of Lynchburg or the State was liable for the payment of the compensation, and this question was certified to the court of appeals. The court, because the case was not one between private persons but against the government of the State, did not confine itself to the determination of the question submitted. It was accordingly held that a policeman is not an "employee" within the meaning of the workmen's compensation law and the plaintiffs were denied compensation. The following is an extract from the decision:

The statute is to be liberally construed to the end that its wise and humane purpose may be advanced; but we can not extend its provisions by construction, so as to cover persons or occupations not within its scope and intent.

The act as its title shows relates to industrial accidents, and its well-known purpose was to substitute for the unsatisfactory common-law remedies a speedier and simpler and more equitable form of

relief for personal injuries sustained by persons engaged in hazardous occupations. It would seem clear from the history and purposes and general provisions of the act that the legislature did not have in mind as beneficiaries any other persons than such as are commonly understood as falling within a contractual relationship of master and servant. It often happens that cities and towns employ large forces of men in connection with municipal undertakings, such as the construction of sewers, the building of streets, the operation of rock quarries, and, other similar and more or less hazardous occupations akin to those undertaken by individuals and industrial corporations. The legislature undertook to make an improvement upon the remedies hitherto existing in cases of employees receiving personal injuries, and who might or might not, according to the particular facts of the case, have a cause of action against the employer on the ground of negligence or breach of duty, and manifestly the idea was that this remedy should be provided for those who theretofore stood in such a relationship as that there might be in cases of negligence a liability on the employer. The case of a city policeman does not, as we think, fall within the reason and purpose of the act, and this conclusion is greatly strengthened by the language which the legislature used in its enactment.

Of course, as already pointed out above, there is a sense in which every officer is a servant, and in which every officer performs services for pay, but this is no more true of policemen than of any of the other officers of the State or municipality. If any such officers are to be included within the provisions of the statute, the amendment should be made by the legislature, and not by the tribunals called upon to construe and enforce the law.

It follows that we are of opinion that neither the city of Lynchburg nor the State of Virginia can lawfully be required to pay the compensation claimed in this proceeding.

WORKMEN'S COMPENSATION—EMPLOYEE—POLICEMAN—*Shelmadine v. City of Elkhart et al.*, Appellate Court of Indiana (February 18, 1921), 129 *Northeastern Reporter*, page 878.—Shelmadine was employed by the city of Elkhart as a policeman. During the course of his work he was killed, and his widow brought proceedings for compensation under the State workmen's compensation act. The industrial board denied her compensation and she appealed. The order denying the widow compensation was affirmed. The opinion is, in part, as follows:

The court will take judicial notice that the city of Elkhart, at the time of the injury and death of appellant's decedent, was a city having a population of between 10,000 and 35,000, and that its police force was established under and regulated by the act known as the metropolitan police act of 1897. (Burns' Ann. St. 1914, secs. 9033, 9046.) This act provides for a board of metropolitan police commissioners with power to appoint policemen and fix their compensation within certain limitations; such appointees to serve during good be-

havior. The act also fixes the powers and duties of policemen so appointed.

A public officer may be defined as a position to which a portion of the sovereignty of the State attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.

It is urged by appellant, however, that even if it be conceded that appellant's decedent was, at the time he met his death, a public officer, and was discharging his duties as such, still he was an employee of the city within the meaning of the word "employee" as used in the Indiana workmen's compensation act. This contention of appellant's is without merit, as will be seen by an examination of the definition of the word "employee" as found in clause (b) of said section 76 of said act.

It is clear that the term "hire" as used in this definition does not relate to public officers elected or appointed and whose duties are fixed by law. Appellant's decedent, being a public officer whose duties are specifically prescribed by statute, was, under his oath of office, obligated faithfully to perform his official duties, and was subject to impeachment for failure so to do; but he was not the servant or employee of the city under any "contract of hire," either express or implied.

WORKMEN'S COMPENSATION—EMPLOYEE—REGULAR TERM OF OFFICE—POLICEMAN—EMPLOYMENT NOT FOR GAIN—*Rooney v. City of Omaha, Supreme Court of Nebraska (December 23, 1920), 181 Northwestern Reporter, page 143.*—Rooney was killed by an accident arising out of and in the course of his employment as a policeman by the city of Omaha. His widow brought suit for compensation under the workmen's compensation act of the State, and recovered a judgment. The employer appealed upon two grounds: First, because a police officer is appointed to hold office during good behavior, he holds for a "regular term of office" and is thus one of the classes of employees excluded from the act; and, second, because a policeman is not engaged in an enterprise for the city for pecuniary gain or profit he is not covered by the compensation act. The supreme court held that a policeman is not appointed for a regular term of office and that so far as this provision was concerned he was within the act, but it also held that a policeman is not engaged in work for the pecuniary gain or profit of the city and that therefore he was not covered by the act. The opinion in part is as follows:

A police officer of the city of Omaha is appointed to serve during good behavior. That means an indefinite period. No two officers will hold for the same duration of time. The law has fixed no limitation on the tenure of office. One may hold for life or as long as he desires, unless, through his own misconduct he is discharged for cause. With such irregularity of duration, the period of tenure can

hardly be denominated a "regular term" of office, within the meaning of the statute [citing a Minnesota case, *State v. District Court*, 134 Minn. 26, 158 N. W. 790, involving an identical situation].

The defendant has raised a further question, that a policeman in the city of Omaha is an employee of a governmental agency of the State and is employed in the governmental capacity of the State and not for the gain or profit of the employer, and that, under section 3656, Rev. St. 1913, he is expressly exempted from the operation of the compensation law. It is manifest that such a policeman, in the general service of the city as a policeman, is not employed for the pecuniary gain or profit of the city. This case is controlled by the decision, just rendered in this court, *Ray v. School District of Lincoln*, 181 N. W. 140 [below] and, for the reasons therein set out, plaintiff is not entitled, as we view it, to a recovery in this case.

WORKMEN'S COMPENSATION—EMPLOYEE—SCHOOL JANITOR—EMPLOYMENT NOT FOR GAIN—*Ray v. School District of Lincoln, Supreme Court of Nebraska (December 23, 1920)*, 181 Northwestern Reporter, page 140.—Ray was employed as a janitor in a school in Lincoln, Nebr., by the school district of the city. While engaged at his duties he was injured by an accident arising out of and in the course of his employment and he brought proceedings for compensation under the workmen's compensation act and recovered a judgment. The employer appealed, contending that inasmuch as it was not engaged in an enterprise for pecuniary gain or profit it was not covered by the act. That section of the law (sec. 3656) which defines employees concludes as follows:

(3) It shall not be construed to include any person whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession, or occupation of his employer.

The supreme court held that Ray was not an employee within the meaning of the statute and reversed the judgment and dismissed the case. The opinion in part is as follows:

By a literal reading of the provisions of the statute in connection with subdivision (3) last above quoted, the term "employee" covers only such employees, whether in the service of private enterprises or in that of the State, or of its subdivisions, as are employed for "gain or profit."

The plaintiff contends that, should the literal wording of the act confine the act, in its operation, to those employees only who are employed for pecuniary gain or profit of the State and its subdivisions, then the literal wording must be found to be in conflict with the express purpose and intent of the act, and that such intent must be allowed to prevail. By the earlier provision of the act, every person in the service of the State, except officers holding for a regular term of office, is mentioned as being included within its operation. That provision, however, is not more general in its terms than the

like provision covering private employments. It is necessary for the court, then, first to determine from the language used, whether there can be any logical reason for the exception, as applied to State employees, or whether the exception is out of harmony with the act and opposed to a clearly expressed intent to the contrary.

It must be remembered that the State and its governmental agencies could not be held liable under the common law for personal injuries sustained by its servants in line of employment, though due to its own negligence, nor could such a recovery be had under the law as it existed in this State at the time of the enactment of the workmen's compensation act. The State could, however, be held for injuries to its employees resulting from its negligence, when such employees were engaged in corporate enterprises, carried on for profit. City water works and lighting plants, which furnish service to individuals generally, are carried on for profit, and have been in the past subjected to the same duties and liabilities towards their employees as if they were privately owned enterprises of like nature.

For the reasons given, it is our opinion that the act does not cover the plaintiff in this case, and the judgment of the lower court is therefore reversed and the case dismissed.

WORKMEN'S COMPENSATION—EMPLOYEE—SOLDIER WORKING IN CIVILIAN OCCUPATION—SUIT FOR DAMAGES—*Rector v. Cherry Valley Timber Co., Supreme Court of Washington (March 14, 1921), 196 Pacific Reporter, page 653.*—In the prosecution of the war against Germany the United States Army formed a military unit known as the Spruce Production Corps. Spruce lumber was necessary in the production of aeroplanes and ships, and because the demands of the military forces had drawn so heavily upon the labor supply of the country it was found necessary to form the Spruce Production Corps for the purpose of providing labor to cut the timber. Rector was inducted into the military service through the draft under the selective service act, and then because he was an experienced logger he was transferred to the Spruce Production Corps and became a member of a military company with a full line of officers. He was then put to work at logging for the defendant company under whose superintendent he worked. He was carried on the pay roll of the company along with its civilian employees. During the course of his employment in the capacity of a logger in the military service he was injured and brought suit for damages against the company for whom he was working at the time on the theory that he was injured while engaged in involuntary servitude. He recovered judgment, but upon the appeal of the defendant the decision was reversed. In delivering the opinion of the supreme court Judge Mackintosh said in part:

It is the respondent's contention that he was not a workman employed by the appellant and is not compelled to look to the workmen's compensation law for his remuneration for his injury, but that he

could maintain this common-law action upon the theory that his service was involuntary and the State compensation act had no application to him. The question, then, is to determine whether the appellant's relation to the respondent was that of a workman or that of an involuntary servant.

It is abhorrent to every idea of our institutions and the methods necessary for their preservation that a member of the Army should be considered as being in involuntary servitude, and this is true whether his entrance into the Army was by voluntary enlistment or through the method adopted in the late war, under the selective service act. The mental attitude of a soldier does not affect the nature of his service. In whatever way he views his presence in the Army, it must be viewed by all others as voluntary service in the performance of the duty which he owes to the Government.

The respondent, as a member of the Army, was not impressed into involuntary servitude, and wherever he was called upon to perform service in the furtherance of the interest of his country in the attempt to prosecute the war successfully his status was the same, whether he was called upon to work in the woods of Washington or to fight in the fields of France, and when he was ordered to the camp of the appellant his appearance there was voluntary. Being voluntarily in the Army and under its discipline, all acts which were done under military orders were voluntarily done, and when the respondent was ordered to the appellant's camp, his appearance there was as voluntary as though he had applied for employment at a public employment agency and had been informed that there was a position which he might obtain by going to the appellant's works. While in the case of the soldier by the voluntary act of joining the Army he agreed to comply with every lawful order of his superior officers, and when that order was to engage in work designed to assist in the prosecution of the war, as provided by act of Congress, his appearance was voluntary. In any event, the respondent comes under the definition of a "workman" laid down by the statute in relation to the compensation of workmen.

There seems little room for arguing that the respondent does not fall within the scope of this act. It is true that in 1911 the legislature, by its act, did not specifically cover a person in the respondent's position. But the legislature intended, and so stated, that after the passage of that act all the common-law system covering the remedies of workmen against employers for injuries should be abolished, and the State, in the exercise of its sovereign power, removed all phases of the matter from private controversy and afforded sure and certain relief for workmen engaged in extrahazardous work, and, excluding every other remedy, provided the compensation set out in the act. (Rem. Code, sec. 6604-1.) It was the intention of the legislature to protect every one engaged in work in any of the extrahazardous industries of the State, whether he be soldier or civilian; that is, as to matters outside of his employment as a workman, whether he be subject to either the military or ordinary civil and criminal restraints and regulations, and the act made it impossible for either the employer or employee to exempt themselves from its operation.

The appellant would never have agreed to the employment of respondent on the basis of the nonapplicability of the workmen's com-

pensation act. To our minds it is clear that the respondent was a "workman" within the definition of the act, and, as such, is not entitled to prosecute this action.

The judgment is reversed and the action dismissed.

WORKMEN'S COMPENSATION—EMPLOYEE—SUBCONTRACTOR—LIABILITY OF CITY FOR INJURIES TO EMPLOYEE OF A CONTRACTOR—*City of Chicago v. Industrial Commission et al.*, *Supreme Court of Illinois* (December 21, 1920), *129 Northeastern Reporter*, page 112.—Tenie Murray was injured by a collision between a city street car and the ash wagon upon which he was riding while in the employ of Susan Burns, to whom the ash wagon belonged. Susan Burns was a subcontractor of the city of Chicago and had undertaken to remove the city ashes and garbage. She had not come under the workmen's compensation act and was not insured. Murray proceeded against the city of Chicago to recover compensation under section 31 of the compensation act, which provides that:

Anyone engaging in any business or enterprise referred to in subsections 1 and 2 of paragraph (b) of section 3 of this act who undertakes to do any work enumerated therein shall be liable to pay compensation to his own immediate employees in accordance with the provisions of this act, and in addition thereto if he directly or indirectly engages any contractor, whether principal or subcontractor to do any such work, he shall be liable to pay compensation to the employees of any such contractor or subcontractor unless such contractor or subcontractor shall have insured in any company or association authorized under the laws of this State to insure the liability to pay compensation under this act, or guaranteed his liability to pay such compensation. (Laws of 1917, p. 504.)

He was allowed an award of compensation by the industrial commission, which on appeal was affirmed by the circuit court. The city of Chicago brought a writ of error alleging that Murray being an employee of Susan Burns and not being an employee of the city he could not recover compensation from it. The court, however, refused to take this view of the matter and affirmed the award, saying in part:

The language of this section makes it applicable to a city engaged in any business or enterprise of the kind mentioned. Section 5 of the act defines the term "employee" so as to include every person in the service of a city under appointment or contract of hire except any official of the city, and contains the proviso that one employed by a contractor who has contracted with the city shall not be considered as an employee of the city which made the contract. The contention of the plaintiff in error that this section excludes from the provisions of the act the employee of a contractor can not be sustained. It simply declares that such employee shall not be considered an employee of the city and by such provision excludes the

contractor of the employee from the general provisions of the act, but section 81 expressly provides that the city shall be liable, in the cases mentioned in that section, to pay compensation, not only to its own employees in accordance with the provisions of the act but also to the employees of the contractor, unless such contractor shall have insured his liability to pay compensation or guaranteed his liability. No claim is made that the city was not engaged in any business or enterprise referred to in subsections 1 and 2 of section 3 or that Susan Burns was not engaged to do any work enumerated in those subsections. We held in *City of Rock Island v. Industrial Com.*, 287 Ill. 76, 122 N. E. 82, that a city in the sweeping and cleaning of its improved public streets is engaged in the business of maintaining a structure, and that the finding of the industrial commission in that case that a person who was engaged in such work was engaged in an extrahazardous occupation could not be said to have been unsupported by the evidence.

The judgment of the circuit court will be affirmed.

WORKMEN'S COMPENSATION—EMPLOYEE—VOLUNTARY WORKER ON PERCENTAGE BASIS—*Rockefeller v. Industrial Commission of Utah*, Supreme Court of Utah (April 29, 1921), 197 Pacific Reporter, page 1038.—Jesse Y. Rockefeller and Ben Trobough were partners in a taxi service in Ogden City, Utah. They employed one man on a salary basis to clean and repair cars and another on a commission basis to drive a taxi. Darrell E. Wilson was an extra man who came and went as he pleased and was allowed 25 per cent of any money he could make driving plaintiff's car. He had no regular shift and could answer a call for a taxi or refrain from doing so at will. There was no agreement between the partners and Wilson that obligated him to do any work. He was killed while driving a car belonging to the plaintiff, and his widow was awarded compensation by the industrial commission. Rockefeller made an application to annul the order entered by the commission, on the grounds that there was no contract of employment expressed or implied, that the plaintiff did not have "three or more workmen regularly employed," and that he had not elected to "come under the terms of the industrial act." The supreme court annulled the award, holding that the relationship was not that of employer and employee, but bailor and bailee, i. e., that Wilson merely hired the car for his own use, paying a part of his receipts therefor. The decision is in part as follows:

While it is clear, to our minds at least, that there was no contract of hire and employment between plaintiff and deceased, yet did they not sustain some legal relationship in respect to each other and the business? We think they did. What relationship was that? We think it was that of bailor and bailee.

It has frequently been held that partners are not employees within the purview of compensation acts.

The evidence in this case is without dispute that neither plaintiff [Rockefeller] nor Trobough received any other compensation than that which they drew from the business after the expenses of conducting the same were paid. Neither, therefore, was engaged in the capacity of an employer. The evidence was that Trobough had the same power to direct the men engaged in the taxi service that plaintiff had. The relationship of the plaintiff and Trobough was therefore that of partners, generally speaking.

Nor were any others who upon occasion drove an automobile, as hereinbefore stated, "regularly employed in the same business" as provided by our industrial act. To so hold under the undisputed evidence of this case would be to defeat the humane provisions of the law, which is to preserve and devote the fund created by the industrial act for the exclusive benefit of regular employees, and not for mere volunteers as such, who for their own benefit or pleasure drove an automobile in the taxi service business. In view, therefore, that we make every possible allowance in favor of the applicant, yet her deceased husband did not come within the provision of the industrial act, and for that reason she is also excluded from its provisions.

We do not wish to be understood by anything said or omitted herein that one who is paid a commission for his services may not be regularly employed within the purview of the industrial act. The payment of a commission may be merely a convenient method of fixing the compensation. At all events, it is not determinative of the question of whether one who receives a commission for his services is or is not an employee within the provisions of the industrial act. All that we now decide is that under the undisputed evidence the deceased was not an employee of the plaintiff within the provisions of the industrial act.

WORKMEN'S COMPENSATION—EMPLOYER—BUSINESS NOT FOR PECUNIARY GAIN—COOK FOR GOLF CLUB—*Francisco v. Oakland Golf Club et al.*, Supreme Court of New York, Appellate Division (November 10, 1920), 185 New York Supplement, page 97.—Francisco was employed by the Oakland Golf Club as a cook. While engaged in frying a chicken an alcohol stove exploded, burning him so severely that he died. His widow was given an award of compensation and the employer appealed on the ground that, being a membership corporation to provide social and other benefits to its members without any effort to make pecuniary profits, it was not subject to the compensation law. The club was maintained by the dues of its members, and although it operated a restaurant it did so at a loss. The court held that the club did not come within the provisions of the compensation act. The opinion is in part as follows:

It is entirely clear, therefore, that the deceased employee was not employed in a trade, business, or occupation carried on by his em-

ployer for pecuniary gain, within the meaning of subdivision 5 of section 3 of the workmen's compensation law (Consol. Law, c. 67). An award for his death, therefore, should not have been made.

The award should be reversed and the claim dismissed. All concur.

WORKMEN'S COMPENSATION—EMPLOYER—EMPLOYEE OF STATE—PAYMENT BY STATE—*Smith v. State Highway Commission of Virginia et al., Supreme Court of Appeals of Virginia (November 21, 1921), 109 Southeastern Reporter, page 312.*—William Oscar Smith, a quarry foreman, in the direct employment of the State highway commission of Virginia, died as a result of an injury which arose out of and in the course of his employment. His wife, Grace Lillard Smith, filed an application for a hearing before the industrial commission of Virginia. Questions of law arose as to whether the State highway commission of the Commonwealth of Virginia was the employer, who was liable as such, in what manner and against what funds would the award of compensation be directed. The questions were certified to the supreme court of appeals. The court there held that the State, municipal corporations, or any political division thereof are employers within the statute. The State highway commission did not come under any of these heads, therefore the State was to be considered the employer. The other questions the court settled as follows:

As to the manner in which and the funds from which the compensation awarded by the industrial commission in such a case should be paid, no order can be made directing the payment, but the same must be provided for by special appropriation to be made by the legislature.

While it is true that the compensation act contemplates employees of the State, and expressly provides that they shall have the benefit of the same, no provision has yet been made for the payment of claims against the State, and section 2582 of the code provides that no judgment or decree, unless otherwise provided, shall be paid without a special appropriation by law. Neither the court nor the industrial commission can require the legislature to make an appropriation for cases of this character, but it is not to be doubted for a moment that such appropriation will be made in every case in which an order against it is made by the commission. The State will not provide that its employees shall have the right to claim compensation under the workmen's act, and then decline to give them any means whereby they may collect the compensation allowed them thereunder.

WORKMEN'S COMPENSATION—EMPLOYER—GRAVE DIGGING—RELIGIOUS SOCIETY—PECUNIARY GAIN—*Dillon v. Trustees of St. Patrick's Cathedral in City of New York, Supreme Court of New York, Ap-*

pellate Division (June 17, 1921), 189 New York Supplement, page 594.—The defendant is a charitable corporation which maintains a cemetery. It sells burial privileges and devotes the money so raised to the expenses of running the cemetery, and for religious and educational work and for charity—primarily in providing graves for those unable to pay for them. On April 26, 1918, the plaintiff, a grave digger, was directed to make an excavation for a monument. When he had reached a depth of 9 feet, the earth fell upon him and injured him severely. The workmen's compensation law classifies grave digging as a hazardous employment, but compensation is provided for "employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith." The employment was hazardous, but the proceeds of the gain received by selling burial privileges are devoted entirely to the purposes of the cemetery and to charitable work. The court followed the decision of *Uhl v. Hartford Club*, 116 N. E. 1000, and held that the injured grave digger was entitled to compensation under the compensation act as it was of no importance to what purpose the pecuniary gain was devoted.

WORKMEN'S COMPENSATION—EMPLOYER—LONGSHOREMAN ENGAGED BY TRADE-UNION—EMPLOYEE—*Hines v. Henry I. Stetler (Inc.) et al., Supreme Court of New York, Appellate Division (May 4, 1921), 188 New York Supplement, page 73.*—John Hines was employed by Joe Brosnan, an agent of the Longshoremen's Union, under circumstances indicated in the matter quoted below, to load trucks on the water front of New York. While so employed he injured his finger and was awarded \$15 a week for 9 weeks by the State industrial commission. Henry I. Stetler (Inc.), the owner of the truck that was being loaded when the injury occurred, was considered the employer. The case was appealed to the appellate division, which reversed the finding of the commission, holding that the corporation was not the employer. In deciding this point Judge Woodward said in part:

The claimant was clearly not an employee of Henry I. Stetler (Inc.). Joe Brosnan, or the labor organization which he represented, took the job, or rather prevented anyone else taking the job, at 3 cents per 100 pounds, to load and unload all trucks which appeared upon the particular dock where this accident occurred. Henry I. Stetler (Inc.) had no voice in the matter, beyond the payment of the price arbitrarily fixed by the labor organization, and neither the corporation nor the runner had anything to do with the claimant. His relations were all with the labor organization or Joe Brosnan. *Matter of Litts v. Risley Lumber Co.*, 224 N. Y. 321, 324, 325, 120 N. E. 730 [Bul. No. 258, p. 182], is a sufficient authority for holding that Joe Brosnan was in the position of an independent

contractor, and that the claimant was his employee at the time of the accident and not the employee of Henry I. Stetler (Inc.). Until some court of competent jurisdiction has overruled *Skeels v. Paul Smith's Hotel Co.*, 195 App. Div. 39, 185 N. Y. Supp. 665 [relating to independent contractors] and the authorities therein cited and relied upon, the award in the present case can not be permitted to stand. The claimant does not pretend ever to have submitted to the conditions incident to a contract of employment by Henry I. Stetler (Inc.). He declares that he was employed by Joe Brosnan, and there is no pretense that he owed any allegiance, except to that person as the representative of a labor organization which has assumed to control this branch of work in connection with all the freight entering or leaving New York Harbor.

WORKMEN'S COMPENSATION—EMPLOYER—NUMBER AND PLACE OF EMPLOYEES—*Vantrease v. Smith et al.*, *Supreme Court of Tennessee* (February 26, 1921), 227 *Southwestern Reporter*, page 1023.—*Vantrease* was injured while employed in the sawmill of the defendant by having two of his fingers crushed. He brought suit for damages for personal injuries. Smith set up as a defense the workmen's compensation law (ch. 123, Laws of 1919). The defendant Smith had over 10 employees in its employ in the State, but at the place of the plaintiff's injury there were at the time fewer than 10 persons in its employ. Smith undertook to bring himself under the provisions of the law by taking out insurance and giving notice to the insurance commissioner. He did not, however, give notice to the State factory inspector of his election to come under the law, as required of persons employing less than 10 persons. Judgment was rendered in favor of the defendants and plaintiff appealed, contending that as defendant's 10 employees were not all employed at the place where the injury occurred they did not come within the provisions of the compensation law. The decision in favor of the defendants, however, was affirmed. The following is an excerpt from the opinion:

From the foregoing it appears that an "employer" is one who uses the services of not less than 10 persons for hire, and that the act shall not apply in cases "where less than 10 persons are regularly employed."

The defendant was using the services of more than 10 persons, and had more than 10 persons regularly in his employ, so that he falls strictly within the letter of the statute. The idea that the employment refers to a certain or fixed place is refuted by section 19 of the act, which provides that where an employee is injured while out of the State he shall nevertheless be compensated if, at the time, he were acting within the scope of his employment under a contract made in the State. It is manifest, therefore, that the legislature intended that the contract of employment, and not the place of the accident, governs the recovery. Had the plaintiff been injured while

on a mission for the defendant to Wilson County, and while acting within the scope of his employment, he would be entitled to recover according to all of the authorities. This of itself is a refutation of the place or group theory.

On the other hand it is very plausibly argued that the numerical provision of the act can only be explained upon the theory that the employees should work in conjunction, or at the same place. It is also insisted that other acts of this character have been sustained solely upon the ground that the classification was reasonable, because it was more dangerous to have a large number of servants and employees working together in the same group or establishment than to have a less number of employees and servants so working together, and authorities are cited to support this theory.

The act in question is not subject to an attack of this character for the reason that it is elective in its nature, and hence can not be discriminatory.

It is not necessary for us to determine the legislative intent in limiting the application of the act to 10 or more employees. Suffice it to say that the legislature said in plain and unequivocal terms that where an employer has as many as 10 persons in his employ, the act should apply, without attaching thereto any restriction as to place, or any provision that such employees should work in conjunction.

The act in question is very broad and comprehensive in its scope, and, under a liberal construction, should be given the interpretation we have placed upon it.

WORKMEN'S COMPENSATION — EMPLOYER — STOCKBROKERS — MESSENGERS—WORKMEN—*Westbay v. Curtis & Sanger et al.*, *Supreme Court of New York, Appellate Division* (July 7, 1921), 189 *New York Supplement*, page 539.—Robert Westbay was a messenger in the employ of Curtis & Sanger, stockbrokers, occupying offices at 49 Wall Street, New York City. On September 16, 1920, while on the street, in pursuance of his duties as a messenger, he was instantly killed on the occasion of the mysterious explosion of that date. Isabella Westbay proceeded under the workmen's compensation law and an award of compensation was granted her. The employer and insurance carrier appealed to the appellate division. This court reversed the award and dismissed the claim, the bench being divided three to two, on the ground that neither the employer nor the employee was covered by the act. Judge Woodward wrote the opinion of the court, from which the following is quoted:

An "employer," within the meaning of the workmen's compensation law, means "a person * * * employing workmen in hazardous employments" (sec. 3, subd. 3), and an employee "means a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer."

The undisputed evidence before the commission was that Curtis & Sanger had about 45 employees on an average; that these were clerks and salesmen and stenographers.

There is an opinion by Commissioner Sayer in which he says that there are 2 telephone and 2 telegraph operators, and that these employments, if performed for a telephone or telegraph company, would come under the named employments of Groups 5 and 6, and that "they are clearly operatives within the meaning of Group 45."

The amendment to the constitution, under which the enactment finds its justification in law, is made contingent upon the expense of the system being held to be a proper charge in the cost of operating the business of the employer (art. 1, sec. 19), and it was clearly understood and contemplated that the workmen's compensation law should be just what its name indicates—a special provision for the industrial workers of the State, as distinguished from clerks, stenographers, errand boys, and the like.

Clearly the letter and the spirit of the law do not contemplate the situation shown by this record. There are no workmen employed by Curtis and Sanger within the meaning of the workmen's compensation law; no employee in a mill or factory would recognize one of these employees as a laboring man, and, if we are to have class distinction, there is no reason why one who would not have recognition in the class, or who would not be willing to be so classified in ordinary life (*Bowne v. S. W. Bowne Co.*, 221 N. Y. 28, 33, 34, 116 N. E. 364), should be inducted into it for the purpose of imposing a burden upon the insurance carrier which has never been undertaken. The statute, and the constitutional innovation, proceed upon the theory of an economic adjustment of the accident burden of the productive industry of the State, not the insurance of individuals against the accidents or crimes of those who are in no manner connected with the commercial and productive life of the community, and it is unthinkable that the legislature ever contemplated that an errand boy in a brokerage office should be protected against a crime or an accident in the public streets of a city, having no relation to any industrial pursuit.

WORKMEN'S COMPENSATION—EXTRATERRITORIALITY—ACTS OF THIRD PARTIES—SUBROGATION OF RIGHTS—*Anderson v. Miller Scrap Iron Co. et al.*, *Supreme Court of Wisconsin* (May 3, 1921), 182 *Northwestern Reporter*, page 852.—Katherine Anderson, as administratrix of Joseph Boncher, brought an action for damages based on a Michigan statute allowing suit in case of death by negligence. Joseph Boncher was a resident of Wisconsin in the employ of the defendant company, which was a Wisconsin corporation. He worked under a contract of employment that was made in Wisconsin. While riding to work in Michigan with Herman Miller, superintendent of the employing company, who was driving an automobile, the car overturned, through the negligence of Miller, and Boncher was fatally injured. The action was against both the company and Miller and a verdict

was rendered in favor of Katherine Anderson. On appeal this judgment was reversed and remanded for further proceedings (170 N. W. 275), the court stating that the workmen's compensation act of Wisconsin would apply. The widow put in a claim for compensation and she was granted an award of \$3,000. In *Miller Scrap Iron Co. et al. v. Industrial Commission et al.*, 180 N. W. 726, the award was upheld, the court saying that Mrs. Boncher did not waive her right to compensation because of the action taken by the administratrix of the estate of deceased.

The original action was reversed as to Herman Miller upon Katherine Anderson's request that if the judgment should be reversed as to the Miller Scrap Iron Co. it should also be reversed as to Herman Miller. Upon remittitur to the lower court a motion was made on behalf of both defendants to dismiss the action on the merits. No objection was made to the dismissal as to the Miller Scrap Iron Co. The plaintiff, Anderson, and the Miller Scrap Iron Co. both objected to the dismissal of the action as to the defendant, Herman Miller. The motion to dismiss was granted, and from the order granting such motion the Miller Scrap Iron Co. brought this appeal. The Miller Scrap Iron Co. depended upon a statute of Wisconsin for its title to the present action, which they claimed was theirs. The statute provided, in effect, that the making of a claim under the workmen's compensation act operated as an assignment to the employer of any cause of action for tort.

The court held that the Miller Scrap Iron Co. had acquired no title to the cause of action, because that action was predicated upon a Michigan statute. In deciding this point Judge Owen said in part:

To recognize the right of the legislature of this State to say that certain conditions shall operate as an assignment of that cause of action, or that it shall inure to the benefit of any except those specified by the law of Michigan, is to ascribe to the legislature of this State extraterritorial power. To apply the provisions of the workmen's compensation act to the present cause of action is to take away from some of the beneficiaries of that cause of action the benefits thereof and confer them upon another. Neither the legislature nor the courts of this State have power to interfere with a cause of action created by the laws of a sister State.

WORKMEN'S COMPENSATION — EXTRATERRITORIALITY — COMPENSATION ACT PART OF CONTRACT OF EMPLOYMENT—*Crane v. Leonard, Crossette & Riley et al.*, *Supreme Court of Michigan* (June 6, 1921), 183 *Northwestern Reporter*, page 204.—George M. Crane was employed by the defendant company, a corporation organized under the laws of Ohio and authorized to do business in the State of Michigan, to travel with shipments of produce sent by his employer in inter-

state commerce. On December 11, 1919, Crane left Greenville, Michigan, with a shipment of potatoes destined to Chicago, Illinois, for the purpose of keeping up a fire to prevent freezing. On the morning of December 13, he was found in the car with his skull badly crushed. The evidence was convincing that he received his injuries in the State of Illinois. The compensation board awarded compensation to the widow for the death on the theory that the statute of Michigan applied whether the death occurred within or without the State. The defendants appealed from the decision of the board, but the supreme court affirmed the award, giving as its reason that "the contract of employment was a Michigan contract, and the workmen's compensation act became and was a part of it." The court, speaking through Judge Fellows, continued:

Both parties agreed to be bound by its terms. The contract was to be performed within and without the State. Deceased met his death within the ambit of his employment. The rights, being contractual, accompanied the employee wherever he went within the ambit of his employment. This construction is within the legislative intent when we consider the purposes of the act. And this is the construction it must receive at our hands.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—COMMON HAZARD—*Illinois Publishing & Printing Co. v. Industrial Commission et al., Supreme Court of Illinois (October 22, 1921), 132 North-eastern Reporter, page 511.*—Phillip A. Coates, deceased, was employed by the Illinois Publishing & Printing Co. as an advertising solicitor. He used his own automobile, going from place to place in the city of Chicago. He was paid \$50 a week and allowed an expense account, including a charge for automobile transportation. On October 21, 1919, he started to make his calls after receiving directions from the advertising manager to call on certain prospects. While he was driving on the public streets of Chicago he was killed in a collision between his own car, driven by himself, and another car driven by Abraham Rubenstein. Compensation was claimed and awarded. The award was affirmed in the circuit court, and on appeal to the supreme court the award was again upheld. The supreme court based its decision on paragraph 8, section 3, of the workmen's compensation act of 1919. This section provides that the provisions of the act shall apply automatically and without election to all employers and their employees engaged in any of the enterprises or businesses which are declared by the act to be extrahazardous. The printing company is engaged in an enterprise that is declared to be extrahazardous. The company contends that the only employees covered by the act are those directly exposed to the hazards peculiar to the enterprise and

that it does not extend to salesmen who are not exposed to special hazards. The contention in favor of upholding the award is that if the industry is covered by the terms of a compulsory compensation law based upon a hazardous classification, it is covered as to all the employees therein, regardless of whether or not they are actually exposed to the particular hazard of the business. Judge Thompson upheld this latter view in his decision, which is in part as follows:

This compulsory compensation act is general in its application and embraces all employers and their employees engaged in businesses or enterprises declared by the statute to be extrahazardous. The language of the act is clear and is not open to construction.

The theory and purpose of workmen's compensation acts are to provide speedy and equitable relief in case of injury to those exposed to the peculiar hazards of certain businesses and enterprises generally known to be hazardous, and at first thought it seems arbitrary and unreasonable to extend the protection of the act to that group of employees of a given industry that is not exposed to the hazards peculiar to the industry. On the other hand, how difficult of administration the act becomes when the courts must determine in each case which employee is and which employee is not exposed to the hazards of the business! In the case at bar it was the business of the employer that brought deceased to the place where he was killed, and the work in which he was engaged was just as essential to the operation of the employer's business as the work of the linotype operator or the pressmen. The authority of the State to classify employees in groups identified by the business of the employer, without regard to whether the employee is exposed to the special hazards of the employer's business, has been upheld by the Supreme Court of the United States.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—CONSTITUTIONALITY OF CLASSIFICATION OF EMPLOYMENTS—*Europe v. Addison Amusements (Inc.) et al.*, Court of Appeals of New York (April 19, 1921), 131 Northeastern Reporter, page 750.—The Addison Amusements (Inc.) was a company formed for the purpose of supplying engagements for Europe's Band. The band was composed of 65 pieces and had 4 or more workmen regularly accompanying the band. Lieutenant James R. Europe was a musical composer, director, and orchestra leader. He was employed with the band. During an intermission in the program of a concert on May 9, 1919, in the city of Boston, Europe was stabbed and killed by a drummer of the band. The industrial commission made an award to his widow Willie A. Europe. The employer and insurer appealed, but the appellate division and later the court of appeals affirmed the award. The basis for the allowance is section 2, second group 45, of the workmen's compensation law, which reads as follows:

SECTION 2. Application. Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 45.—All other employments not hereinbefore enumerated carried on by any person, firm, or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants.

James R. Europe, although not himself engaged in hazardous work, was engaged in a business classified by this law as a hazardous employment. By subdivision 4, section 3, "employee" means—

A person engaged in one of the occupations enumerated in section 2, or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.

Judge Crane delivered the opinion of the court of appeals, from which the following quotations are taken:

Group 45 as above quoted, was added by the Laws of 1918, c. 634, paragraph 2. The legislature classified as hazardous employments all those occupations in which there were regularly engaged four or more workmen or operatives. It covered employments not specified in the other subdivisions. No doubt it was considered a risk to be in an employment where four or more manual laborers or operatives were engaged.

Europe, however, was an employee within the meaning of section 3, subdivision 4, employed in a business or enterprise classified as hazardous, because it employed regularly four workmen or operatives.

Why the legislature should have extended by the second group of subdivision 45 the hazardous employments to any employment having four workmen or operatives is not for us to say. The courts, in construing statutes, are not concerned with the wisdom of the legislation. (*Wilson v. C. Dorfinger & Sons*, 218, N. Y. 84, 86, 112 N. E. 567 [Bul. No. 224, p. 282].)

We do not think, however, that the legislature has exceeded its powers of classification by this extension of hazardous employment. It may be, as above intimated, that a business not ordinarily hazardous becomes such at times when manual work is done or machinery operated in connection with its main purpose.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—DEPENDENCY—DEATH OF CLAIMANT—VESTED RIGHTS—*East St. Louis Board of Education v. Industrial Commission, Supreme Court of Illinois (April 21, 1921), 131 Northeastern Reporter, page 123.*—Robert A. Paschal was janitor of a school in the district named. While in the

discharge of his duties, washing windows on the second floor, he fell to the ground, receiving injuries which resulted in his death the same day, October 27, 1917. The school was heated by steam generated from a boiler. This boiler was subject to city and insurance inspection, which fact was relied on to bring the employment under the compensation law. Paschal was his wife's sole support. She made demand for compensation but died on October 16, 1919, before the case was settled. Her administrator was awarded compensation for the interval between the death of the husband and the wife. The circuit court sustained the industrial commission and the case was brought to the supreme court by writ of error, and again affirmed. This court followed the reasoning in the case of *Hahnemann Hospital v. Industrial Board*, 282 Ill. 316, 118 N. E. 767 (Bul. No. 258, p. 188), holding that the municipal regulations for the inspection of the boilers brought this employment under subsection 8 of section 3 of the workmen's compensation act.

The court also held :

The workmen's compensation act is intended for the benefit of dependents, and the dependency of a wife is presumed. Dependency and the award are determined by section 7 of the statute, and the extinguishment of the award by the death of the beneficiary, under section 21, is subject to the provisions of section 7, which determines the right, and should not be construed as retroactive or as abating the rights given under section 7, but only as abating the right to receive the payments due after the death of the beneficiary. Under statutes worded similarly to the one we are here construing, it has been held that the right to compensation conferred upon the dependents of a deceased workman is a right which vests in the dependent and is transmitted to his legal representatives on his death, notwithstanding that the dependent has died before an award or even without having made a claim for it.

The right to receive compensation was fixed as of the time of the employee's death, and we think a fair reading of section 21, including the proviso, justifies the conclusion that the death of the beneficiary stops any further right to payment but it is not retroactive so as to extinguish the right to receive payments for the period from the date of the injured employee's death until the beneficiary's death. The fact that there may or may not have been an award at the time of her death is an incident which does not decide whether she was entitled to compensation. The proviso in section 7 shows clearly that the right to go forward with the proceeding and receive compensation under the application, under the circumstances mentioned in the proviso, continues after the death of the beneficiary.

WORKMEN'S COMPENSATION—HAZARDOUS EMPLOYMENT—POWER OF COMMISSION—*State v. Eyres Storage & Distributing Co., Supreme Court of Washington (May 23, 1921), 198 Pacific Reporter, page*

390.—This action was brought by the industrial insurance commission to recover from the defendant the contribution to the accident fund provided for in the workmen's compensation act. The commission, after notice published as required by law and a hearing, had made an order that the business of storage and wholesale warehouse was extrahazardous. The court found that the Eyres Storage & Distributing Co. was engaged in operating a general storage business and that said business was not extrahazardous in character under the workmen's compensation act and that the commission's order was null and void. The State appealed from this decision, but the supreme court affirmed the action of the lower court. The act of 1911 (section 6604-2, Rev. Code) is in part as follows:

There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them which are within the legislative jurisdiction of the State in the following enumeration, and they are intended to be embraced within the term "extrahazardous" wherever used in this act, to wit: * * * If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 6604-4.

An amendment of 1919 reads:

The commission shall have power * * * to declare any extrahazardous occupation or work to be under this act.

The court, through Judge Mitchell, declared that if the legislature intended that the commission should have the power they seek, its "language should have been that the commission shall have power to determine any employment not plainly extrahazardous to be extrahazardous, in addition to the power to declare an extrahazardous work to be under the act." The court said:

Manifestly, the purpose of the amendment of 1919 was to place or establish the power in the commission to declare any such plainly extrahazardous occupation or work to be under the act, but not the power to declare or determine any employment not enumerated in the statute as extrahazardous, and not plainly extrahazardous to be extrahazardous, in addition to the power to declare it to be under the act.

The legislature of 1921 specifically includes warehousing in the list of employments covered by the act.

WORKMEN'S COMPENSATION—INJURY—ACCIDENT—ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PREEXISTING CONDITION—*Patrick v. J. B. Ham Co. et al., Supreme Judicial Court of Maine (January*

18, 1921), 111 *Atlantic Reporter*, page 912.—Patrick was engaged as an employee of the defendant, in loading grain into a box car. The grain was contained in sacks each containing 100 pounds, which were brought into the car, two at a time, on a truck by a fellow employee named Bailey. After lunch Patrick and Bailey lifted two bags from the truck and stowed them in the car. Each time Patrick lifted he lurched a little against the bag. When he attempted to aid Bailey unload the second truck he was unable to do so, but fell across the bag. Bailey and some other men removed him to the storehouse, where he became unconscious. He later died at a hospital about 10 o'clock the same evening. The doctor declared that the cause of the death was cerebral hemorrhage. The industrial accident commission allowed Patrick's widow an award of compensation under the workmen's compensation act (Rev. St., ch. 50), and the employer appealed on the ground that Patrick did not die as the result of an accident. The supreme court, however, affirmed the decision allowing the widow an award, saying, in part:

The chairman found from facts proved, and inferences from facts proved, that the decedent's death was due to personal injury by accident arising out of and in course of his employment.

We are asked to reverse the decision of the commission because, as defendant's counsel says, "there is not even a scintilla of evidence to support its finding." We think there was sufficient evidence, though slight, from the very nature of the case, to support the finding, and that the inference of death from accidental cause was reasonable and justifiable.

The petitioner claimed that Patrick's death was due to injury resulting from accident occurring while decedent was engaged in lifting bags of grain. Appellant contended that there was no accident, but that decedent died from natural causes.

That Patrick was suffering from diseased arteries predisposing him to cerebral hemorrhage is of no consequence in the case. That he might have died or would have died in his bed of cerebral hemorrhage in a year or a week is immaterial.

The question before the commission was whether the work that he was doing on the afternoon of October 13, 1919, caused the cerebral hemorrhage to then occur. If so, we think it was an accident arising out of and in the course of his employment.

This was a question of fact. The industrial accident commission, through its chairman, has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts.

Decree affirmed.

WORKMEN'S COMPENSATION—INJURY—ACCIDENT—CAUSAL CONNECTION—PREEXISTING CONDITION—EVIDENCE—*Fink v. Sheldon Axle & Spring Co.*, Supreme Court of Pennsylvania (May 9, 1921), 113 *Atlantic Reporter*, page 668.—Levi S. Fink, an employee of the defendant company, stated that as he approached a pair of swinging

doors in defendant's establishment, one of them was opened, knocking him down and causing paralysis of one side of the body, for which he brings the present action. It appeared that plaintiff had diabetes before the accident and suffered from arteriosclerosis. The lower court approved a decision of the board disallowing compensation, its referee having found no proof that the claimant's present condition was due to the alleged injury. This was affirmed by the supreme court, Judge Moschzisker, speaking for the court, saying in part:

Both the courts and the administrative authorities have, very properly, been most liberal in construing the workmen's compensation law (Pa. St. 1920, sec. 21916 et seq.), holding that claims thereunder need not be made out with the same exactness of proof required in suits at common law. It must be understood, however, that when, in cases of this class, expert testimony is relied on to show the connection between an alleged cause and a certain result, it is not enough for the doctors to say simply that the ailment in question might have resulted from the assigned cause, or that the one could have brought about the other; they must go further and at least testify that, taking into consideration all the attending data, it is their professional opinion the result in question most probably came from the cause alleged.

WORKMEN'S COMPENSATION — INJURY — ACCIDENT — HEART DISEASE—INHALING IMPURE AIR—*Utilities Coal Co. v. Herr et al.*, *Appellate Court of Indiana* (October 4, 1921), 132 *Northeastern Reporter*, page 262.—Eli A. Herr was employed by the Utilities Coal Co. as a miner. On June 26, 1920, Herr and other miners went down into the mine as usual, but found that it was full of smoke produced by firing explosives early that morning for the purpose of loosening the coal. The miners returned to the top of the mine as they could not stay below with comfort or safety. Herr came up with the other miners, walked a short distance to a stairway, sat down on one of the steps and then fell over, dead. An autopsy disclosed the fact that decedent had been afflicted with a serious chronic heart disease. An award of compensation was made to Isabella Herr by the industrial board. The employer appealed, but the award was affirmed by the appellate court, on the grounds that even though two physicians testify that death resulted from heart disease and not as a result of inhaling the impure air of the mine, an occurrence which merely hastens an existing disease to its final culmination will be deemed an accident within the meaning of the workmen's compensation act; and where such occurrence arises out of and in the course of an employment compensation will be awarded. It was within the province of the industrial board to draw the inference that the elements in the air of the mines which caused other workmen to become weak, dizzy,

blind. to have rapid pulsations, headache, and shortness of breath so affected the decedent that death followed.

WORKMEN'S COMPENSATION—INJURY—ACCIDENT—OCCUPATIONAL DISEASE—CAISSON DISEASE—ARISING OUT OF EMPLOYMENT—*Williams v. Missouri Bridge & Iron Co. et al.*, *Supreme Court of Michigan* (December 21, 1920), 180 *Northwestern Reporter*, page 357.—The Missouri Bridge & Iron Co. was engaged in constructing a bridge over Rouge River for the Michigan Central Railroad Co., and in constructing the concrete piers it was necessary to use a caisson. Claude Williams was employed by the bridge company to work in the caisson, which extended some 70 or 80 feet below the surface and subjected workmen in it to an atmospheric pressure of from 37 to 40 pounds. When the workmen left the caisson they climbed a ladder into an air-tight locker where the air pressure was reduced at the rate of 1 pound per minute. When the air pressure is reduced too quickly the men become affected with "caisson sickness," which manifests itself by a dizziness accompanied with partial paralysis of the limbs. Early one morning Williams and other workmen entered the air locker from the caisson, and another employee proceeded to reduce the air pressure. Instead, however, of reducing it at the rate of 1 pound per minute, he permitted air to escape at the rate of 2 pounds per minute. The result was that Williams became afflicted with the "caisson disease" and fell from the ladder upon the head of the man below him, striking his chest and stomach and later striking his head against the side of the shaft, receiving fatal injuries. The employer appealed from an award of compensation to Williams' widow on the ground that although the fall and death were caused by accidental means, they were the result of "conditions peculiar to the industry in which he was engaged." It was also claimed that the injury was the result of an occupational disease. The court after considering both points affirmed the award in favor of the widow, saying in part:

Effort is made to classify the present case among those cases, to which *Van Gorder v. Packard Motor Co.*, 195 Mich. 588, 162 N. W. 107, belong. It is also sought to bring it within the "occupational disease" cases, of which the lead poisoning case of *Adams v. Acme White Lead Co.*, 182 Mich. 164, 148 N. W. 485, is an example. We are not persuaded that the present case falls within the first class mentioned.

The reason why recovery has been denied in the first class named is because of some inherent physical defect which was the proximate cause of the injury and which had no causal connection with the employment. Such, however, was not the situation in the present case. The thing which caused the death of plaintiff's intestate was not

inherent. It was a condition which came on suddenly and was caused by the inattention and neglect of a coemployee in permitting the air to escape from the locker too rapidly. The locker was decompressed at the rate of two pounds a minute, where it should have been done at the rate of one pound a minute. This produced in Williams what is termed "caisson disease." Herein lies the distinction between this and the Van Gorder case. In that case epilepsy caused the fall. In the present case caisson disease caused it. The epilepsy had no causal connection with the employment. The caisson disease was directly due to it. It, therefore, arose out of the employment.

Neither are we persuaded that the case should be classed among the occupational diseases. It is true the testimony establishes the fact that caisson disease develops by the slow process, the same as occupational diseases usually do. Had Williams contracted caisson disease in this manner and his injury and death had resulted therefrom, the argument of counsel would have great force, but the caisson disease, which was responsible for this accident, developed in a few moments as a result of the inattention and neglect of another. In this inattention and neglect we find the unusual thing—the happening—the accident.

Being impressed that the board reached the right conclusion, their award will be affirmed, with costs to the plaintiff.

· WORKMEN'S COMPENSATION—ACCIDENT—OCCUPATIONAL DISEASE—
"HOUSEMAID'S KNEE"—PERMANENT PARTIAL DISABILITY—*Standard Cabinet Co. v. Landgrave, Appellate Court of Indiana (November 7, 1921), 132 Northeastern Reporter, page 661.*—Philip D. Landgrave was a carpenter and had been in the employ of the Standard Cabinet Co. for about 19 years as a general carpenter and repair man. In April, 1919, he was sent to the home of the president of the appellant company to scrape and polish floors. After working there 3 or 4 days his knee became very painful and on April 23, 1919, after working 7 days, he had a chill and had to go home. He was wholly disabled from work for about 20 weeks. In proceedings for compensation under the workmen's compensation act his physician testified that he treated his knee for bursitis, which is sometimes called "housemaid's knee," a name given to it because it is an injury common to housemaids, resulting from being on their knees when scrubbing floors. An award was granted. An appeal was had, which was reversed and remanded for further proceedings in an opinion reported in 128 N. E. 358. A new award was granted from which an appeal was again taken. This award was reversed with instructions to the industrial board to modify its award in harmony with this opinion. It was reversed in part because the board erroneously awarded compensation for 20 weeks for the time which he was totally disabled for work and 20 weeks for the permanent impairment of his right leg. The contention of the company that the award for

permanent partial disability should be "in lieu of all other compensation" was upheld as the positive mandate of the law. The recovery for permanent partial disability was affirmed in an opinion written by Judge Nichols, from which the following is quoted:

That his injury was caused by being on his knees and scraping floors is a reasonable inference from the evidence, and justifies the finding of the industrial board that on April 23, 1919, appellee received a personal injury by accident arising out of and in the course of his employment. Appellant contends that appellee is suffering from an occupational disease, and that his ailment can not be classed as an injury resulting from an accident. But, we need not consider whether such disease is or is not an occupational disease, for if it be conceded that it is in the nature of such, compensation may nevertheless be allowed, if it is contracted under such conditions as to constitute an accidental injury, as found in this case. It has been repeatedly held by this court that the words "by accident arising out of and in the course of employment," as used in the workmen's compensation act, should be liberally construed in harmony with the humane purposes of the act, and that the word "accident" means an unlooked for mishap, or untoward event, not expected or designed. It can not be contended that the injury suffered by the appellee was other than an untoward event. For 19 years his occupation as a carpenter in the employ of appellant had not developed the disease. The most of his work had been, not scraping floors, but general carpentering and repairing, but only a few days before he was finally disabled, his knee began to pain. He had no warning of the approach of his disability, and no knowledge that he had bursitis till his physician informed him.

WORKMEN'S COMPENSATION—INJURY—ACCIDENT—OCCUPATIONAL DISEASE—INHALING IMPURE AIR—*Prouse v. Industrial Commission of Colorado et al.*, *Supreme Court of Colorado* (December 6, 1920), *194 Pacific Reporter*, page 625.—George Prouse was employed as a miner in a coal mine of the Rocky Mountain Fuel Co. During the course of their duties Prouse and some other miners broke into an old entry, from which came foul air and dioxide gas. This bad air flooded the mine and remained there several weeks. This happened on the 15th day of December, and on January 1 Prouse became sick and called in his physician, who advised him to lay off work for a while, but he continued to work and became much worse until about January 17, when he was removed to a hospital, where he died from septicæmia or pyæmia, which are forms of blood poisoning. The testimony of the doctors seems to indicate that the bad air in the mine so weakened Prouse's condition as to render him highly susceptible to infection and was the cause of his death. The industrial commission refused to allow his widow an award of compensation, and on appeal the district court confirmed this decision. She brought a writ

of error to the supreme court, but her claim was again denied and the decision of the commission affirmed, two judges dissenting. The opinion of the majority of the court was in part as follows:

There are several reasons why this is not within the terms of the statute above quoted: First. An accident, under the various workmen's compensation acts, must be traceable to a definite time, place, and cause. (*Mattheissen etc. Co. v. Industrial Board*, 284 Ill. 378, 120 N. E. 249 [Bul. No. 258, p. 159].) The occurrence shown in the evidence is not traceable to a definite time. Second. The occurrence constituting an accident must be unexpected. (1 Corp. Jur. 39; *Mattheissen v. Industrial Board*, supra.) In the present case it was not expected. Third. The occurrence must be the approximate cause of the death or of the disease which produced the death. This occurrence was not.

As to the first point: In the present case the time is indefinite. A continued working in bad air for somewhere between two weeks and two months depleted the system, and rendered it susceptible to a disease or unable to resist a disease, the time, place, or manner of contracting which is not shown by the evidence, nor is anything shown from which it can be determined.

Upon the second point: An accident must be unexpected. Bad air, continued from day to day, is expected. The doctor expected it to continue and advised a lay-off. Prouse knew it was bad, knew it was continuing, or he could not have told the doctor about it. Prouse continued to labor in the gas-contaminated air for some weeks, growing constantly worse, so his doctor testified, because of the bad air. This is no accident. Every definition or attempted definition of accident includes the element of unexpectedness.

As to the third point: Prouse did not die of the poisonous gas; he died of septicæmia or pyæmia, a disease caused by a definite infection by a germ, which has been isolated by the bacteriologists and classified. The only connection that the gas and bad air had with this disease, according to the undisputed testimony of the physicians, was that it depleted the patient's system and rendered him more susceptible or less resistant to it. They would not say that he would not have contracted the disease if he had not worked in the gas, or would not have died of it, nor do they express such opinions.

The judgment of the district court is affirmed.

Chief Justice Garrigues dissented without an opinion.

A strong dissenting opinion was rendered by Justice Scott, who said in part:

I must earnestly dissent from the opinion of the majority.

A consideration of the majority opinion will disclose that the conclusion is based solely upon the doctrine of assumed risk. Prouse went back to work after the gas was discovered, which act was his own fault, and by which he assumed the risk, and should not recover. Such is the reasoning, and the opinion not only ignores the command of the statute in this respect, but fails to comprehend the principle and purpose of the legislative acts of the character involved.

It is as certain as human testimony can make it, positive and medical expert, that Prouse died of a disease directly or indirectly due to

the inhalation of gas and foul air while working in the mine of the defendant company. It is held by the great weight of judicial authority that this constitutes an accident within the meaning of workmen's compensation laws, and entitles the workman or his dependents to an award of compensation. Simple justice and sound reason support this view.

WORKMEN'S COMPENSATION — INJURY — ACCIDENT — PROXIMATE CAUSE—HEART DISEASE CAUSED BY DUST LADEN AIR—*Carroll et al. v. Industrial Commission of Colorado et al.*, *Supreme Court of Colorado* (December 6, 1920), 195 *Pacific Reporter*, page 1097.—Carroll was employed in an alfalfa mill. His duties were to pitch hay in the hay shed, which was an inclosed building. The pitching of the hay was hard physical labor. The air in which Carroll had to work was heavily laden with dust stirred up by the handling of hay, alfalfa meal, and machinery. He had organic heart trouble. The strenuous exertion of his work in the dust-laden atmosphere brought on an attack of heart trouble causing his instant death. His widow and minor children brought proceedings for compensation but the industrial commission refused to grant an award on the ground that Carroll's death had not been the proximate result of an "accident." They appealed, but the district court affirmed the decision, and they appealed again. In reversing the decision and ordering the district court to order the industrial commission to grant the plaintiff an award the court said in part:

The proximate cause of the death of Joseph Carroll was the condition of the air in his place of employment, or the fact that it was dust laden. The question to be determined now takes this form: Under the foregoing facts, must it be held, as a matter of law, that the death was "accidentally sustained" or resulted from an "injury proximately caused by accident"?

The dust-laden condition of the air was the "proximate cause" of the death, because had it not been for such condition the death would not have occurred at the time. Such condition of the air which decedent was required to breathe brought on an attack of heart trouble, resulting in death. The dust-laden condition of the air was the cause, and the fatal attack of heart failure was the result. The result was unexpected and unintended, and therefore an "accident." The term "accident" is often used "to denote any unintended and unexpected loss or hurt apart from its cause." (1 C. J. 395.)

Our statute uses the expressions "personal injury or death accidentally sustained" and "injury proximately caused by accident" in providing for what injuries or deaths compensation shall be allowed. By the term "injury" is meant, not only an injury the means or cause of which is an accident, but also an injury which is itself an accident. The expressions above quoted are the equivalent of "injury by accident," which is frequently used in the decisions. The word "by" may mean "through the means, act, or instrumentality of." (9 C. J. 1109.) Therefore, "injury by accident" and "injury

caused by accident" are terms or expressions which can be used interchangeably.

For the reasons above indicated, we are of the opinion that the record shows that the death of Joseph Carroll resulted from an "injury proximately caused by accident," and that therefore his dependents are entitled to compensation.

The judgment of the district court is reversed, and the cause remanded with directions to the district court to remand the case to the industrial commission, with directions to enter an award allowing compensation to the claimants.

Reversed.

WORKMEN'S COMPENSATION—INJURY ARISING IN COURSE OF EMPLOYMENT—SCUFFLING—*Industrial Commission of Ohio v. Weigandt*, Supreme Court of Ohio (January 18, 1921), 130 *Northeastern Reporter*, page 38.—Weigandt was an employee of the Sidney Tool Co. He had arrived at his employer's plant and punched the time clock. While on his way to his work he passed two other employees who were playfully scuffling for the possession of a file. As Weigandt came near them the file flew off the handle and struck him in his left eye, destroying its sight. He brought proceedings for compensation under the workmen's compensation act, but his claim was rejected by the industrial commission on the ground that his injury did not arise in the course of his employment. He appealed to the court of common pleas, where his case was heard before a jury and a verdict rendered in his favor, which on appeal was affirmed by the court of appeals. The employers appealed to the Supreme Court of the State, which affirmed the judgment in favor of Weigandt. The opinion in part is as follows:

The decisive question is whether the facts, which are substantially undisputed, bring the case within the workmen's compensation law. Was the defendant in error injured "in the course of his employment," within its meaning?

There has been divergence of judicial decision concerning the scope of the quoted phrase and its application to different circumstances. The Ohio law was passed pursuant to section 35, article 2 of the constitution, adopted in September, 1912. The act now in force, under which defendant in error claims (103 O. L. 72-92), was passed pursuant to the grant of power contained in the above provision of the constitution, and provides (sec. 1465-68, General Code) for compensation to "every employee * * * who is injured * * * in the course of employment."

It will be noted that the language of the amended section of the constitution is "for * * * injuries * * * occasioned in the course of such workmen's employment." The language of the statute is "every employee * * * who is injured * * * in the course of employment." Of course the legislature would not have the power to make any broader provision than the constitution authorized it to make.

The rule is familiar that, where the language will permit, such construction will be given to a statute as will not render it obnoxious to the State or Federal Constitution. We think it clear that the framers of the constitution intended to provide that the employment should have some causal connection, directly or indirectly, with the injury, either through its activities, its conditions, or its environments. We are likewise impressed that this law is intended to provide an inexpensive, humane remedy as a substitute for outworn and unsatisfactory methods, and it should be liberally construed in favor of employees. Measured by these considerations, how stands this case? Were the employer and his enterprise in the line of causation? We think they were. The claimant was in the plant of his employer, proceeding to his machine in full compliance with his duty, when he was injured. At the time he was engaged both parties knew and understood the circumstances and conditions necessarily a part of the factory life.

In this case the scuffle for the file between the other employees was a thing not at all unlikely to occur. It was an event of the sort that is of frequent occurrence between workmen. It must be remembered that the claim or award is not based on any neglect or fault of the employer or of any of his employees. The injury in this case was caused by an occurrence occasioned in the environment, and it was an injury "occasioned in the course of the employment" and because of the employment.

For the reasons given, the judgment in this case will be affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACCIDENT—EVIDENCE—EPILEPTIC DROWNED IN WATER TANK—*Miller et al. v. Beil et al.*, Appellate Court of Indiana (January 28, 1921), 129 *Northeastern Reporter*, page 493.—Miller and Young were engaged in the business of threshing grain and used steam power to operate their machinery. Carl Beil was employed by them to haul water from a near-by reservoir in a water tank drawn by horses. Beil was known to be subject to epileptic fits. While filling the tank from the reservoir with a hose Beil fell into the opening in the tank and was drowned. It was not known exactly what caused Beil to fall into the tank; however, the industrial board held that Beil died as the result of an accident arising out of and in the course of the employment and allowed an award of compensation. The employers appealed on the ground that Beil's death was not the result of an accident. In affirming the award the court said in part:

Appellants have assigned as error that the findings and award are not sustained by sufficient evidence, and are contrary to law. It is urged by appellants that there is no evidence to show that the death of the employee was the result of an injury arising out of his employment; but that "from all the evidence in the case it appears conclusively that the death was the result of a disease to which de-

ceased was subject"; and that under clause (d) of section 76 of the workmen's compensation act (Acts 1915, p. 416) the dependents are not entitled to compensation.

There is no direct evidence that appellee's decedent fell in the tank as a result of an epileptic fit, and we can not say that the industrial board found that appellee's decedent, at the time of his death, fell as a result of the disease of epilepsy. There is authority, however, which would support the award even if the board had so found. (*Carroll v. What Cheer Stables Co.*, 38 R. I., 421, 96 Atl. 208; *Vulcan Detinning Co. v. Industrial Commission*, 295 Ill. 141, 128 N. E. 917.) The theory of the court in each of these decisions is that an epileptic fit might not have caused injury or death, except for the fact that the work of the employee required him, at the time, to be at the particular place where he fell. It is stated by the court in the *Wicks* case, above cited, that—

"An accident none the less arises out of the employment because its remote cause is to be found in the employee's physical condition."

The question as to whether or not the death of the employee was the result of an accident arising out of his employment was a question of fact for the industrial board. (*American Hominy Co. v. Davis*, 126 N. E. 703.) There was some evidence to support the finding.

Judgment affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ACCIDENTAL SHOOTING BY EMPLOYER—*General Accident, Fire and Life Assurance Corporation et al. v. Industrial Accident Commission et al.*, *Supreme Court of California* (August 15, 1921), *200 Pacific Reporter*, page 419.—Samuel Shrout brought proceedings under the workmen's compensation act because of injuries received while in the employment of Fred Barr. He was opposed by his employer and the insurance carrier. Shrout was employed as an automobile tire repairer by Barr in the latter's garage. During the day upon which Shrout was injured, two strangers drove their automobile into Barr's garage and requested him to supply them with gasoline. A dispute arose as to the method of supply. One of the strangers in an attempted assault on Barr was shot at by Barr. The bullet missed the stranger but hit Shrout, who was working at the other end of the garage, and who was not taking part in the altercation. Shrout was awarded compensation and the defendants took the decision of the commission to the supreme court for review. That court affirmed the award, saying through Judge Shurtleff:

That the accident occurred in the course of the employment is obvious and does not admit of discussion. It happened while Shrout was actually engaged in performing work usual to and included in his employment.

The serious question presented, and which is debatable, is: Was the injury suffered by Shrout one "arising out of the employment"?

The act does not define this phrase, and no court has attempted to do so. It seems to be universally conceded that no comprehensive definition or unerring guide can be formulated which will determine with certainty the accidents embraced within it, and that therefore each case must be decided conformably to the specific facts it presents.

In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline. That it ultimately resulted in a personal difference, or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. That would, indeed, be a severe rule to apply in a case where, as here, the injured employee was blameless, and at the time he was injured was in his accustomed place, pursuing his usual employment in the business of his employer.

It is equally true that the fact that the injury to Shrout was not an anticipated one, nor peculiar to the employment in which he was then engaged, does not defeat his claim to compensation if otherwise it is within the provisions of the act.

We think it can be said that Shrout was injured, not merely because he happened to be in the garage at the time of the shooting, but because he was there, regularly employed, and hence exposed to all the dangers which might arise in the conduct and transaction of the business of his employer, including the reasonable protection of the latter's property and right to transact his business in an orderly manner.

When Barr began shooting, he voluntarily exposed Shrout as well as all other employees to the danger of being shot, and the fact that the injury which resulted was unintentional and purely accidental does not, in our opinion, prevent Shrout from recovering.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT BY ASSISTANT FOREMAN—*Stasmos v. State Industrial Commission et al.*, Supreme Court of Oklahoma (February 8, 1921), 195 Pacific Reporter, page 762.—Adolf Stasmos was employed as a miner by the Rock Island Coal Mining Co. The company decided to shut down the mine, and all the miners were notified to this effect. Stasmos along with the other miners thereupon left his work and proceeded through the various entries and passageways to the foot of the shaft, there to take the cage which would take them to the surface. When Stasmos arrived at the foot of the shaft the cage was not there. He asked Woods, an assistant mine foreman, where the cage was, as he wanted to go out of the mine. Woods became angry and applied an ugly epithet to him adding that he might go up the air shaft. Upon Stasmos resenting the insult, Woods picked up a 2 by 4 scantling and struck him upon the head, knocking him unconscious and frac-

turing his skull. *Stamos*, who was completely disabled for 6 weeks as the result of his injuries, brought proceedings for compensation under the workmen's compensation law, but the industrial commission refused to allow him an award, declaring that his injuries were not the result of an "accidental personal injury, arising out of and in the course of the employment." Upon the employee's appeal the decision was reversed by the supreme court and the case remanded to the industrial commission.

After stating the facts, the court quoted the section of the law declaring the employer's obligation to pay compensation for injuries, and continued:

A casual reading of this section makes it fairly obvious that the petitioner's right to recover depends upon an affirmative answer to two questions: (1) Were his disabilities the result of actual personal injuries? (2) Did they arise out of and in the course of his employment? It seems clear to us, in view of the rule of construction many times announced by this and other courts, that the workmen's compensation law should be construed fairly, indeed, liberally, in favor of the injured workman, that both of these questions must be answered in the affirmative.

It is now well settled in these workmen's compensation cases that the fact that an injury is the result of the willful or criminal assault of another does not prevent the injury from being accidental.

Accident in the legal signification is difficult to define. It is not a technical legal term with a clearly defined meaning and is used in more senses than one. [One definition is:] An event which under the circumstances is unusual and unexpected by the person to whom it happens. Under this definition we think the injury was "accidental" within the meaning of the statute. It was sudden and unlooked for, and the purpose of the act is to insure the workmen at the expense of their employers against personal injury not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment.

It seems equally clear to us that the facts in this case show that petitioner's injury arose out of and in the course of his employment. As we have seen from the brief statement of the case hereinbefore set out, the petitioner was in the act of leaving the mine following the usual course of exit from his working place to the foot of the shaft for the purpose of taking the cage to the top. Tom Woods, the assistant foreman, was there directing the men, and while the test of liability under the statute is not the dereliction of the master, or that of his representative acting within the scope of his authority, it seems to us that it was entirely proper for the petitioner to complain to the mine foreman concerning the delay in the arrival of the cage.

It is the decided weight of authority in Great Britain and the United States that an assault by a third party, or an assault of the employer arising out of and in the course of the employment, resulting in an injury and disability, is such an injury as comes within the workmen's compensation law (*L. R. A. 1917B, 112, notes; Willis v. State Industrial Commission, 78 Okl. 216, 190 Pac. 92; Willis v.*

Pilot Butte Mining Co. (Mont.), 100 Pac. 124, and many other cases).

If we apply this test to the case at bar, it is obvious that the State industrial commission erred in denying the petitioner compensation for his disabilities.

For the reasons stated, the judgment of the State industrial commission is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

All the justices concur.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT BY FELLOW EMPLOYEE—DISPUTE OVER WORK—*Payne, Director General of Railroads, v. Wall, Appellate Court of Indiana (November 16, 1921), 132 Northeastern Reporter, page 707.*—Henry Wall was an employee of Payne. His work consisted of shoveling coal from a railroad car into certain bents for use in connection with the operation of a railroad. There were three shifts of eight hours each. Wall was preceded by one Durham and was relieved by one Lape at 2 p. m. On the day in question a controversy arose when Lape was going on duty and while Wall was still in the car, as to whether each was doing his full share of the work. Wall left the car and was filling in a card pertaining to the work when the controversy was reopened. Both became very angry and threats were made. Wall started to leave the premises, and while going down a near-by stairway he was struck by a lump of coal thrown by Lape and severely injured. An award of compensation was made. Defendant appealed to the appellate court, contending that the award was based on a mere conclusion and not the finding of an ultimate fact, and that the evidence was insufficient to sustain it. However, the appellate court sustained the award, on the authority of *Mueller v. Klingman*, 125 N. E. 464 (Bul. No. 290, p. 406).

The following is quoted from the case cited as setting forth the rule followed by the court:

When the disagreement arises out of the employer's work in which two or more are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ASSAULT BY FOREMAN—*Knocks v. Metal Package Corporation et al., Court of Appeals of New York (April 19, 1921), 121 Northeastern Reporter, page 741.*—William George Knocks brought proceedings for compensation for injuries, under the workmen's compensation act, against his employer the defendant

company and the insurance carrier. The claimant was an oiler in the plant of the defendant company on June 11, 1919. On this date a seaming machine was running defectively because a superabundance of oil had been supplied it. The foreman of the plant noticed the machine, called the plaintiff and told him that he was responsible for the machine's defective operation. Answering the accusation the claimant called his foreman a liar and immediately his foreman struck plaintiff over the left eye. The blow resulted in the total loss of useful vision of the eye. The industrial commission found that the injuries sustained by the claimant were accidental and arose out of and in the course of his employment. The case was brought up to the appellate division which reversed the award, but upon appeal to the court of appeals the award was affirmed, Judge Chase saying:

Each seems, while performing his work and in discussing the employer's business, to have been equally hasty in becoming angry toward the other.

The claimant's use of an irritating word in making his denial did not, however, justify either in law or in fact an assault upon him by the foreman. The foreman's duty as such to exercise reasonable discipline over the employees of the factory made possible a lack of discretion in performing such duty. The assault by the foreman was incidental to his employment as such. It grew out of his performance of his duty as foreman for the employer. It can not be said as a matter of law or fact that the foreman who up to the moment of the assault was properly engaged in the performance of his duty to his employer at that moment abandoned his duty and indulged in the assault as an individual act.

The employer should be responsible for an excitable and violent foreman in the prosecution of his duties as such, at least until there is sufficient interruption in the performance of such duties as to justify the conclusion that the foreman had abandoned his employment and that the assault was an independent and individual act, as distinguished from acts within the terms of his employment. There was no intervening time between the acts and words of the assailed and the injury in this case.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—BURNS RECEIVED WHILE EXTINGUISHING FIRE—*Associated Employers' Reciprocal et al. v. State Industrial Commission et al.*, *Supreme Court of Oklahoma* (July 12, 1921), *200 Pacific Reporter*, page 174.—The claimant, Basil D. McClain, was employed by E. L. Robinson as a roustabout on an oil and gas lease. On February 18, 1920, the claimant had been engaged in pulling rods from well No. 10. At noon he stopped work, ate his midday lunch, and sat down to wait for other employees to bring him

some tools, so that he could continue his work. While waiting he dozed off to sleep. When he awakened he discovered that a fire had developed in the grass near the well, and in an attempt to extinguish the same he was badly burned. He was awarded compensation during disability by the State industrial commission. This was an original action commenced in the supreme court, seeking to reverse the award upon the ground that the award was contrary to the evidence and the law. Judge Kennamar wrote the opinion of the court affirming the award, which is in part as follows:

Counsel for the petitioners in their brief filed herein contend that the claimant is not entitled to compensation for the reason that the claimant testified that his duties as roustabout consisted of fixing the lines, pulling rods, fixing and starting the engine, and that his own testimony shows that he was not acting in the course of his duties or employment when injured. The substance of the contention is that it was none of the duties of the claimant under his employment to fight fire. A casual statement of the contention demonstrates the absurdity of the contention. While it is true that he was not employed to fight fire, it is obvious that he would be an unworthy servant if he stood idly by and watched his employer's property destroyed by fire without making any effort to protect it.

It is undisputed in this cause that the claimant was on the lease, where his duties required him to be; that the injuries of the claimant resulted from trying to extinguish a fire that had accidentally developed on the premises; and no contention is made that the injury is the result of the willful or intentional conduct of the claimant, and we have no hesitancy in saying that upon the facts as disclosed by this record the award was properly made.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—ELECTROCUTION WHILE GOING FROM WORK—*Kowalek et al. v. New York Consol. R. Co., Court of Appeals of New York (November 16, 1920), 128 Northeastern Reporter, page 888.*—Max Gottesfeld was employed by the defendant company as a flagman on its elevated electric railway trains. At times, as overtime work, he performed service as a train guard. On the date of his injuries he completed his service as a flagman and reported to the train dispatcher for overtime work and was assigned as a guard on a train. When he completed one trip he again reported to the train dispatcher, but did not receive more work. He thereupon proceeded to go to the passenger platform to take a train to his home. The company permitted its employees to ride to and from work on its trains free of charge. About 10 minutes after he left the train dispatcher his dead body was found between the third rail and the running rail of the tracks. Ida Kowalek and another brought proceedings for compensation for his death under the workmen's com-

pensation law and were granted an award. Upon appeal the appellate division unanimously affirmed the award. (170 N. Y. Supp. 637.) The employer appealed again, and the decision was reversed and the award annulled. The opinion of the court of appeals is in part as follows:

The death of Gottesfeld resulted from an accidental injury. In case the injury arose out of and in the course of the employment, the determination of the industrial commission is right. We are thus brought to the question whether or not, under the facts as found, the injury arose out of and in the course of the employment. The decedent went, at the termination of his actual work for the day, from the office of the train dispatcher upon the passenger platform at the station. It is a general rule that if an employee is injured on the premises of the employer in going, with reasonable dispatch and method, to or from actual performance of the specific duties of the employment, by a way provided by the employer, or reasonably used by the employee, compensation must be awarded. The going to and from the actual work and the risk involved in it are reasonably incidental to the employment. The rule, however, is not applicable to the facts in the instant case. The decedent went and was upon the passenger platform with the intention and for the purpose of taking a passenger train from it to his home. The company permitted him to ride to and from his work upon the cars or trains without charge. The contract of employment did not obligate the company to transport him. In enjoying or exercising the permission he adopted his own will and choice and served his own convenience. The company was indifferent as to the way or means by which he reached the place where the day's work began. It did not contract that he should ride to and from work, or pay him for the time through which he was riding.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING FROM WORK—DEATH WHILE BOARDING TRAIN—*Fisher v. Tidewater Building Co., Supreme Court of New Jersey (June 7, 1921), 114 Atlantic Reporter, page 150.*—Abraham Fisher, an employee of the defendant company, quit work as usual on September 10, 1918, and went to the railroad station to board a train on his way to his home in Camden. While attempting to board the train he was struck by a passing train and killed. The company supplied transportation to its employees. The workmen's compensation bureau made an award of compensation to Annie Fisher. The common pleas court set the award aside, but on an appeal to the Supreme Court of New Jersey the court reversed the judgment of the common pleas and affirmed the award. The court followed the rule which is as follows:

Where the workman is employed to work at a certain place, and as a part of his contract of employment there is an agreement that his employer shall furnish him free transportation to or from this work,

the period of services continues during the time of transportation, and if an injury occurs during the course of transportation, it is held to have arisen out of and in the course of the employment.

The court said that the injury in this case happened while in the act of boarding the train and not while being transported, but that that was a difference without a legal distinction.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—GOING TO WORK—MINER KILLED BY TRAIN—*Western Coal & Mining Co. v. Industrial Commission et al., Supreme Court of Illinois (February 15, 1921), 129 Northeastern Reporter, page 779.*—Frank Sergi was employed by the Western Coal & Mining Co. and lived in the town of Bush. While walking along the railroad track on his way to work and after he had come upon his employer's premises he was run down by a train and killed. His wife brought proceedings for compensation and was granted an award by the industrial commission. The employer appealed, contending that inasmuch as Sergi had not entered upon his duties but was only on his way to work, although on the premises of the employer, his death was not the result of an accident arising out of and in the course of his employment. The circuit court affirmed the award of the industrial commission, and upon appeal the award was again affirmed by the supreme court. The decision is in part as follows:

The going to work was necessarily incident of the decedent's contract of employment and was necessary to its performance. He had arrived on the premises of his employer and was engaged in the course of his employment in going toward the washhouse preparatory to entering the mine. There is reason to suppose that the accident by which he lost his life was a risk growing out of the nature of his employment. The premises of the employer, where the deceased had to pass in going to his work, were occupied by railroad tracks on which trains of cars were operated. The causal connection between this condition and the resulting injury is apparent. The deceased might reasonably be crossing the track or walking along it going to the washhouse to change his clothes before going to work, and in so doing might reasonably be regarded as doing something incidental to his employment. He was not compelled to use this track to get to the washhouse, but he with all the other men were permitted to use it, and the railroad tracks had apparently long been used habitually for walking to and from the mine—in fact, from the commencement of its operation. In an action at common law such use of the tracks might have constituted contributory negligence, but contributory negligence is not a bar to an award under the workmen's compensation act.

The transportation was not an incident of the employment. The employment continues throughout the transportation in case the par-

ties by their contract of hiring positively or inferentially so stipulate. If they do not so stipulate, the employee, when he enters into the process of the transportation, is not under the hiring or control or in the employment of the employer, and is not the employee. (*Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267.)

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY—*Federal Mutual Liability Insurance Co. v. Industrial Accident Commission of California et al.*, *Supreme Court of California* (November 4, 1921), 701 *Pacific Reporter*, page 920.—Gus Farsais was in the employ of the San Joaquin Packing Co., and at the time in question was engaged in sweeping the premises on which other employees were putting grapes into a machine as a part of their duty. While Farsais was at work, an employee threw some grapes at another, and, his aim being bad, he missed the other person and one of the grapes hit Farsais in the eye, thereby causing the injury complained of. The industrial accident commission granted an award of compensation. The employer and insurer took the cause to the supreme court where the award was annulled for the reason that the injury did not occur in the course of and arise out of his employment. This case was distinguished from *General Accident Fire and Life Assurance Corporation v. Industrial Accident Commission*, 200 Pac. 419 (see page 298). In a per curiam decision the court said:

There was nothing in the nature of the employment in which any workmen present were engaged which required any of them to throw grapes at another. The act was either a playful or malicious act of one employee toward another, having no connection whatever with the work in which he was engaged.

The argument is that in every establishment where a number of workmen are required to be near to each other in the course of their employment for hours at a time "some frolicking is inevitable. It occurs in every plant. The industry, by bringing workmen together in numbers exposes its workmen to this hazard, which is just as much a hazard incident to the employment and 'arising out of the employment' as the danger of slipping upon floors, colliding with other workmen, falling down stairs," and the like.

Although the line of reasoning has support in the decision of some of the other States, it is contrary to our own, and it seems to us to be an unwarranted extension of the meaning of the controlling language of the constitution and of the statute defining the character of injuries that are to be compensated out of the earnings of the business in which they occur.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HORSEPLAY—INJURY BY AIR HOSE—*Socha v. Cudahy Packing Co.*, *Supreme Court of Nebraska* (February 23,

1921), 181 *Northwestern Reporter*, page 706.—Albert Socha was employed by the Cudahy Packing Co. in one of its plants. He worked in a room in which meat was cooked and trimmed. The cooked meat was dumped upon a table, and it was Socha's duty to push it across this table to the trimmers on the other side. This work at times required a stooping position. While engaged at this work a fellow-employee playfully applied the compressed air hose against his person. The assault caused a rupture of the intestines resulting in septicæmia. Socha died from his injuries, and his widow brought action for and recovered an award of compensation under the workmen's compensation act. The employer admitted that the injuries arose in the course of employment, but denied that they arose out of the employment, and appealed from the decision. The judgment and award were affirmed, and a previous Nebraska case, *Pierce v. Boyer-Van Kuran Lumber Co.*, 99 Neb. 321, 156 N. W. 509 (Bul. No. 224, p. 309), refusing compensation to an employee who was injured while "skylarking" was overruled. The opinion is in part as follows:

The very fact that injuries of this nature, resulting from the sportive use of compressed air under like circumstances, have been before the courts in a number of cases is worthy of note. Such a combination of elements seems to present a situation attractive and suggestive to a youthful, or to a rude and untutored, mind having no knowledge of the serious or fatal consequences liable to result. This combination of elements may arise out of the nature of the occupation. The liability to perform such acts by the employees was known to the employer, since, as we have seen, warning notices in a language foreign to that of the workmen had been placed upon the bulletin board; and the fact that the men had previously played with the air hose, but not in this manner, was known to the foreman, Schultze, Socha's immediate superior. Though negligence is not a necessary element in an award under the act, such knowledge affords light upon the question whether the injury may reasonably be said to arise out of the employment. If a person familiar with the whole situation could reasonably contemplate that such an accident might result from the peculiar nature and circumstances of the employment, and the nature of the place where the injured man was required to work, then it may reasonably be said to arise out of it.

We are of the opinion that, under all the facts, such a happening might reasonably have been foreseen, and, in fact, was anticipated by the employer in this case, and that the accident arose out of the employment. So far as the case of *Pierce v. Boyer-Van Kuran Lumber Co.*, supra, is in conflict with the principles herein announced, it is overruled.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—HOTEL FIRE—EXTRATERRITORIALITY—*Stansberry et al. v. Monitor Stove Co.*, *Supreme Court of Minnesota* (July 15, 1921), 183 *Northwestern Reporter*, page 977.—Frank

J. Stansberry was a traveling salesman in the employ of Monitor Stove Co. He was employed by the Minneapolis branch and worked under its direction. While in the Frederic Hotel at Grand Forks, N. Dak., a fire broke out at night and Stansberry was killed while attempting to escape. His widow and minor children made a claim for compensation under the Minnesota workmen's compensation act. The claim was allowed, and the defendant appealed to the supreme court. Judge Hallam wrote the opinion affirming the award, in which he declared that "for the purposes of this case the situation is the same as though the head office, instead of a branch, were located in Minnesota. The business in which Stansberry was employed had a situs in this State." In referring to the fact that Stansberry was killed without the State, he said that the business was localized in Minnesota and that the Minnesota "compensation act applies and compensates for injuries in a service incident to its conduct, sustained beyond the borders of the State." On the question as to whether the death was due to an "accident arising out of and in the course of employment" it was stated that "as he was obliged to stop at hotels in the course of his travels and to furnish the Minneapolis office with a list of the cities on his itinerary and the names of the hotels at which he was to stop and how long he was to be at each hotel, and it was his duty to carry out such schedule," it was an injury within the terms of the law.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—INJURY AFTER WORKING HOURS—ACT OF STRIKER—*Rourke's Case, Supreme Judicial Court of Massachusetts (January 30, 1920), 129 Northeastern Reporter, page 603.*—A strike was in progress at the Holyoke Machine Co. in Worcester, Mass., and the company advertised in a Boston newspaper for other workmen. Robert Rourke, in answer to the advertisement, applied for a job as an iron molder and was employed. He was aware at the time that a strike was in progress at the employer's factory. Mr. White, the company's superintendent, assured Rourke that he would be protected from injury; that he would be thoroughly taken care of; and that he, White, would accompany him to his home in the evenings. Rourke went to work for the Holyoke Machine Co. and at 5 o'clock of the first day he dropped his tools, changed his street clothes, rang in his time, and went out on the street with 12 other workmen in the company of Mr. White, and proceeded to the lunch room where they were to eat. On the way to the lunch room the party was accosted by pickets and strikers and Rourke was injured in the scuffle that ensued. The industrial accident board allowed him compensa-

tion for the injuries he thus sustained, and on appeal this decision was upheld by the superior court. The employers' insurer again appealed and the decision was reversed. The opinion of the supreme court is, in part, as follows:

We can not agree with the reasoning or with the result arrived at by the board. Unless the incidents of employment be exceptional the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when after the interval of rest the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. (*Langley v. Boston Elev. Ry.*, 223 Mass. 492, 496, 112 N. E. 79.)

In the case at bar the day's work of the claimant came to an end when he dropped his tools, rang in his time, left the place of his employment, and entered upon the public highway. While not conclusive in the determination of the incidents of the employment, it is worthy of consideration that thereafter the employer under the contract of employment had no legal right to command the services of the claimant, and he was under no duty of obedience thereto.

As bearing upon the question of the incidents of the employment, we can perceive no resemblance between a contract of protection against criminal acts of third persons who may seek to coerce a hostile employer to grant their demands through the intimidation of and assaults upon his servants and a contract of employment which has regard to conditions and circumstances which are the natural and not abnormal concomitants of the work to be performed under the contract; for example, agreements for transportation, when the place of work is at a distance.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—LUNCH-HOUR ACCIDENTS—INJURY IN ELEVATOR—SUIT FOR DAMAGES—*Martin v. Metropolitan Life Ins. Co.*, Supreme Court of New York, Appellate Division (July 1, 1921), 189 New York Supplement, page 467.—Catherine Martin was employed by the defendant company on the eleventh floor of its building in New York City. Elevator service was maintained for the use of employees and others. Upon the twelfth floor there was a luncheon, furnished free to all the employees. Thirty-five minutes were allowed for a lunch period. During this 35 minutes, on the day in question, plaintiff walked to the twelfth floor, procured a lunch, and started down the elevator. By reason of the negligence of the operator of the elevator, as she was about to get out, the elevator started up and caused her injuries for which she now brings an action for damages. Plaintiff obtained a verdict in the supreme court, and the defendant appealed to the appellate division. That court reversed the order of the trial court and dismissed the complaint because the

workmen's compensation law was held to cover the plaintiff, and therefore she could not recover in an action for negligence. Judge Smith stated in his opinion that the defendant company was covered by the workmen's compensation act as it employed more than four people engaged in a hazardous employment, and therefore all of the employees were brought within the protection of the act; that "while the statute requires that in order to come within the act the injury must arise out of and in the course of the employment, it necessarily covers any act done as incidental to that employment; that the defendant was bound to furnish a safe entrance and a safe exit at any time that an employee's service was not required."

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—NIGHT WATCHMAN KILLED BY POLICEMAN—*Heidemann v. American District Telegraph Co., Court of Appeals of New York (March 1, 1921), 130 Northeastern Reporter, page 302.*—Heidemann was employed by the American District Telegraph Co. as a night watchman to patrol the streets in a given section of Brooklyn. While engaged at his duties he was accidentally shot and killed by a policeman in pursuit of burglars. Upon application his widow was awarded compensation under the workmen's compensation law, but on appeal the award was reversed by the appellate division of the supreme court and the widow appealed. In reversing the latter judgment and reinstating the award the court of appeals said in part:

An award under the workmen's compensation law, in favor of his widow, was reversed at the appellate division on the ground that death, though occurring "in the course of employment," did not arise "out of" employment within the meaning of the statute.

We reach a different conclusion. Heidemann's duties involved exposure to something more than the ordinary perils of the street, with its collisions, its pitfalls, and the like. His calling multiplied the chance that he would be near when trouble came, and in multiplying the chance increased exposure to the risk. He was brought by the conditions of his work "within the zone of special danger."

The sudden brawl, the "chance medley" are dangers of the street, confronting with steady menace the men who watch while others sleep. Casual and irregular is the risk of the belated traveler, hurrying to his home. Constant, through long hours, was the risk for Heidemann, charged with a duty to seek, where others were free to shun. The difference is no less real, because a difference of degree. The night, too, has its own hazards, for watchman and for wayfarer. Death came to Heidemann in the performance of his duty, face to face with a peril to which the summons of that duty called him.

The order of the appellate division should be reversed, and the award confirmed, with costs, in the appellate division and in this court.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—PERSONAL ERRAND—*Clark v. Voorhees et al.*, *Court of Appeals of New York* (April 19, 1921), 131 *North-eastern Reporter*, page 553.—John C. Clark prior to his death was employed as a salesman by William Voorhees, a wholesale dealer in fruit and vegetables. Early in the morning of May 30, 1918, Clark left his employer's place of business for the purpose of going to a restaurant between 400 and 500 feet away to get a cup of coffee. While in a public street, going to such restaurant, and between 250 and 300 feet from the employer's place of business, he was struck by a motor truck and sustained injuries from which he died shortly thereafter. Clark's widow was awarded compensation. The defendants appealed, but the appellate division affirmed the award of the State industrial commission. The defendants then appealed to the court of appeals, which reversed the judgment and dismissed the claim on the ground that the injury did not arise out of and in the course of employment. In deciding the point Judge McLaughlin said:

When the decedent left the employer's place of business for the purpose stated, and while walking in the street, he was not doing anything which he was employed to do; nor was it anything incident to or connected with the employment. It was no more a part of his employment than it would have been had he started for his own home for the purpose of getting breakfast. The business of the employer ended when he got into the street.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VIOLATION OF EMPLOYER'S RULES—WORK FOR FELLOW EMPLOYEE—*Hinton Laundry Co. v. DeLozier*, *Supreme Court of Tennessee* (October 25, 1920), 225 *Southwestern Reporter*, page 1037.—The Hinton Laundry Co. permitted its employees to have their personal laundry done free of charge on Monday of each week. This privilege was not allowed on any other day. Florence DeLozier was injured while pressing a skirt for another employee after regular working hours on a Friday. She brought suit for compensation under the workmen's compensation act and recovered an award of \$5 per week for 75 weeks. The employer appealed, claiming that the injury did not "arise out of and in the course of the employment," so as to come within the compensation act. The supreme court took the employer's view of the case and reversed the decision. The opinion is in part as follows:

The question presented for determination by the court is whether the service that was being performed by the petitioner was one contemplated by the employment, and one in which the employer had an interest, or whether it was simply a voluntary service being per-

formed by petitioner as a matter of accommodation to one of her fellow employees, and therefore was not in the course of her employment.

Her act of pressing the skirt for Margaret Bowling was purely a voluntary one, and was being done by the petitioner as a matter of accommodation to her fellow employee. The evidence is uncontradicted that the defendant had no interest whatever in the service which was being performed by the petitioner at the time of her injury.

The petitioner being injured in the manner and circumstances herein stated, she can not recover of the defendant, because her injury did not arise out of her employment, or while performing any service for the defendant, or in any service in which it was interested. Upon the other hand, the uncontradicted proof shows that the service which petitioner undertook to perform, and which resulted in her injury, was purely voluntary, and was being performed for the accommodation of a fellow employee.

We do not think the workmen's compensation act covers such injury. It results that the judgment of the court below will be reversed, and the suit dismissed, with costs.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—VIOLATION OF LAW—*Union Colliery Co. v. Industrial Commission et al.*, *Supreme Court of Illinois* (June 22, 1921), *132 Northeastern Reporter*, page 200.—Leon Harnetiaux was employed as top cager on the night shift at the coal mine of the Union Colliery Co. On May 8, 1919, he was called from his work on the tippie to help load props which were to be carried into the mine. In returning to the tippie he usually ascended a flight of stairs, but this night, as he had done on several previous occasions, he stopped a car of coal at the mouth of the mine and got on the cage, in violation of law, to ride to the top of the tippie in order to be at his place in time to dump the car. Just before reaching the top of the tippie he was caught in some unknown manner and so injured that he died before the parties present could get to him. The widow and children of deceased were awarded compensation under the workmen's compensation act. Upon appeal to the circuit court the record was quashed, but upon appeal to the supreme court the award was affirmed. This court held that the injury arose out of and was in the course of his employment, and the fact that he was violating the mining act by riding on the cage was at most contributory negligence and not a departure from the scope of his employment. The court quoted from an English decision as follows:

The sole question in this cause is whether the man was outside the sphere of his employment. It does not matter in the slightest degree how many orders he disobeys or how bad his conduct may have been if he was still acting within the sphere of his employment and in the course of it and if the accident arose out of it.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—"COMMON HAZARDS"—EMPLOYEE NOT AT HEARING—EVIDENCE—*Empire Health & Accident Insurance Co. v. Purcell*, *Appellate Court of Indiana* (November 2, 1921), *132 Northeastern Reporter*, page 664.—On December 7, 1920, William F. Purcell was in the employ of the Empire Health & Accident Insurance Co. as an insurance solicitor and collector of premiums at an average weekly wage exceeding \$24. About 5 p. m. on said day in the course of his employment he called at the home of one Williams, for the purpose of collecting a premium from Williams on a policy of his employer. After making the collection from Williams, Purcell asked one Charlie Wood, who lived with Williams, whether he could pay the premiums which he owed the company. Wood replied that he could not pay anything as he had been sick and not able to work. Wood and a friend named Mason left the house with Purcell. As they were leaving, Wood and Purcell became engaged in conversation relative to a claim Wood had against the insurance company. About five minutes later Purcell came back into the house; his skull was fractured and his brain lacerated and torn by bone fragments which had been driven into it. He was unable to give any account of what had taken place, became unconscious, and ever since that time has been unable to perform any labor and is only at times seemingly rational. Wood and Mason disappeared in the darkness without waiting to get their suppers, and have not been seen since that time. No one was able to testify whether the injured man was struck or fell.

On a claim for compensation, an award was made by the industrial board. Purcell did not appear at the hearing in the case, and the company contended that his absence raised a presumption that his testimony would have been adverse to his interests, if it had been given; also that there was no evidence on which to base an award. The court overruled the first contention, saying that the physician's testimony as to the claimant's physical condition was a sufficient explanation of his absence. The appeal was determined in the appellee's favor. The following is quoted from the opinion by Judge McMahan:

The words "by accident arising out of and in the course of the employment," as used in workmen's compensation acts, should be given a liberal construction in order that the humane purpose of their enactment may be realized. An accident is said to arise out of the employment when there is a causal connection between it and the performance of some service of the employment. The causal relation is established when the accident is shown to have arisen out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering into the employment, or when the evidence shows an incidental connection be-

tween the conditions under which the employee works and his resulting injury.

In the instant case the duties of the appellee required him to travel from place to place for the purpose of soliciting insurance and making collections. The localities to which he was required to go in the course of the business constituted the place or places of his employment. It was by reason of his employment that he was at the place where he was injured. He was where his employment took him. The hazard of being injured as the result of an attempt to collect money due appellant, the hazard of being assaulted or robbed on account of his business, as well as the hazard of being injured by reason of accidentally falling while in the course of his employment, were all hazards incidental to his employment. This proposition is not changed by the fact that the public generally in that vicinity was exposed to the same hazards. Appellee's employment as a collector of money exposed him to increased hazards generally. The evidence warrants the inference that his injury resulted from conditions brought about by reason of his employment and because he was in that locality at the time in question.

While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment.

When one so situated and employed as was appellee receives an injury by reason of the hazards and conditions surrounding him, it is ordinarily a question of fact as to whether the employment of such persons was or was not a contributing proximate cause of the injury. We are of the opinion that the industrial board was justified in drawing the inference that appellee's injury arose out of his employment.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—DEATH FROM LIGHTNING—"COMMON HAZARD"—*Hassell Iron Works Co. et al. v. Industrial Commission, Supreme Court of Colorado (November 7, 1921), 201 Pacific Reporter, page 894.*—John Hrutkai, was an oxyacetylene welder in the employ of the plaintiff company. His employment required him to use several tools, which he carried on his person. On the day in question he was working on an iron bridge that had been wrecked in a flood, one end of which was in the water and the other end was on an island near by. The ground was damp, and an electrical storm was in progress. He was struck by lightning, death resulting instantly. The tools he carried on his clothes were over the spot on his body where burns were found. The industrial commission made an award of compensation to decedent's widow and minor children. The employer and insurer brought proceedings in the district court to set aside the award. Judgment favored the defendants, and an appeal was taken to the supreme court where the award was again affirmed.

The question before the court was, on the facts stated, Did the accident of being struck by lightning arise out of the employment? It was assumed on both sides that a correct statement of the law relevant to this matter is found in 1 Honnold on Workmen's Compensation, 428, as follows:

The employer can not ordinarily be held liable for compensation for disability from sunstroke, freezing, and lightning. These are forces of nature which he can not foresee and prevent, and the employee is ordinarily no more subject to injury from such sources than others. But where the work and the method of doing the work exposes the employee to the forces of nature to a greater extent than he would be if not so engaged the industry increased the danger from such forces, and the employer is liable.

The plaintiffs contended that there was no evidence that deceased was exposed to the danger of being struck by lightning to a greater extent than he would be if not engaged in his employment. One expert testified, in answer to a hypothetical question that the deceased would be exposed to a greater hazard from lightning because of the place at which he was working and the conditions of his employment.

The court held that the commission "could have found as a reasonable inference to be drawn from the evidence that the steel in the bridge and the water underneath caused an attraction for lightning and was a conductor thereof to an extent much greater than was common to other points elsewhere in the vicinity," and that "the findings of the commissioners should not be disturbed where there is any substantial basis for them in evidence." There was evidence to support the finding that the accident arose out of the employment, and judgment was affirmed.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—MINOR DOING FORBIDDEN ACT—*Radtke Bros. et al. v. Industrial Commission of Wisconsin et al.*, Supreme Court of Wisconsin (May 3, 1921), 183 Northwestern Reporter, page 168.—Herbert Rutzinski was a boy 14 years of age and employed by the Radtke Bros. printing establishment with light duties such as running errands and folding sheets of paper. His instructions were to keep away from all machines. The boy had watched a man operate a paper-cutting machine, and thinking he could do it himself, when he was not observed by anyone in authority, he used the machine to cut the edges of a tablet which he intended to take home. In doing this he cut off the ends of two of his fingers. He brought proceedings under the workmen's compensation act and was awarded compensation. Radtke Bros. and the insurance carrier brought an action to set

aside the award and appealed to the supreme court for a reversal of the action of the lower court in affirming the award of the commission. The supreme court reversed the judgment and sent the cause back to the lower court with instruction to set aside the award. Judge Jones wrote the opinion of the court from which the following quotations are taken:

The crucial question in this case is whether at the time of the accident the employee was "performing service growing out of and incidental to his employment."

In determining this question we fully recognize that the act must be given a broad liberal construction, to the end that its beneficent purpose should be fully carried out. Although there was vigorous opposition to the statute before its enactment, it has been so well administered by the commission that it now meets with general approval. This court has not applied technical rules in determining whether in given cases the accident was incidental to the employment.

But we have found no reported case in this State or any other where it has been held that an employee may recover under compensation acts for an injury received while doing work entirely different from that assigned him, against orders, and for his own benefit. Lack of precedent would not necessarily prevent us from approving the award in this case; but it is very significant that in the numberless cases which have arisen where this or similar statutes have been construed there is so little authority for the position taken by respondents' counsel. In this State there have been several decisions illustrating that the statute should not be construed to cover accidents occurring outside the employment.

It is strongly urged upon us that boys of this age from natural curiosity are apt to intermeddle with machinery, and that there should be the most careful supervision to prevent accidents where they are engaged to render a service wherever machinery is used. It does not appear in this case that the claimant was led by curiosity to operate the machine, but that after full warning of the danger he undertook to use it to do work for his own benefit. Although, as already indicated, the statute should be liberally construed, it should not be so interpreted as to make employers insurers against all accidents happening to employees, even though they are minors.

Respondents' counsel argue that the question involved is one of fact, and that the finding of the commission is conclusive. The facts are practically undisputed, and the construction of the statute is a question of law on which the decision of the commission is not binding upon us.

Judgment reversed and cause remanded, with instructions to set aside the award.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—PROXIMATE CAUSE—PREEXISTING IDIOPATHIC CONDITION—*Rockford Hotel Co. v. Industrial Commission et al.*, Supreme Court of Illinois (October 22, 1921), 132 *Northeastern Reporter*, page 759.—Joseph Madison was employed by the Rockford Hotel Co. on

and prior to September 5, 1919. On that day, while in the discharge of his duties, he fell into an ash pit, where hot coals and cinders were thrown when removed by him from the furnace. The engineer, just before the accident, saw Madison raising the cover from the pit for the purpose of drawing into it ashes and cinders from the furnace. When he returned five minutes later Madison was lying on his back in the pit on the hot cinders. He was unconscious, and before he could be removed he was badly burned. He later regained consciousness but died on December 15, 1919. His widow was granted an award of compensation, by an arbitrator, which award was confirmed by the industrial commission. The company contends that Madison's injury did not arise out of his employment and that the fall was not due to an incident of employment, but was caused by Madison being seized with an epileptic fit. The circuit court set aside the award, but upon appeal to the supreme court, the original award was reinstated and the judgment of the circuit court was reversed. Judge Farmer speaking for that court said:

The fact that we can not overlook or ignore is that Madison, by reason of his falling into the pit while engaged in performing the duties of his employment, was so severely injured that he died from the injuries. He did not die from epilepsy or a preexisting disease, but from the burns he received from falling into the pit. Some cases hold that where an employee is seized with a fit and falls to his death, the employer is not liable because the injury did not arise out of the employment, but a majority of the courts, American and English, hold that, if the injury was due to the fall, the employer is liable, even though the fall was caused by a preexisting idiopathic condition.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF EMPLOYMENT—RETURNING FROM WORK—INJURY BY THIRD PARTY—ACTION FOR DAMAGES—*Koubek v. Gerens, Supreme Court of Minnesota (December 17, 1920), 180 Northwestern Reporter, page 219.*—Frank Koubek was employed as a foreman in charge of a street-flushing crew by the city of St. Paul. There were two crews, a night crew and a day crew. Koubek, who was foreman of the day crew, worked on the day of the accident from 7 o'clock in the morning to 4 in the afternoon. After leaving his work he attended to various personal errands, and about 5 o'clock, while on his way home, he stepped into the street to examine the engine of a street flusher being operated by the night crew. He had that day repaired the engine on the flusher and was desirous of noting how it was working. While walking alongside the flusher he was run into from the rear by an automobile of the defendant, operated by one of defendant's employees, sustaining a fracture of his left leg above the knee. Koubek brought an action for damages for redress for his injuries and recovered a verdict. The defendant

appealed, declaring that the action should be governed by the workmen's compensation act as he and the plaintiff and plaintiff's employer were all under the act and subject to its provisions. The court, however, held that Koubek had left his work and was on his way home; that what he was doing at the time of the injury merely was a display of interest in his work; and that the injury did not arise out of his employment. The decision in part is as follows:

The sole question here presented or argued is whether the plaintiff's injury arose out of and in the course of his employment, under such circumstances that he is governed by the workmen's compensation act.

It is not disputed but that an hour had elapsed after the plaintiff had completed his day's work when the accident occurred, unless his mere stepping into the street and listening to the working of the engine on the passing flusher renewed his duties and extended his day's work. We do not think so. Such an act could hardly be said to amount to overtime, as suggested by appellant. It merely shows the plaintiff's interest in his work.

He had repaired the engine shortly before, and, as he explained, he undertook, out of curiosity, to ascertain whether it was working well. He was not duty bound so to do at that particular time. It was a voluntary act on his part, for which he could not expect to be reimbursed in wages. It could have required but a few seconds of time.

It is well settled by recent decisions of this court that an employee is not, as a general rule, within the compensation act while on his way home after completing his day's work. We think that the trial court was right; that under the circumstances in this case the plaintiff was properly permitted to recover in this action.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—CHOICE OF REMEDIES—*Leva v. Utah Fuel Co. et al.*, *Supreme Court of Utah* (July 1, 1921) 199 *Pacific Reporter*, page 659.—Charles Leva, an employee of the Utah Fuel Co., left work on September 11, 1920, and while walking on the right of way of the Denver and Rio Grande Railway Co. was injured. He made a claim against the railroad because of his injuries, which claim was compromised and he was paid \$1,500. Leva then claimed compensation from his employer under the industrial commission act, based on the same injury. The industrial commission found "that the applicant sustained injury by the negligence or wrong of another, not his employer; that he did not comply with section 3133 of title 49 in compromising and adjusting his claim against the railway company and did so without securing the written consent of the fuel company." The commission decided that for these reasons it had no jurisdiction and the claim was denied. The decision was reviewed by the supreme court on proceedings by

Leva, and the order of the commission was affirmed. Judge Gideon, speaking for the court, said in part:

It is the contention of the plaintiff that the provisions of the foregoing section denying the right to an injured employee to receive compensation in the event of injury by the negligence or wrong of any one except the employer unless such injured employee complies with the other provisions of the section are unconstitutional, as being in contravention of article 1, section 10 of the Constitution of the United States, prohibiting any State from enacting a law impairing the obligations of contracts; also of article 1, section 18, of the State constitution, relating to the impairment of contracts.

The right of an employee to be awarded compensation under the industrial commission act is not dependent upon the negligence or wrong of his employer. The right is determined by the fact of his employment at the time of the injury, or whether the injury arose in the course of his employment. Moreover, the plaintiff is attacking the constitutionality of the very law under which he claims compensation. This he is not in a position to do.

In this case the injury is in no way the result of the negligence or wrong of the employer. The accident did not happen while the plaintiff was upon the premises of the employer. Any right plaintiff could have against his employer must result from a duty imposed upon the employer by the terms of the industrial act. That act prescribes the procedure or method by which an award can be made to the injured employee. It is therefore incumbent upon such employee, under facts such as are disclosed by this record, to comply with the provisions prescribed by which he can obtain relief. The section quoted provides that before any suit or claim is made by a claimant he must elect whether to take compensation under this title or to pursue his remedy against such other. It appears without dispute that the applicant has not brought himself within the provisions of the statute under which he claims.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—CHOICE OF REMEDIES—EFFECT OF SUIT—EVIDENCE—*Bennett v. Page Bros. et al.*, *Supreme Court of New York, Appellate Division (July 7, 1921)*, *189 New York Supplement*, page 529.—Henry Bennett, an employee of Page Bros., met with an accident upon the premises of the Metropolitan Tobacco Co. from which he received injuries resulting in his death. Ellen Bennett and her husband filed a notice of election with the State industrial commission to sue the Metropolitan Tobacco Co. for the death of their son. An action was brought, but two and one-half years after the cause of action accrued it was discontinued by consent. The State industrial commission subsequently made an award to the mother of the decedent on her claim as a dependent, and the employers and insurers appealed to the appellate division. That court decided:

The election on the part of dependents to bring an action against a third party does not operate to relieve the employer or insurance

carrier. The statute provides that the insurance carrier "shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." (Sec. 9.) The advantage to the dependents is to be found in the fact that, if they succeed in recovering more than the amount of the compensation, they are at liberty to retain the sum so recovered, with the assurance that, if they recover less, the deficiency is to be made up to them.

No rights of the appellants being sacrificed by reason of the discontinuance of the action, we are of the opinion that the election to sue the tobacco company, and the subsequent action on the part of the claimant, do not operate to estop her from asserting a claim as a dependent. We are thus brought to consider the further objection that the evidence does not show dependence on the part of the claimant.

While the evidence is unsatisfactory, we are of the opinion that there is sufficient to show that the claimant was in some measure dependent upon the decedent. The rule in compensation cases does not require the highest degree of evidence; it is satisfied if there is some evidence of a probative character to support the findings of the commission.

The award should be affirmed. All concur.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—EFFECT OF SETTLEMENT—*Renner v. Model Laundry Cleaning & Dyeing Co. et al.*, Supreme Court of Iowa (September 30, 1921), 184 Northwestern Reporter, page 611.—On July 25, 1917, A. B. Bodine, since deceased, was an employee in the service of the defendant laundry company, and in pursuance of such employment was driving a laundry wagon in the streets of the city of Waterloo, Iowa. While thus engaged, a collision occurred between the wagon and a street car operated by the W. C. F. & N. Ry. Co. In this collision, Bodine was severely injured. The laundry company's insurer, the defendant Fidelity and Casualty Co., undertook to pay Bodine compensation, which it did for about three months. Bodine was then visited by a representative of the railway company, who made a settlement, paying \$750 for a release of Bodine's right to sue for the injuries. Thereafter the insurer refused to make further payments, claiming that because of such settlement with the railway company the employer and his insurer are both released from further liability. A committee of arbitration appointed on the request of Bodine decided that \$750 should be deducted from the amount of the compensation award to which he was entitled. The industrial commissioner reviewed the decision and upheld it. Pending the review Bodine died, and his administrator, W. C. Renner, was substituted as plaintiff. Further appeal was made to the district court, which reversed the

decision of the commissioner, entering judgment for plaintiff for the full amount of the unpaid statutory compensation which had accrued up to the date of Bodine's death, without any deduction on account of the sum paid by the railway company. Defendants appealed to the supreme court. The compensation statute provides that in case of an injury to an employee caused under circumstances creating a legal liability in some person other than the employer to pay damages: (a) The employee may take proceedings against both his employer and the third person, but his compensation shall be reduced by the amount of damages recovered. (b) If the employer pays compensation, he shall be entitled to indemnity from the third person so liable. The laundry company and its insurer contended that the case fell within the above statute. The supreme court in affirming the decision in favor of Renner held that the facts alleged and proved must comply with the statute and show a "legal liability" in the third person, which was not done in this case, therefore the company's defense failed. The appellants stated that Bodine accepted money in payment of the damages he sustained, thereby releasing the railway and depriving appellants of their rights of subrogation. The court said that it was not within the power of Bodine to deprive them of this right if they had it. It is no defense that Bodine accepted money in payment of the damages he sustained, as it is not shown that a legal liability for such damages existed. The money here received is in consideration of a promise not to sue, which is a legitimate contract. The court in conclusion said:

The right of Bodine to sue any person other than his employer was a mere option. He could, if he chose, rest upon the allowance to him of the statutory compensation, and his refusal to seek satisfaction at common law would work no wrong to his employer. If he could refuse to sue without affecting his right to receive compensation, how can his mere agreement not to sue affect the relations of the parties, even though as between him and the railway company it may be said to operate as a release? Had he elected to sue and had recovered and collected judgment for damages then, as he could not be permitted to receive more than one satisfaction, the appellants could require him to account to them for their advancements upon his compensation. But he did not sue, and there is no showing that in covenanting not to do so he deprived the appellants of any right or advantage they would have acquired or enjoyed had that covenant never been made. If Bodine had no right to recover damages from the railway company (and none has been shown), then the appellants could not obtain any better or higher right by subrogation, even though the covenant not to sue had never been made. And for appellants to be allowed credit or deduction upon the compensation payable to the claimant, it must affirmatively appear that the money received by him was in legal effect a recovery of damages, a showing which has not been made.

WORKMEN'S COMPENSATION—INJURY BY THIRD PARTY—SUBROGATION OF INSURER—*Henderson Telephone & Telegraph Co. (Inc.) et al. v. Owensboro Home Telephone & Telegraph Co. et al., Court of Appeals of Kentucky (June 24, 1921), 233 Southwestern Reporter, page 743.*—The Henderson Telephone & Telegraph Co. (Inc.) was directed by the board of workmen's compensation to pay an employee named Graves about \$800, in weekly installments of \$12 each. This company was insured with and by the Georgia Casualty Co., who paid the award to Graves. The Henderson T. & T. Co. then brought this action against the Owensboro company and another, to recover the amount of the award, upon the ground of gross negligence of the two defendant companies in leaving exposed a dangerous explosive which was the proximate cause of the injury to Graves. In the circuit court judgment favored the defendants and the plaintiff appealed. The court of appeals held that there was no question but that an employer who had paid or become obligated to pay an award of the board of compensation to an injured employee has a right of action against third persons whose negligence was the proximate cause of the injury. But in this case the employer has neither paid nor obligated himself to pay the award and therefore has no right of action under the act. The language of the act is:

The employer, having paid the compensation or having become liable therefor, shall have the right to recover in his own name.

Judge Sampson, speaking for the court, said:

The payment or obligation to pay the award on the part of the employer is a condition precedent to his right to maintain the action against a third party. The statute gives no right of action in such case to the insurance company either in its own name, or that of the employee to recover the amount paid on the award from the negligent third person who caused the injury for which the award was made. So if such right of action exists it is on equitable grounds of subrogation and not by statute in this State. The statutes on this subject are not the same in all the States. We can conceive no equitable reason why the insurance company should have such right of action against a third person. The employer in conjunction with many others pays to the insurance company a sum larger than that which is required to satisfy all such claims for indemnity, and the insurance company only appropriates from such fund such part as is necessary in the given case to satisfy the award. It has lost nothing whatever.

But it is insisted that the employer, being at a constant expense in providing or maintaining a fund for the payment of such claims, is properly given by the statute a right of action against the tortfeasor to recoup the loss sustained. The employer by the statute has the right only when he has paid or obligated himself to pay such award, and in no other case. The mere fact that he has paid an insurance premium does not operate to give to him the right to maintain such action, and the statute can not be so construed.

In States where the insurance companies are entitled to recover against a negligent third party the statute is so worded as to confer the right and not as in the Kentucky statute, which by implication excludes the insurance company from the right.

WORKMEN'S COMPENSATION—INJURY NOT COVERED BY ACT—MULTIPLE INJURIES—EXCLUSIVENESS OF REMEDY—*Hyett v. Northwestern Hospital for Women and Children, Supreme Court of Minnesota (December 24, 1920), 180 Northwestern Reporter, page 552.*—Plaintiff was injured while in the employ of the defendant hospital. He was disabled for the performance of his duties for a brief period and in adjustment thereof was given \$44. At the same time of receiving this injury he received another injury which, though of definite functional effect, did not result in disability to work. Not being able to find any provision in the workmen's compensation act covering an injury of this nature he brought this action for damages against the employer, alleging negligence on the part of the latter. Plaintiff demurred to defendant's answer, and the demurrer was sustained. The employer appealed, and the order sustaining the demurrer was reversed. The opinion of the court is in part as follows:

The only question presented is whether an employee within the compensation act, who suffers an injury in the course of his employment which results (1) in a disability, temporary or permanent, for which compensation may be had under the act; and (2) an associate injury not amounting to a disability, either temporary or otherwise and for which no compensation is provided, may maintain an action at law for the latter injury on the ground that it was occasioned by the negligence of the employer. We answer the question in the negative.

The question is of first impression in this State, though it has come before the courts of other jurisdictions. It is important, for a decision thereof will determine whether our workmen's compensation act, as heretofore generally understood, furnishes the exclusive relief of an injured employee, or whether, in addition to the relief thus provided, he may resort to a common-law action for injuries not amounting to a disability. Every personal injury causes pain and suffering, measured in degree by the character of the injury; some result in the disfigurement of the person—the loss of a hand or other member of the body, an eye, scalds and burns upon the hands or face—all of which must be carried through life, to the mental distress of the victim. And in given cases, like that at bar, an injury, accidental or otherwise, may impair and totally destroy some function of the human body not of a character to incapacitate the employee from his usual employment, or affect his earning capacity, therefore not within the letter of the compensation act. Matters of that character are proper elements of damage in the negligence action, but our compensation act makes no provision for a consideration thereof in the

award to an injured employee, even though they may constitute his major or principal grievance.

That the remedy so given and provided is exclusive of all others seems to be the prevailing opinion of the courts where the question has received attention. If the compensation so provided is deemed inadequate, or that the act should be made to include all, or any of the common-law elements or ingredients of relief found in the negligence law, the change should come about by legislation and not by rule of court.

For the reasons stated the demurrer to the answer should have been overruled, and the order sustaining it is accordingly reversed.

WORKMEN'S COMPENSATION—INSURANCE—SELF-INSURANCE—POWER OF COURTS TO DETERMINE EMPLOYER'S SOLVENCY—CONSTITUTIONALITY—*In re Southern Cotton Oil Co., Supreme Court of Louisiana (October 15, 1920), 86 Southern Reporter, page 656.*—Section 22 of act No. 20 of Acts of 1914 as amended by act 247 of Acts of 1920, known as the employers' liability act (workmen's compensation act) requires employers to file with the district court of the parish of their domicile proof of their ability to meet the obligations assumed by them in coming under the provisions of the act. The district court is charged with the duty of examining the books, records, and accounts of the employers to determine their solvency. If they are found to be sufficiently sound financially, they are then exempt from the requirement of insuring the payment of compensation under the act and may carry their own insurance. Two judges of the 28th judicial district court refused to receive or act on the Southern Cotton Oil Co.'s petition for permission to carry its own insurance, whereupon the company brought this proceeding for a writ of mandamus to compel said judges to comply with the provisions of the law, and an alternative writ of mandamus was issued. In recalling the alternative writ of mandamus and dismissing the application the court declared that this section of the employers' liability act was unconstitutional, because it imposed nonjudicial functions upon the judges of the district courts, contrary to article 96 of the constitution.¹ The opinion is in part as follows:

The respondent judges have replied that relator is not entitled to have the question of its solvency determined by them vel non in their capacity as judges of the twenty-eighth judicial court, for the reason that article 96 of the constitution provides that no duties or functions shall ever be attached to the district court or to the several judges thereof, except such as are judicial; and respondents show that the determination of the solvency vel non of relator for the

¹ Though the opinion makes no statement in reference to the matter, it is presumed that the constitutionality of the law as a whole is unaffected by the finding of unconstitutionality as to this provision, section 41 of the act providing that such a finding affecting any provision of the law shall not affect any other portion that can be given reasonable effect without the invalid portion.

purpose of the administration of the workmen's compensation act is an executive, and not a judicial, function; that it is beyond the province of the court to examine or verify the books, records, accounts, or statements of relator, and that the constitution and statutes of the State have not provided the courts with the necessary machinery or assistance for such work.

Article 96 says in part:

"Except as herein provided, no duties or functions shall ever be attached by law to the supreme court, courts of appeal, or district courts, or to the several justices, or judges thereof, except such as are judicial," etc.

The determination of the solvency of the relator under the compensation act can not be said to be judicial in its nature, and the respondent judges are forbidden to perform such act.

WORKMEN'S COMPENSATION — INTERSTATE COMMERCE — OIL FOR ENGINES—*Lindway v. Pennsylvania Co.*, Supreme Court of Pennsylvania (December 31, 1920), 112 Atlantic Reporter, page 40.—Lindway was employed by the defendant to look after its oil reservoir tank and to make note who received oil and where it went. In the performance of his duties he attempted to open the valve of a tank car which he desired to drain into the reservoir tank from which oil would be drawn for both interstate and intrastate commerce. While attempting to do this an accident occurred by which he met his death. His widow brought proceedings for compensation, but the referee disallowed the claim on the ground that Lindway was engaged in interstate commerce at the time of the accident which caused his death. The decision was affirmed by the workmen's compensation board and again by the court of common pleas, whereupon the claimant entered an appeal to the supreme court which reversed all the previous decisions and held that Lindway's work was not in interstate commerce. The opinion is in part as follows:

In this class of cases we must accept the decisions of the Supreme Court of the United States as our guide. The latest utterance from that tribunal, on this branch of the law, dealing with facts which at all approximate those at bar, is *Chicago, B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177, 179, 36 Sup. Ct. 517, 518 [Bul. No. 224, p. 105]. There a member of a switching crew was killed while engaged in switching a car of defendant's coal to a shed, where the coal was to be stored, for the purpose of supplying, "as needed," locomotives "engaged or about to be engaged in interstate and * * * intrastate traffic." Justice Hughes, in deciding that, under these circumstances, the deceased was not engaged in interstate commerce, said:

"The only ground for invoking the Federal act is that the coal thus placed was to be used by locomotives in interstate hauls."

After which he said that the work in question "was nothing more than the putting of the coal supply in a convenient place, from which it could be taken as required for use," and that this was not "so closely related" to interstate commerce "as to be practically a part of it," which he stated is the test.

It will be noted that in the matter above quoted, Justice Hughes expressly states that the "only" ground for invoking the Federal act was that the article being handled was intended for interstate traffic. In view of this traffic statement, the sole distinction which we can see between the case just cited and the one now before us, is that in the present instance claimant's husband was killed when engaged in storing oil, which was to be subsequently used in both interstate and intrastate commerce, while in the case cited the person affected met his death when engaged in storing coal for like uses. Of course, this is a distinction without a difference so far as the question of law here involved is concerned; therefore, the ruling authorities govern the facts at bar in favor of the appellant.

WORKMEN'S COMPENSATION—JURISDICTION OF COURTS—LUMP-SUM SETTLEMENTS—*Employers' Indemnity Corporation v. Woods et al.*, Court of Civil Appeals of Texas (April 30, 1921), 230 Southwestern Reporter, page 461.—This was an action to set aside an award by the industrial accident board to Willie Woods, who accidentally injured his right arm while in the discharge of his duties. Woods agreed with the indemnity corporation to accept a lump-sum settlement of \$150, which was decided on by judgment of a justice court. The industrial accident board did not approve of this settlement, but made a separate settlement of \$9 a week for 200 weeks. The trial court upheld the findings of the industrial accident board. The Employers' Indemnity Corporation, on appeal to this court, claimed that the justice court had jurisdiction, and that its judgment was final as to all matters in this suit. The court of civil appeals affirmed the action of the lower court and said in part, speaking through Judge Walker:

It seems to us clear, from a reading of these sections, that it was the intention of the legislature to provide for the payment of compensation in weekly payments, with certain definite exceptions, to be approved by the industrial accident board, and to make void a contract by a beneficiary to commute his compensation to a lump sum without the board's approval. If we are correct in this construction of this act, it follows that the contract of settlement between Woods and appellant was void, as the board never approved it.

Again, if there rests with the courts the power to decree lump-sum settlements as a subject of original jurisdiction, it must be under their general legislative or constitutional grant of power or the power inherent in them under the common law, for such power is not given them by the terms of the workmen's compensation act. Under

their general jurisdiction we do not think they have the power to decree such settlements.

This workmen's compensation act is in derogation of the common-law rights of the parties, and proposes, within its own compass, to provide for a speedy adjustment of all industrial accidents coming within its terms.

Against the letter of the law, the justice court could not assume jurisdiction, and thereby make its judgment *res judicata* of that issue.

WORKMEN'S COMPENSATION—MEDICAL SERVICES—MASSAGE INDEPENDENT OF TREATMENT BY PHYSICIAN—*Golden's case, Supreme Judicial Court of Massachusetts (November 26, 1921), 132 Northeastern Reporter, page 726.*—Newton Golden was an employee of the Worcester Electric Light Co. While at work on March 29, 1918, he received an injury to his shoulder resulting in complete atrophy of his right hand and arm. He was awarded \$500 for "the loss of the use of his hand." He was also paid compensation for seven months following the injury. From early in September, 1919, to the date of the hearing he had been treated upon 303 days by Gertrude R. Doyle, a masseuse. Her bill for services amounted to \$909. The industrial accident board approved of her fee for services. The employer and its insurer appealed. The supreme judicial court reversed the award and dismissed the petition, holding that an insurer was not liable for services in massaging an injured arm solely upon the employee's request and not as a part of treatment by a physician, even though the injury was an unusual case. Judge Jenny for the court said:

The statute provides for the payment of only physicians and hospitals. Under the procedure now considered, that which is to be furnished is "adequate and reasonable medical and hospital services, and medicines, where they are needed." Detailed provisions as to the selection of a physician are set forth. While the term "medical services," if used without limitation, may be susceptible of a broad construction, the statutes cited clearly indicate that those words, as therein used, are restricted to medical assistance rendered by the physician or under his direction and control.

The massage performed, so far as it appears solely upon the employee's request and not as a part of treatment by a physician, was not medical services within the statute, and the insurer is not liable therefor in this proceeding.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—INSURANCE—*Edward Stern & Company v. Liberty Mut. Ins. Co., Supreme Court of Pennsylvania (March 7, 1921), 112 Atlantic Reporter, page 865.*—Edward Stern & Co. operated under the workmen's compensation act, and in accordance with its provisions had itself insured against all liability for injuries sustained by its employees coming

under the act, and "where a liability is imposed upon the employer by the laws of Pennsylvania for damages on account of such injuries." Edward Stern & Co. employed Edward Hair, a minor under the age of 16 years, to work about dangerous and unguarded machinery. It was contrary to the State law to employ minors of such age about such machinery (act of May 18, 1915, P. L. 286), and it was unlawful to maintain dangerous machinery in such an unsafe and unguarded condition (sec. 11, act of May 2, 1905, P. L. 352). Hair sustained an injury for which he brought suit for damages. By agreement the case was settled for an agreed sum. The employer company then sued the insurance company for reimbursement under the insurance contract for its loss. Judgment was rendered in favor of the employer, and the insurance company appealed. In affirming the decision the court said in part:

We have held in *Lincoln v. National Tube Co.*, 112 Atl. 73, not yet (officially) reported, that a minor so [illegally] employed, is not a compensable employee under the workmen's compensation act. The risk under the policy in the present case was not limited solely to liability as imposed by the workmen's compensation act. Liability under that act is (1) to pay elective compensation under article 3; (2) to pay damages in cases where the employer or employee has elected not to accept the provisions of article 3. But, under the second paragraph of the policy, it indemnifies against loss for liability imposed by the laws of the State for damages on account of personal injuries to employees. With these plain statements, we can not limit its coverage to claims arising under the compensation act, as it was manifestly intended to reach common-law liability, based on employment not specifically within the terms of the compensation act. When the policy was written, it may have been intended to cover cases where the employer was imposed upon with respect to the ages of some of its employees; but, had appellant desired to limit its risk, it could have easily written the limitation in the contract.

Nor is the policy a contract to indemnify against the consequences of the violation of a penal statute, and therefore contrary to public policy. It does not insure against penal violations, but indemnifies against loss through accidents to employees, resulting in physical injury. Undoubtedly appellee was guilty of an offense for which it might have been fined or some of its members imprisoned. The policy did not insure against this. To make it civilly liable, an accident must have happened, and, without the accident there would be no cause for liability. The risk or hazard was loss by reason of an accident, and whatever elements, whether of negligence or of illegality, entered into the accident, are merely incidental to the main question, namely, recovery under a hazard indemnifying an employer against loss by reason of liability to employees, enforced under the laws of the State. It was not necessary for plaintiff to prove an unlawful act to make out its case.

The contract was, in itself, fair and legal, founded on a valid consideration, and is not to be declared void simply because there was,

or might have been, a violation of the child-labor law. Appellant forgets the business it is engaged in and the risk it took; the premium is fixed on that risk, and the loss covered by it contemplated employees generally, without qualification. The circumstances under which the employment is made are merely incidental. To refuse to sustain the contract would be to read into it an exemption not contained therein nor thought of at its inception.

The judgment is affirmed.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—SUIT FOR DAMAGES—*Lincoln et al. v. National Tube Co., Supreme Court of Pennsylvania (December 31, 1920), 112 Atlantic Reporter, page 73.*—Lincoln, a minor, was, contrary to the express provisions of the statutes of the State of Pennsylvania, assigned to the duty of operating a hoisting machine, and while so doing he was injured. He brought action for damages for his injuries and recovered a judgment. The employer appealed, declaring that the case came under the provisions of the workmen's compensation law and that the recovery should be governed by the provisions of that law. The court affirmed the decision for plaintiff, saying in part:

Notwithstanding the able argument of the junior counsel for appellant, we are not satisfied the court erred in deciding the former act did not apply to the case of minors engaged in work for which, by statute, their employment was expressly forbidden. Certain clauses in it furnish opportunity for a plausible argument to the contrary, but in terms it relates only to those employers who "shall, by agreement, either expressly or implied, * * * accept the provisions" thereof. Since no legal contract could be made by or for the minor to do this kind of work, and as such a contract could not be legally "renewed or extended by mutual consent, expressed or implied," it is clear the workmen's compensation law does not cover the case; and this conclusion is rendered still further necessary by the fact that the two statutes were adopted at the same session of the legislature, and if possible each must be given full effect without one infringing upon the domain of the other.

WORKMEN'S COMPENSATION—MINOR ILLEGALLY EMPLOYED—SUIT FOR DAMAGES—*Noreen v. William Vogel & Bros. (Inc.), Court of Appeals of New York (May 31, 1921), 132 Northeastern Reporter, page 102.*—Leonard Noreen, an infant, by his guardian ad litem, Oscar Noreen, brought an action against the defendant, his employer, for damages on account of injuries received while in its employ. The defendant urged that it had complied with the provisions of the workmen's compensation act and that the compensation commission had made an award of \$369 for the injuries now sued for, which amount had been paid before the commencement of

this suit. Noreen was employed on the representation that he was 17 years of age, but he actually was under 16, and had worked upon a metal-stamping machine in violation of the provisions of the labor law. The trial court gave a judgment in favor of the plaintiff, which the appellate division of the supreme court affirmed. The question was whether an infant under 16 years at the time of the injury could maintain an action to recover damages for such injury against an employer who has complied with the requirements of the workmen's compensation law, or is the remedy provided in the workmen's compensation law exclusive. The court of appeals reversed the decisions of the lower courts and dismissed the complaint. Judge Hogan wrote the opinion of the court, in which he said:

In substance, we held that the legislature was clothed by the constitution with the plenary power to extend or curtail the right of an injured party to maintain an action to recover damages for an injury sustained; that the statute provided compensation not only for the employee, but as well for the family and dependents of such employee, and likewise definite compensation for an accidental injury occurring with or without fault imputable to the employer.

Irrespective of the fact that the plaintiff secured employment by misrepresentation as to his age, and that defendant omitted the exercise of due diligence to ascertain his age, when plaintiff entered upon the service of the defendant in consideration of a compensation to be paid him therefor the relation of employer and employee existed between them. In the absence of the workmen's compensation law the plaintiff having been injured in such service, if he brought a common-law action to recover damages for such injuries, would seek a recovery upon the ground that he was an employee, and as such entitled to assert the applicability of the rules of law relating to the duty imposed upon a master toward a servant. He could not be an employee and defendant an employer in said common-law action and occupy a different position by reason of the existence of the workmen's compensation law. The method adopted by an individual to secure employment from an employer misled by the representations of the individual seeking service does not determine the relationship existing between such persons. When the employment is entered upon, the law determines the relations, rights, and remedies of the parties.

WORKMEN'S COMPENSATION — NOTICE — FIRST-AID TREATMENT — PROGRESSIVE DISABILITY—NEGATIVE DECISION FINAL—*Conley v. Upson Co. et al.*, *Supreme Court of New York, Appellate Division* (July 7, 1921), 189 *New York Supplement*, page 473.—Philip Conley, an employee of the defendant company, while at work upon a pressing machine some time in the month of May, 1918, had some paper shavings thrown into his left eye. He was sent to the first-aid room, where the eye was washed with boracic acid. He finished his day's work and continued to work, making no complaint and giving

no notice of any serious trouble with his eye. He said that following the accident his eye became gradually worse, and in January, 1919, eight months after the accident, the sight was completely gone. He had never consulted a physician, or asked the employer to furnish a physician, until after the eye had fully lost its sight. He consulted a lawyer in January, but did not call a physician until April, 1919. In October, 1919, Deputy Commissioner Lang denied a claim for compensation because "no date of accident fixed" and there was "no notice of accident to employer in accordance with provision of law." The commission, upon the suggestion of its counsel, reversed its former decision and reopened the case, giving an award in favor of claimant. The Upson Co. and the insurance carrier appealed to the appellate division, which reversed the award and dismissed the claim. Judge Woodward, speaking for the court, said:

Giving the claimant the benefit of a technical construction of the act, that the notice was not required until "within 10 days after disability," he says that this eye had totally lost its sight in January, 1919, and certainly he was called upon to give the notice at that time, if he was to come within the plain letter of the law. But if the employer and the insurance carrier were not to be prejudiced by the alleged serious consequences of this apparent trifling accident, they were entitled to notice as soon as it became evident that the eye was growing worse; they had a right to have the claimant treated for the injury at a time when treatment was calculated to be of use in preventing further injury. Such notice as was given by the washing out of the eye at the first-aid station on the occasion of the accident was not notice that this eye was likely to become wholly useless within a period of eight months. It was notice of a trifling injury, such as the first-aid station was designed to provide for—nothing more; and the fact that the claimant went back to his work, continuing the same for a considerable period, making no complaint, justified the employer in concluding that the first aid had fulfilled its legitimate purpose and that there was no occasion for further action.

It is true that where an award is made the commission is authorized, upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, at any time to review any award, and, on such review, may make an award ending, diminishing, or increasing the compensation previously awarded; but this is confined to an award previously made.

When, by its decision, it determines that there is no case, then it is without jurisdiction. As it is not called upon to make findings upon which an award is denied, so there is no authority for reviewing such denial, except by an appeal in the manner prescribed by section 23. It is the "finding or orders relating thereto," which the commission is authorized to modify or change (sec. 74), and not the determination of the commission making or denying an award, for this is declared to be "final as to all questions of fact, and, except as provided in section 23, as to all questions of law," and the court of appeals has "always given literal effect to the words 'final and con-

clusive,' and has sought to promote the policy upon which the statute is founded."

WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—DISFIGUREMENT—SINGLE INJURY—*Chicago Home for the Friendless v. Industrial Commission et al., Supreme Court of Illinois (April 21, 1921) 130 Northeastern Reporter, page 756.*—Kate Budnick was employed by the Chicago Home for the Friendless. While at her work she had her left hand caught in a mangle and so badly crushed that the fingers had to be amputated. She developed a state of tetanus, which when it subsided left her face disfigured, and she was unable fully to use her jaws. The compensation law of the State provides (sec. 8) for compensation for disfigurement, but not where the injury causing it also causes a permanent partial or total disability for which compensation is awarded. The claimant was awarded compensation for the loss of her left hand and for disfigurement, which on appeal was affirmed by the circuit court. The employer appealed again, alleging that the additional award for disfigurement was not properly allowable. The supreme court accepted this view and amended the award to eliminate this item. The decision is in part as follows:

Plaintiff in error concedes its liability for the loss of the left hand, and has voluntarily paid the installments arising out of that injury as they fell due. It contends, however, that it is not liable under the compensation act for any disfigurement of the face of defendant in error. We have held that if an employee receives two injuries, one that disables him and another that causes disfigurement of his hands, face or head, he is entitled to compensation for the disability and the disfigurement. (*Wells Bros. Co. v. Industrial Com.*, 285 Ill. 647, 121 N. E. 256; *International Coal Co. v. Industrial Com.*, 293 Ill. 524, 127 N. E. 703.) On the other hand, we have held that where an employee is disabled and disfigured by the same injury he is not entitled to recover compensation for the disfigurement. (*Smith-Lohr Coal Co. v. Ind. Com.*, 291 Ill. 355, 126 N. E. 164.) The only question presented for decision is, therefore, whether defendant in error suffered one or two injuries. If at the time her hand was crushed in the mangle she had fallen into the machinery and disfigured her face, there would be no question but that she would be entitled to compensation for the injury to the hand and the disfigurement to the face: but the facts here present a different situation. Defendant in error suffered a single injury, which has resulted in a disability and a disfigurement.

Compensation was payable and has been awarded under paragraph (e) of section 8 for loss of the left hand—the only injury defendant in error received. Compensation has been paid for the temporary disability resulting from the sickness which followed this injury, and the act does not authorize further compensation for a disfigurement resulting from the same sickness. This case presents a meritorious claim for which compensation is not provided by the terms of the

act, but the courts are not authorized to write a provision into the act in order to sustain this award. The remedy is with the legislature.

In so far as the judgment of the circuit court confirms the award of the industrial commission for disfigurement of the face of the defendant in error, it is reversed and the award set aside. In all other respects the judgment of the circuit court is affirmed.

Reversed in part and affirmed in part.

WORKMEN'S COMPENSATION—POWERS OF COMMISSION—DECISION—FINDINGS OF FACT—*Lorchitsky v. Gotham Folding Box Co., Court of Appeals of New York (November 16, 1920), 128 Northeastern Reporter, page 899.*—While working for the box company an outsider offered to help Lorchitsky, but the latter rejected the proffered aid. The outsider, however, assisted and bungled the job, whereupon Lorchitsky applied to him an opprobrious epithet and was assaulted therefor by the outsider. Later Lorchitsky while at work fell to the floor. It afterwards developed that he was injured, and upon applying for compensation he was granted an award by the industrial commission. The commission rendered a statement of facts and included an opinion in which both the assault and the fall were discussed in an attempt to determine which caused the injuries, but finally concluded that one or the other occurrence actually caused them without definitely stating which. The appellate division unanimously affirmed the award (179 N. Y. Supp. 932), and the employer appealed again. In reversing the award and granting a new hearing the court said, in part:

A substantial award was made to the claimant because of injuries received by him while in the employ of the appellant box company. It is insisted by appellants that while these injuries arose in the course of his employment, they did not arise out of it. Since the award has been unanimously affirmed, we are confined in a consideration of this claim to the facts as found by the commission.

The findings proper state that while claimant was in the regular course of his employment he received certain injuries, and that these injuries arose out of and in the course of his employment. This latter statement is a mere conclusion, and an award ought not to rest upon so general and inadequate a basis. But, further than this, the findings then state that his injuries were sustained as set forth in the opinion of the commissioner writing in the case, "which is adopted herein as if set forth in full." We therefore are not only permitted but required to turn to this opinion in the endeavor to find out what did happen to the claimant and to ascertain how his injuries arose.

The account of the accident is then rehearsed, and reference is made to the commissioner's discussion in his attempt to decide whether the blows or the fall caused the injury.

In the end, however, he does not decide this question, but simply reaches the conclusion that the injuries resulted from either one cause or the other, being of the opinion that it was unnecessary to determine which was the cause, because where "there is distinct proof of an accident section 21 of the compensation law raises the presumption that it arose out of and in the course of the employment."

This view of the law was erroneous and did not furnish any excuse for not determining which of the two causes resulted in claimant's injuries. It is not the law that mere proof of an accident without other evidence creates the presumption under section 21 of the workmen's compensation law that the accident arose out of and in the course of the employment. On the contrary, it has been frequently held, directly and indirectly, that there must be some evidence from which the conclusion can be drawn that the injuries did arise out of and in the course of the employment.

Therefore, treating this opinion as stating findings of fact, as we are required to do by the action of the commission, we have it that it has simply been found that the claimant's injuries resulted from one or the other of two causes, and it is too well settled to require citation of authorities that such alternative findings are insufficient to sustain the award which has been made unless each of the two causes was of such a character as would authorize and justify it. That is not the case

WORKMEN'S COMPENSATION—RAILROAD COMPANIES—INTERSTATE COMMERCE—EMPLOYEE ON FREIGHT TRAIN—PRESUMPTIONS—*Philadelphia & Reading Ry. Co. v. Polk, Supreme Court of the United States (May 16, 1921), 41 Supreme Court Reporter, page 518.*—This case was brought before the Supreme Court on a writ of certiorari. Compensation had been awarded to the wife of John M. Polk under the law of Pennsylvania, and the award was sustained by the court of common pleas and the supreme court of the State. Polk had died as the result of an accident on a freight train, occurring in the course of his employment by the railroad company. The company was a common carrier, by rail, engaged in interstate and intrastate commerce. The train, on which Polk was a member of the crew, had cars of various commodities coming from and consigned to places in and outside of Pennsylvania. Judgment was reversed and the cause remanded. Mr. Justice McKenna delivered the opinion of the court, citing the case of *Philadelphia & Reading Ry. Co. v. Di Donato*, 41 Sup. Ct. 516 (this bulletin, next case below), and held that Polk was engaged in interstate commerce. The opinion reads in part as follows:

The employment concerned both kinds of commerce and was to be exercised as much on one as on the other. In other words, was as much and as intimately directed to the interstate cars and freight as to the intrastate cars and freight, and that there might have been

some duties directed to the latter, though there is no evidence of it, is the suggestion of a speculation that has no tangible prompting in the case.

Besides, we can not accede to the view that there is a presumption that duties performed on a train constituted of interstate and intrastate commerce were performed in the latter commerce. The presumption, indeed, might be the other way. It is to be remembered that it is the declaration of the cases that if there is an element of interstate commerce in a traffic or employment it determines the remedy of the employee.

WORKMEN'S COMPENSATION—RAILROAD COMPANIES—INTERSTATE COMMERCE—FLAGMAN—*Philadelphia & Reading Ry. Co. v. Di Donato*, Supreme Court of the United States (May 16, 1921), 41 Supreme Court Reporter, page 516.—An award of compensation by the workmen's compensation board for the death of Pasquale Di Donato was affirmed by the court of common pleas and the Supreme Court of Pennsylvania. Di Donato was employed as "a crossing watchman," and while flagging a train was struck by another train and instantly killed. The company contends that at the time of the occurrence of the injury Di Donato was engaged in interstate commerce. The case was brought up to the Supreme Court by writ of certiorari. The decision of the Pennsylvania courts was overruled and the case remanded. The court followed *Pedersen v. Delaware etc. R. R.*, 229 U. S. 146, 33 Sup. Ct. 648 (Bul. No. 152, p. 85), and *Southern Pacific Co. v. Industrial Accident Commission of the State of California*, 174 Cal. 8, 161 Pac. 1139 (Bul. No. 246, p. 93), and held that Di Donato was engaged in interstate commerce. Mr. Justice McKenna, in stating the opinion of the court, said in part:

The service of a flagman concerns the safety of both commerces, and to separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies.

Di Donato's duty had other purpose than the prevention of a disaster to a particular train. It has purpose as well to the condition of the tracks and their preservation from disorder and obstructions. This service and the other service can not be separated in duty and responsibility. It is to be remembered that not only the remedy of one employee is involved in a particular duty but that other employees and other remedies are to be considered as well, and the defenses to them, and that behind them are the respective powers that may have ordained them. Therefore, whether they be of State or congressional power, there is an equal necessity for their accurate delimitation. This case, therefore, has importance beyond the interest of the parties to it. Its principle and example, reinforcing the *Pedersen* case and the cases based upon it, make a test by which future cases may be assigned to intrastate or interstate commerce and mark the power and policies that may be necessary or convenient to either.

WORKMEN'S COMPENSATION—SECOND INJURY—PERMANENT PARTIAL DISABILITIES—LOSS OF EYE AND ARM—*Klippert v. Industrial Ins. Department of Washington et al.*, Supreme Court of Washington (February 15, 1921), 196 Pacific Reporter, page 17.—Fred Klippert, while employed in an extrahazardous occupation, sustained injuries which resulted in the loss of one of his eyes by enucleation. He received compensation for this injury in the sum of \$1,200, which is the amount fixed in the schedule of permanent partial disabilities in the workmen's compensation law of the State. About a year and a half later, while again engaged in an extrahazardous occupation, he sustained further injuries which resulted in the loss of his major arm at the shoulder. The industrial insurance commission found that he was entitled to compensation, but decided that the amount which he had previously received for the loss of an eye, \$1,200, must first be deducted from the amount allowable for the loss of a major arm, \$1,900; but since a maximum amount of \$2,000 is allowable for unscheduled injuries, he could have this sum minus the previously awarded \$1,200, or the sum of \$800. Klippert appealed, and the superior court reversed the decision of the commission and held that he was entitled to an award of \$1,900 for the loss of his major arm, notwithstanding any previous awards of compensation for other injuries. In sustaining the decision of the superior court the State supreme court said in part:

The enactment of this specific schedule of awards certainly indicates that from experience in the operation of the industrial insurance compensation system it was found best to fix and make certain specific amounts for specific injuries, and not leave injuries to be classified by the commission with only the maximum for their guidance.

We have always endeavored to interpret the industrial insurance act liberally, with a view of accomplishing the result intended, which was, as stated in the first case we decided bearing upon the act and upholding its constitutionality, to substitute for an unscientific and burdensome system a system which will make an award in all cases regardless of the cause or manner of infliction, limited in amount, it is true, but commensurate in some degree with the disability suffered.

There is some uncertainty as to the meaning of subdivision (g) of the amendment of 1919, providing that—

Where "a further accident occurs to a workman who has been previously the recipient of a lump-sum payment under this act, his final compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries and his past receipt of money under this act."

Thus, under the last clause of the above subdivision, the commission, acting with cautious discretion, thought that they were required to deduct the amount already received from the maximum amount possible to be received by a disabled workman under the act. But statutes must be construed as a whole, and that construction given,

where possible, that will harmonize the entire statute and make it sensible and effective. Applying these principles to the construction of the statute before us, it is manifest that in enacting the schedules provided in the acts of 1917 and 1919, materially changing the phraseology and legal effect of the original act of 1911, the legislature intended to provide for all cases of disability permanent in character but partial in effect, and in adopting the schedule therein to provide for definite amounts for those certain specified injuries, the amount being graduated according to the magnitude of the injury. To the extent of such specific provisions the law is mandatory and, being mandatory, can not be enlarged or contracted beyond its express terms.

WORKMEN'S COMPENSATION—SECOND INJURY—TOTAL DISABILITY—LOSS OF ONE EYE—*Combination Rubber Mfg. Co. v. Court of Common Pleas in and for Essex County et al., Court of Errors and Appeals of New Jersey (September 23, 1921), 115 Atlantic Reporter, page 138.*—Richard Obser, a workman, having already lost one eye at the time of entering the employment of the rubber company, sustained an injury that rendered him totally blind. The accident in which he was injured arose out of and in the course of his employment. An award was made under the compensation law on the basis of total and permanent disability. From this award the employer brought the matter before the supreme court for review, but judgment was affirmed. Judge Parker wrote the opinion of the court, which was adopted by the court of errors and appeals after the company had again appealed. It is in part as follows:

It is claimed for prosecutor that what the employee lost by the accident was "an eye," and inasmuch as the act prescribes specific compensation for the loss of an eye, that clause should be applied. But this we conceive to be too literal an application of the letter of the statute, with results quite inconsistent with its spirit. That the act is remedial in character appears by the entire trend of decision in this State in cases arising under it. As a remedial act it should be liberally construed; and, applying this rule, we are clear that as respects major injuries, like the loss of an eye, an arm, or a leg, the legislature was dealing with a situation in which the other eye, arm, or leg would still be available. The case of *Bateman Mfg. Co. v. Smith*, 85 N. J. Law, 409, 89 Atl. 979 [Bul. No. 169, p. 256], is not at variance with this view, for in that case the claim was for loss of one of two legs, plus nervous shock caused by the injury. We think this is not parallel with a case in which a one-legged man is deprived of his only remaining leg, or a one-eyed man of his sole eye. Such cases come within the general clause of subdivision (c) of paragraph 11, as amended in 1913. "In all other cases of this class, or where * * * any physical function is permanently impaired." The petitioner had eyesight when he entered on his employment. That eyesight was a physical function; it was destroyed utterly. True, the word "impair," taken literally, does not cover total destruction of

a function, but here again the spirit should not be killed by the letter. The compensation proscribed by the clause is the same proportion of that provided for loss of both eyes (involving total blindness) as the disability produced by the injury in question (total blindness) bears to that produced by the loss of both eyes, i. e., the same.

The trial judge was manifestly entitled to find that petitioner had suffered a total loss of the function of vision, and that this entitled him to the same compensation as a disability produced by the loss of both eyes.

WORKMEN'S COMPENSATION—SECURITY OF PAYMENTS—VIOLATION A MISDEMEANOR—*People v. Donnelly, Supreme Court of New York, Appellate Division (October 28, 1921), 190 New York Supplement, page 502.*—Albert E. Donnelly was an employer of labor, engaged in the business of painting, a hazardous employment as defined in group 42 of section 2 of the workmen's compensation law. He was charged with and convicted for a violation of section 52 of the law, which provides:

SEC. 52. Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured employee, or, in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section eleven of this chapter.

From an order arresting judgment the people appealed. The appellate division affirmed the order upon the grounds that the words, "shall constitute a misdemeanor and have the effect," etc., penalized the employer to the extent of depriving him of his common-law defenses in a suit for damages, and did not authorize punishment under section 1937 of the penal law, which fixes a penalty of fine or imprisonment, or both. Judge Rich, in rendering the opinion of the court, said:

The statute provides that failure to secure the payment of compensation "shall constitute a misdemeanor and shall have the effect of" enabling the injured employee or, in case of death, his dependents or legal representatives, to maintain action for damages in the courts, as prescribed by section 11 of the act. The present statute does not provide that the penalty shall be fine and imprisonment, in addition to the deprivation of the employer's ordinary common-law defenses in an action by the employee, and, as a penalty, an amount equal to the pro rata premium which would have been payable for insurance in the State fund for such period of noncompliance. (Sec. 51.) While it terms the act a "misdemeanor," the language immediately following, to which it is connected by the conjunction "and," without punctuation, indicates, I think, that the failure to secure compensation shall have the effect of enabling the injured employee to maintain his action for damages as provided in section 11 of the act, which section penalizes the employer to the extent of depriving

him of his common-law defenses. The statute created an offense which was not such at common law; and the legislative intent was to term it a misdemeanor and prescribe the penalties, viz, deprivation of the employer's common-law defenses in the action which the employee is permitted to bring in the event his employer fails to secure compensation, and the monetary penalties recoverable under section 51.

Judge Jaycox (dissenting) stated that section 52 of the workmen's compensation law was amended in 1916 by adding the words "constitute a misdemeanor and," and the words "or representatives." In his opinion he said:

The principal change made in this section was to declare that the failure to secure compensation should constitute a misdemeanor. By this amendment I think the legislature intended to make some change in the law upon this subject. I can not believe that this amendment was inserted in the statute for the mere purpose of denouncing the act for which it had previously prescribed penalties. If a change was intended, then the only change possible was to make the act complained of a misdemeanor punishable under section 1937 of the penal law.

The legislature, I think, intended to impose some punishment upon a person offending against the statute; but if the prevailing opinion in this case is correct, it signally failed to accomplish its purpose. It declared the failure to secure compensation a misdemeanor, but as long as no accident occurred the only penalty that could be inflicted would be the recovery of an amount equal to the amount the employer would have paid for insurance. This penalty is to be recovered in an action brought by the commission, and the commission is authorized for good cause shown to remit this penalty. What shall constitute good cause rests entirely in the discretion of the commission. Therefore we have this curious anomaly: That a person may be guilty of a misdemeanor, and his liability to punishment rests in the discretion of some governmental body. This is contrary to the spirit of our laws and the ordinary methods prescribed for their enforcement.

WORKMEN'S COMPENSATION—SURGICAL TREATMENT—HERNIA—SUBMISSION TO OPERATION—*O. W. Rosenthal & Co. v. Industrial Commission, Supreme Court of Illinois (December 21, 1920), 129 Northwestern Reporter, page 176.*—Sylvester Bush, while in the employ of the Rosenthal Co. became so injured that he sustained a hernia. He received an award of compensation, which on appeal was set aside by the circuit court. Upon being brought before the supreme court the award was confirmed and the decision of the lower court was reversed. (125 N. E. 250.) After the award was confirmed, the industrial commission suspended payments under it until Bush submitted to an operation to cure the hernia. Bush refused to submit to the operation and appealed, and the circuit court set aside the order of

the commission modifying the award; whereupon the employer brought a writ of error. The sole question seems to be, Was the commission, which had found the operation to be reasonable and not dangerous, justified in requiring Bush to submit to it. The supreme court held that it was so justified, saying in part:

The testimony of the physicians was to the effect that it was a comparatively superficial operation, though counsel for defendant in error argues that it is a major operation, and one involving some danger to life, and should not be required as a prerequisite to obtain compensation for the injury.

This and similar questions have been before the courts quite frequently. Paragraph (d) of section 19 of the workmen's compensation act (Hurd's Rev. St. 1917, c. 48, sec. 144) vests the industrial commission with the right to suspend the compensation of an injured employee if he "shall refuse to submit to such * * * surgical treatment as is reasonably essential to promote his recovery." Whether the operation is reasonably essential is for the industrial commission to determine, based upon the evidence submitted to it, and it would only be in a case where the commission had acted unreasonably or abused its discretion that the court could interfere with its findings.

Naturally, each case must depend largely upon its special facts. The hernia here was caused by the accident, but it appears that an injury of this kind is not recovered from in the ordinary process of healing by allowing nature to take the ordinary course, as is the case with many wounds. On the facts as found in this record, we think the findings of the industrial commission suspending the award, as stated above, were justified, and the courts are bound by the commission's finding.

WORKMEN'S COMPENSATION—SURGICAL TREATMENT—REFUSING OPERATION—REASONABLE GROUND—*Grant v. State Industrial Accident Commission, Supreme Court of Oregon. (October 28, 1921), 201 Pacific Reporter, page 438.*—C. Grant was employed by the Columbia Shipbuilding Corporation as a riveter. While at work on September 23, 1919, a plank gave way, causing his left knee to strike against a piece of steel, resulting in a floating semilunar cartilage of the knee joint. He returned to work on October 4, 1919. An award of compensation for temporary total disability for nine days was made. Grant later had trouble with his knee, and on October 29 an examiner of the accident commission advised him that he was free to go to any doctor he wished. He consulted several doctors who advised him to submit to an operation. One doctor told him to "let it go for a year and maybe it will come back and be all right." The operation that was necessary is known as a major operation and would have resulted in a cure or in a stiff knee. Grant was afraid that an operation would not be successful and refused to submit to one. He requested an award for permanent partial disability, which the com-

mission refused. Grant appealed to the circuit court, which adjudged that he was entitled to an award of 75 per cent disability. Judgment was based on the special finding of a jury that the plaintiff had reasonable ground for his refusal to be operated upon. The commission, not satisfied with the result of the trial, appealed to the supreme court. The statute to be interpreted reads:

* * * For such period of time as any workman * * * shall refuse to submit to such medical or surgical treatment as the commission deems reasonably essential to promote his recovery, his right to compensation shall be suspended and no payment shall be made for such period, and the commission may reduce the period during which such workman would otherwise be entitled to compensation to such an extent as they shall determine his disability shall have been increased by such refusal.

The supreme court affirmed the judgment of the circuit court in the following language:

There are some operations to which a workman must submit or else lose his right to compensation; and, so, too, there are cases where the workman may refuse to be operated upon without losing his right to compensation. The doctrine debarring the workman from compensation in cases where his refusal operates as a bar proceeds on the theory that continuance of his disability is due to his own unreasonable conduct and not to the employment.

Our conclusion is that our statute should be construed to mean that the workman's right to compensation is to be suspended if he refuses to submit to an operation to which an ordinarily reasonable man would submit if similarly situated. Usually the conduct of a workman is a question of fact to be decided by the triers of the facts.

If, in a given case, it can be said that the workman is refusing to undergo a safe and simple operation, which, if performed by a competent surgeon, is fairly certain to result in removal of the disability and is not attended by serious risk or extraordinary pain, and one to which an ordinarily prudent and courageous person would submit for his benefit and comfort, no question of compensation being involved, then it can be said that the continued disability of the workman is the direct result of his own unreasonable refusal. In the instant case the operation is a major one, and there is a risk of producing a result which some persons might deem worse than Grant's present condition. The jury decided that Grant's refusal was reasonable, and the court is bound by that decision of the jury.

WORKMAN'S COMPENSATION—SURGICAL TREATMENT—REFUSING OPERATION—SUSPENSION OF COMPENSATION—*Myers v. Wadsworth Mfg. Co. et al., Supreme Court of Michigan (July 19, 1921), 183 Northwestern Reporter, page 913.*—W. H. Myers was employed by the defendant Wadsworth Manufacturing Co. in the capacity of subforeman and final inspector of automobile bodies. Because of lighting conditions it was necessary to turn the body of the car around,

which had to be done by pushing the wind shield. On July 14, 1920, in turning the body of a car, the wind shield broke and Myers' arm and wrist were severely cut and injured by the glass. He was awarded compensation under an agreement made with the defendant company and approved by the industrial accident board. On October 13, 1920, the defendant company and its insurer petitioned the board to be relieved from payment of further compensation to the claimant because he had returned to work on September 18, 1920. It was shown that the defendants had on August 21, 1920, offered an operation to remedy the disability caused by the injury, which was refused. The petition was denied. The defendants brought the matter before the supreme court for review. That court reversed the order of the board, and declared that the plaintiff should not be allowed further compensation until he submitted to an operation. Speaking through Judge Stone, who first reviewed the evidence, the court said:

Is it reasonable to say that the refusal to submit to an operation, which in all probability will in no way result in detriment to the plaintiff, either physically or financially, is reasonable conduct of the plaintiff? We think not. We think it can not be said in the light of this uncontradicted testimony that there was no reasonable assurance that the proposed operation would result in lessening plaintiff's disability. When, as here, the employer offers to bear the cost of the operation and hospital treatment, in an operation of minor character, where there is a reasonable prospect of restoration of relief from the incapacity from which the workman is suffering, it seems to us it is the duty of the plaintiff either to submit to an operation, or release his employers from the obligation to maintain him.

WORKMEN'S COMPENSATION—TEMPORARY TOTAL DISABILITY—PERMANENT PARTIAL DISABILITY—SUBMISSION TO OPERATION—LOSS OF USE OF HAND—*Mount Olive Coal Co. v. Industrial Commission, Supreme Court of Illinois (December 21, 1920), 129 Northeastern Reporter, page 103.*—Daniel Ivers was 61 years old and was hurt while in the employ of the coal company. He broke his arm about 1½ inches above the wrist. The bone was set, and a solid union was made, so that the bone knitted properly, and Ivers recovered in about 10 weeks. He was unable, however, to flex the wrist more than 60 per cent and the fingers only 50 per cent, having a general loss of the use of his hand to the extent of about 80 per cent. Upon examination it was declared to be the doctor's opinion that the disability was merely the result of nonuse of the hand and that it would improve with use. He also said that Ivers could be given a harmless anaesthetic, and that the wrist and fingers could be forcibly flexed and the adhesions in the tendons could be broken away without pain. Ivers refused

to submit to this operation. The commission granted Ivers an award of compensation for 54 weeks for temporary total disability, and for 120 weeks for permanent partial disability resulting from an 80 per cent loss of the use of his hand. The employer appealed and the circuit court affirmed the award, whereupon the employer brought a writ of error. The court held that the temporary total disability did not extend beyond 10 weeks, and that before compensation for permanent partial disability could be had the proposed operation to flex the fingers and wrist must be submitted to. The decision in part is as follows:

The period of temporary total incapacity is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. It might be described as the period of the healing process. Temporary, as distinguished from permanent, disability is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit. (*Vishney v. Empire Steel & Iron Co.*, 87 N. J. Law, 481, 95 Atl. 143.) We find no evidence in the record to justify the finding of the arbitrator that the period of temporary total incapacity was 54 weeks. It is clear from what we have said before that three-fourths or more of this period was after the healing process was completed, and the disability was therefore due to the permanent character of the injuries, rather than the temporary illness following the accident.

The evidence here shows, without dispute, that there is a solid union of the bone, and that the only thing the matter with defendant in error is the adhesions in the tendons of his wrist and hand. The operation is a simple one, attended with no danger whatever, and with no pain under a mild and entirely safe anaesthetic. We must therefore hold the permanent disability of defendant in error is due to his refusal to submit to this simple operation, and not due to the accident.

If the operation should be had and prove unsuccessful, plaintiff in error would be liable for whatever loss of use of his hand defendant in error suffers, as well as surgical and hospital services necessary for the operation and for treatment already received, but if successful its liability would be for temporary loss of time and for treatments had and surgical and hospital expenses incurred in the operation. Whatever time the commission finds from the evidence defendant in error has lost by his unreasonable refusal to submit to this operation must be credited to plaintiff in error in awarding compensation. Such loss of time must be attributed to the voluntary act of defendant in error in refusing to submit to proper medical treatment, and must not be attributed to the accident.

The judgment is reversed, and the cause is remanded to the circuit court, with directions to set aside the order of the industrial commission, and for such further proceedings as are provided by statute.

Reversed and remanded with directions.

WORKMEN'S COMPENSATION—TERRITORIES—POWER TO SUPERSEDE FEDERAL STATUTE—*Camunas et al. v. Porto Rico Ry., Light & Power Co., United States Circuit Court of Appeals, First Circuit (March 15, 1921), 272 Federal Reporter, page 924.*—The Porto Rico Railway, Light & Power Co. is a corporation owning and operating steam railroad and electric lines in Porto Rico. It brought suit for an injunction against the enforcement of the Porto Rican workmen's compensation act. A motion was made for a preliminary injunction which was granted in the district court, and the defendants appealed. Plaintiffs claim the compensation act is void by reason of conflict with the Federal employers' liability act and because of lack of due process of law. The circuit court of appeals vacated the decree of the district court and remanded the case to that court with directions to enter a decree dismissing the bill. Judge Anderson delivered the opinion of the court, holding that the legislature of Porto Rico had the power to enact a workmen's compensation law, that section 10 of the act passed superseded the Federal employers' liability act as to the railroads in Porto Rico, and that the requirements as to due process of law were satisfied. The decision is in part as follows:

The main question is whether the Porto Rican compensation act is applicable to Porto Rican railroads. As Porto Rico has in explicit terms undertaken to include railroads, the problem is really whether this act is ultra vires the organic act. We think it was not.

By section 37 (of the organic act) the legislature is given broad and inclusive powers.

Manifestly this grant of power is nearly, perhaps quite, the equivalent of the power of a State legislature to enact all laws not inconsistent with the Federal or the State constitution. The organic act is the practical equivalent of a State constitution. The fact that it remains subject to amendment or repeal by Congress is for present purposes immaterial. In that regard Congress stands as to Porto Rico in the place of the people of a State, acting directly or indirectly through a constitutional convention.

That Congress intended the Porto Rican legislature to have full police powers is apparent, not only from the language of section 37, but expressed in emphatic form in the following provision in section 2—the section containing the bill of rights.

Nothing contained in this act shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees."

But plaintiffs' chief contention is that the Federal employers' liability act was in force in Porto Rico.

In the States, interstate commerce arises in connection with the operation of State-chartered railroads, running through many separate and differing jurisdictions. Thus interstate commerce, conducted by State agencies and subject to numerous conflicting laws, is hampered and complicated in intolerable fashion. Hence the need of one inclusive and exclusive rule of liability. But Porto Rico has

no interstate commerce—no railroad running out of its charter home into quasi foreign jurisdictions.

Further support is given the view that Congress did not intend to continue the liability act operative in Porto Rico by the provision, in section 38 of the organic act, that the interstate commerce act and the safety appliance act "shall not apply to Porto Rico." The safety appliance act is an important, if not an essential, part of the liability act. It was applicable to Porto Rico.

A majority of the court are of the opinion that the liability act and the compensation act are inconsistent, and that therefore the compensation act is, and the liability act is not, applicable to railroads in Porto Rico.

The present workman's compensation act was enacted soon after the decisions of the Supreme Court holding such acts constitutional. As noted above, at the end of section 10 there is an express provision making the act applicable to railroads. Under these circumstances the presumption of congressional acquiescence obtains.

The various contentions as to lack of due process were disposed of in favor of the law, and the district court was instructed to dismiss the bill.

WORKMEN'S COMPENSATION—TOTAL DISABILITY—RELEASE—INTERMITTENT DISABILITY—*Fort Branch Coal Co. v. Farley, Appellate Court of Indiana (June 3, 1921), 131 Northeastern Reporter, page 228.*—William B. Farley on September 4, 1917, received an injury arising out of and in the course of his employment with the Fort Branch Coal Co. The industrial board approved of an agreement between these parties in which the mining company agreed to pay compensation to Farley at the rate of \$10.40 per week during his total disability, not exceeding 500 weeks. On October 15, 1917, the payments were stopped and the employee signed a final receipt stating that his disability ceased on October 15, 1917. From October 15, 1917, to March 10, 1920, Farley was intermittently disabled for work and on the date of hearing March 10, 1920, he was wholly disabled. The board on rehearing awarded compensation at the agreed rate for the time he was unable to work after October 15, 1917. The mining company appealed, claiming that the board was barred from a consideration of the case by a provision of the law which limits the time for action to one year after the end of the prior compensation period.

The court affirmed the award (130 N. E. 132), holding that the compensation period for total disability was not terminated by the employee's receipt stating that his disability had ceased; that the industrial board could not properly determine the date of the cessation of total disability in such a case, and that an employee on the recurrence of a total disability which inevitably followed exertion was not required to apply for reinstatement within a year. The

mining company petitioned for a rehearing, which was denied, the court saying in part:

He signed the receipt and returned to his work in the mine. In less than two weeks he was girt with bandages prepared for him by his wife and because of his broken back he was working on his knees. (This in a humane age!) The only rational inference is that he was importuned to sign the receipt by the insurance carrier. No court would be justified in holding that the signing of a receipt under such circumstances amounts to a "termination of a compensation period," even though the receipt contains a recital to the effect that total disability has ceased.

Rehearing denied.

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 - Table of labor legislation of 1919.
 - Index of various dates relating to labor enacted since January 1, 1919.
- *Pub. 64, January, 1911, Workmen's compensation and insurance laws and min. 1911.
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- Vol. VI, The beginnings of prohibition legislation in various States: a comparative study.
- Vol. XII, Labor laws and foreign conditions.

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- Pub. 121, December, 1912, Labor legislation of 1912.
- Pub. 132, March, 1913, Decisions of courts and opinions affecting labor, 1912.
- Pub. 145, April, 1913, Labor laws of the United States, with decisions of courts following Russia.
- Pub. 152, May, 1913, Decisions of courts and opinions affecting labor, 1913.
- Pub. 156, April, 1914, Labor legislation of 1913.
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- 1913, Minimum and maximum laws of the United States.
- Pub. 113, April, 1913, Legislation of night work of young persons.
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- *Pub. 109, December, 1912, Workmen's compensation laws of the United States and foreign countries.
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